Chapter 6: The International Law Commission

A. Introduction

This chapter analyzes the work of the ILC and to what extent codification choices of the ILC can explain that, in contrast to experiences in municipal law, codification in the context of public international law did not tend to drive out customary international law. The chapter will first explore the implications codification can have on the interrelationship of sources and illustrate that both codification and progressive development, which cannot always be clearly separated, call for a normative assessment (I.). It will be demonstrated that, early on, the ILC searched for inspiration in 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 from a binding to a non-binding form (II.). Subsequently, this chapter will examine how the interrelationship of sources was approached and addressed in specific projects, for which the work on the general law of treaties, on the law of state responsibility, on the fragmentation of international law, on customary international law, on *jus cogens* and on general principles of law were selected (III.).

I. Codification and the interrelationship of sources

Codification has repercussions on the interrelationship of sources and has been rightfully described as an "activity which is intimately concerned with the sources of the law."[1] In 1905, upon reflection of the codification movement, Lassa Oppenheim expressed his sympathy for codification in awareness of its implications for other sources: "It cannot be denied that codification always interferes with the growth of customary law, although the assertion is not justified that codification does cut off such growth."[2] Since then, concerns

1 Robert Yewdall Jennings, 'The Progressive Development of International Law and Its Codification' (1947) 24 BYIL 303.

2 Oppenheim, *International Law* 39, 41. For precursors in Latin-America see Antônio Augusto Cançado Trindade, 'The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law' (2014) 376 RdC 53-56. For an overview

have been expressed that the work of codification would endanger the "superiority of customary over treaty law within the international community"[3], would have "the effect of arresting change and flux in the state of customary international law"[4] and would "have a freezing effect on the customary law even for states non-parties to [the treaty]"[5]. Even though similar concerns continue to be expressed today,[6] by and large codification is regarded to have been beneficial for customary international law.[7] It has even been argued that the very purpose of progressive development and codification is very much about influencing customary international law, rather than replacing it.[8]

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of the history of codification in international legal thought Shabtai Rosenne, 'The International Law Commission, 1949-59' (1960) 36 BYIL 106-109; James Crawford, 'The Progressive Development of International Law: History, Theory and Practice' in Denis Alland and others (eds), *Unity and Diversity of International Law. Essays in Honour of Pierre-Marie Dupuy* (Martinus Nijhoff Publishers 2014) 4-6.

3 Krystyna Marek, 'Thoughts on Codification' (1971) 29 ZaöRV 497: "To sum up, failure to safeguard - or inadequate safeguarding of - the customary nature of the codified rules might lead directly to the absence of all legal links among States, in other words, to the liquidation of all international legal order."

4 Richard R Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 BYIL 299.

5 Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law* 126. Furthermore, against the background of the negative codification experiences made at the Codification Conference 1930 (or generally throughout the 1920s), Hurst was skeptical regarding the possibility to codify international law, see Cecil Hurst, 'A Plea for the Codification of International Law on New Lines' (1946) 32 Transactions of the Grotius Society 139.

6 Cf. Timothy L Meyer, 'Codifying Custom' (2012) 160 University of Pennsylvania Law Review 1001, 1021, 1046 ff.

7 Arthur Watts, 'Codification and Progressive Development of International Law' [2006] Max Planck EPIL para 44.

8 Vladimir-Djuro Degan, *Sources of International Law* (Martinus Nijhoff Publishers 1997) 203 (on codification conventions); for his earlier view that codification could go at the expense of customary international law and general principles of law, the so-called "sources impartfaites", see Vladimir-Djuro Degan, *L' interprétation des accords en droit international* (Nijhoff 1963) 14; Roberto Ago, 'Nouvelles reflexions sur la codification du droit international' (1988) 92 RGDIP 573-576.

II. The institutionalization of codification and the difficult distinction between progressive development and codification

Codification and its repercussions on the relationship of sources were not discussed during the drafting of article 38 of the PCIJ Statute. The Advisory Committee of Jurists only adopted a resolution by which it recommended to call a new interstate conference for the codification of international law.[9] The codification conferences organized by the League of Nations failed to meet the expectations.[10] There was no agreement on substance and on the question of whether the codification conferences should be about a restatement of already binding customary international law or whether conferences should attempt to make exclusively new law in the sense of legislation.[11]

These historical experiences informed the establishment of the International Law Commission after the Second World War. According to article 13(1)(a) UNC, the General Assembly shall initiate studies and make recommendations for the purposes of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. As put by Rosenne, article 13 UNC "stresses the political intent of the organized international community in what had hitherto been commonly regarded as little more than the special preserve of lawyers."[12]

The UN General Assembly firstly appointed by UNGA resolution 94(1) of 11 December 1946 a "Committee on the Progressive Development of International Law and its Codification", with Professor Leslie Brierly acting as the committee's Special Rapporteur.[13] By resolution 174 (II) of 21 November

9 1920 Advisory Committee of Jurists Annexes, 747-748.

10 Ian Sinclair, *The International Law Commission* (Cambridge, 1987) 4; Charles de Visscher, 'Stages in the Codification of International Law' in Wolfgang Friedmann, Louis Henkin, and Oliver Lissitzyn (eds), *Transnational law in a changing society: essays in honor of Philip C. Jessup* (Columbia University Press 1972) 19-21; James Leslie Brierly, 'The Future of Codification' (1931) 12 BYIL 1 ff.; Crawford, 'The Progressive Development of International Law: History, Theory and Practice' 8-9.

11 Cf. Brierly, 'The Future of Codification' 1 ff., in particular 3-4, 7-8; Manley O Hudson, 'The Prospect for Future Codification' (1932) 26 AJIL 137 ff.; Jennings, 'The Progressive Development of International Law and Its Codification' 301-310.

12 Rosenne, 'The International Law Commission, 1949-59' 111.

13 UNGA Res 94 (I) (11 December 1946) UN Doc A/RES/94(I); *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International*

1947[14], the General Assembly decided to establish the International Law Commission as subsidiary organ, rather than many specialized organs for different fields of international law.[15] As article 8 of the ILC Statute indicates, the ILC is intended to represent "the main forms of civilization and of the principal legal systems of the world".[16]

The ILC Statute sharply distinguishes between progressive development and codification[17] and suggests different formats for each. According to article 15 of the ILC Statute, "the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." Codification is understood as "the more precise formulation and systematization of rules of international law in fields where there already had been extensive state practice, precedent and doctrine" (article 15 ILC Statute), here the ILC Statute envisions the use of draft articles that would be submitted to the General Assembly (article 20 ILC Statute).

Yet, from the very beginning, it was clear that this distinction, while being important for the sake of analytical clarity, can be challenging to make in practice. It has been pointed out that codification was not a simple recording of existing law, but an exercise in which old practices were evaluated and

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Law Commission Memorandum submitted by the Secretary-General (10 February 1949) A/CN.4/1/Rev.1 3.

14 UNGA Res 174 (II) (21 November 1947) UN Doc A/RES/174(II).

15 General Assembly resolution 174 (II) of 21 November 1947; Herbert Whittaker Briggs, *The international Law Commission* (Cornell University Press 1965) 3 ff.; 'Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, UN Doc. A/AC.10/51, 17 June 1947' (1947) 41 Supplement AJIL 18.

16 The Statute was annexed to UNGA Res 174 (II) (21 November 1947) UN Doc A/RES/174(II).

17 For a detailed drafting history see Crawford, 'The Progressive Development of International Law: History, Theory and Practice' 11-15: on the discussion within the ILC see *ILC Ybk (1951 vol 2)* 137-139. According to Crawford, 'The Progressive Development of International Law: History, Theory and Practice' 22, the emphasis on this distinction "was the compromised product of the confrontation between Western and Eastern blocs current at the time."

dismissed, when they had been regarded unbeneficial for the further course of the law.[18]

As argued by James Leslie Brierly, in his capacity as Special Rapporteur of the Committee on the Progressive Development of International Law and its Codification of 12 May - 17 June 1947, codification would involve not only the decision to deselect certain practices, but also the filling of gaps:

> "As soon as you set out to do this, you discover that the existing law often uncertain, and that for one reason or another there are gaps in it which are not covered. [...] Hence, the codifier, if he is competent for his work, will make suggestions of his own; where the rule is uncertain, he will suggest which is the better view; where a gap exists, he will suggest how it can best be filled. If he makes it clear what he is doing, tabulates the existing authorities, fairly examines the arguments pro and con, he will be doing his work properly. But it is true that in this aspect of his work he will be suggesting legislation - he will be working on the *lex ferenda*, not the *lex lata* - he will be extending the law and not merely stating the law that already exists."[19]

In this sense, Robert Yewdall Jennings suggested that "codification, properly conceived, is itself a method for the progressive development of the law."[20]

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18 Cf. Carl Ludwig von Bar, 'Grundlage und Kodifikation des Völkerrechts' (1912) 6(1) Archiv für Rechts- und Wirtschaftsphilosophie 158 ("Jede [...] völkerrechtliche Norm, jedes völkerrechtliche Verhalten muss der Prüfung unterworfen sein, ob bei allgemeiner Anwendung, Beobachtung, die gedeihliche Existenz und Fortentwicklung der Menschheit nicht nur möglich, sondern wahrscheinlich ist [...]"); cf. PJ Baker, 'The Codification of International Law' (1924) 5 BYIL 44 ("[Codification] is to improve the form of the law by getting rid of apparent ambiguities or conflicts, by bringing customary law and statutory law together into one coherent and consistent whole [...]"); Hersch Lauterpacht, 'Codification and Development of International Law' (1955) 49 AJIL 29 ("Even within that very limited field where there is both agreement and considerable practice, the work of codification cannot discard a limine the legislative function of developing and improving the law."); James Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 453 ("'Codifying' the law means stating what it is to be rather than - or at least as much as - stating what it has been."); Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 ICLQ 554.

19 Cited according to *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission* 3 (with reference to A/AC.10/30, pp. 2-3).

20 Jennings, 'The Progressive Development of International Law and Its Codification' 302; cf. on the resulting difficulty to distinguish lex lata and lex ferenda Michel Virally, 'À propos de la "lex ferenda"' in *Mélanges offerts à Paul Reuter: le droit international:*

Several examples of the Commission's own practice illustrate the difficulty of always clearly distinguishing both elements.[21] In 1956, the ILC acknowledged in the context of draft articles concerning the law of the sea that "the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained [...] Although [the Commission] tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either."[22] In the context of the work on state responsibility the Commission noted that "the relative importance of progressive development and of the codification of accepted principles cannot be settled according to any pre-established plan. It must emerge in practical form from the pragmatic solutions adopted to the various problems."[23] In 1996, the Commission even concluded that "[t]he distinction between codification and progressive development is difficult if not impossible to draw in practice; the Commission has proceeded on the basis of a composite idea of codification and progressive development. Distinctions drawn in its statute between the two processes have proved unworkable and could be eliminated in any review of the statute [...]".[24]

However, the distinction between codification and progressive development cannot, and should not, be neglected altogether.[25] The ILC itself continues to make the distinction[26] and also the International Court of Justice demonstrated that it could examine whether a certain rule, such as article

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unité et diversité (Pedone 1981) 521-523; Philippe Manin, 'Le juge international et la règle générale' [1976] RGDIP 35.

21 Rosenne, 'The International Law Commission, 1949-59' 142 ("[...] the formal differentiation established in the Statute has been blurred [...]").

22 *ILC Ybk (1956 vol 2)* 255-256.

23 *ILC Ybk (1974 vol 2 part 1)* 276 para 122.

24 *ILC Ybk (1996 vol 2 part 2)* 84.

25 See also Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' 556.

26 *ILC Ybk (2001 vol 2 part 2)* 114, 127 (draft articles on state responsibility); *ILC Ybk (2006 vol 2 part 2)* 36, 48, 83 (draft articles on diplomatic protection); *Report of the International Law Commission: Sixty-sixth session (5 May–6 June and 7 July–8 August 2014)* UN Doc A/69/10 17-18, 76 (draft articles on expulsion of aliens); Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' 556; see recently Nikolaos Voulgaris, 'The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development' (2022) 33(3) EJIL 761 ff., 783.

6 Geneva Convention on the Continental Shelf[27], could be regarded as a codification of already binding customary international law.[28] In particular, it can be argued that with the rise of non-binding instruments as an outcome of the work of the ILC in specific projects, the importance of classifying the work as codification or as progressive development has increased rather than decreased: States had not the opportunity to decide on the rules in the context of a treaty conference, and courts, when resorting to ILC materials, should be informed of whether these materials reflect existing international law.[29]

Whether a specific project of the ILC is rather about the progressive development or about codification can change over the course of this project. Whilst the League of Nations Committee of Experts for the Progressive Codification of International Law had determined which topics were sufficiently "ripe" for codification,[30] codification conferences revealed a high level of disagreement. In 1955, Hersch Lauterpacht pointed to "the absence of agreed law"[31] and noted that "there is very little to codify if by that term is meant no more than giving, in the language of Article 15 of the Statute of the International Law Commission, precision and systematic order to rules of international law in fields 'where there already has been extensive State

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

28 *North Sea Continental Shelf* 33 para 49, 34 para 50, the Court concluded that article 6 did not constitute a codification of already binding customary international law.

29 As Nolte (*Comment by Georg Nolte, Summary record of the 3365th meeting, 30 May 2017* UN Doc A/CN.4/SR.3365 (PROV.) 3) opined, "[when the Commission prepared treaties], it did not make a great difference whether a proposed rule reflected existing customary law or would be new law. The negotiating States would, after all, decide what to include in a treaty and whether to accept the treaty. However, in the context of the current topic, the Commission did not seem to be elaborating a treaty. Any views it expressed on existing law might be used by national and international courts, which needed to know what the existing law was. The Commission therefore needed to be transparent about whether it was stating existing law or proposing new law."

30 League of Nations Committee of Experts for the Progressive Codification of International Law, 'Report to the Council of the League of Nations on the Questions which appear ripe for international regulation' C.196.M.70.1927.V., printed in (1928) 22 AJIL Supp 4; Jennings, 'The Progressive Development of International Law and Its Codification' 324; Arthur Watts, *The International Law Commission 1949-1998: The Treaties* (vol 1, Oxford University Press 1999) 3; see on the notion of "ripeness" also Julius Stone, 'On the Vocation of the International Law Commission' (1957) 57(1) Columbia Law Review 35-38.

31 Lauterpacht, 'Codification and Development of International Law' 17, 23.

practice, precedent and doctrine.'"[32] One purpose of the codification activity can consist very much in bringing about agreement on substance, rather than presupposing such agreement to exist from the very start.[33]

The work of the ILC in relation to the law of the sea is an example of growing agreement over the course of a project. The ILC did at the beginning not affirm that the "numerous proclamations", among them the Truman proclamation[34], by themselves established custom.[35] Over the course of the next years, however, agreement on coastal states' rights regarding the continental shelf began to increase.[36]

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32 Lauterpacht, 'Codification and Development of International Law' 17 (referring to the language of article 15 of the ILC Statute.

33 ibid 27; Robert Yewdall Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law' (1964) 13 ICLQ 395, according to whom "the merging of codification into progressive development has meant that the old futile search of the League days for topics 'ripe for codification' has been happily abandoned [...] The simple truth is that there are no topics of international law ripe for codification; they all need working up into something more than a set of vague principles." Certain scholars had reservation about the success of codification against the background of the ideological differences in the cold war: cf. Charles de Visscher, *Theory and reality in public international law* (Percy Ellwood Corbett tr, Princeton University Press 1957) 147; on the skeptical Soviet scholarship after the second world war see Rosenne, 'The International Law Commission, 1949-59' 155-157; Crawford, 'The Progressive Development of International Law: History, Theory and Practice' 16-17.

34 United States of America, *Proclamation 2667 of September 28, 1945. Policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf, 10 Fed. Reg. 12.305 (1945).*

35 *ILC Ybk (1951 vol 2)* 142: "Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community." When justifying the Commission's decision to address the law of the sea, Yepes argued that the Truman "Proclamation and those measures could be considered, if not as a veritable customary law in the sense already given to that expression by the Commission, at least as an embryonic customary law. [...] There was, as the Commission had decided, no need at all for the practice to date back a long time. It was sufficient for States to recognize it as constituting law and for it to have aroused no protests from other States.", *ILC Ybk (1950 vol 1)* 216-217.

36 The agreement is expressed, for instance in the adoption of the Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

III. The significance of the normative environment

Once it has been recognized that codification requires the filling of gaps the question arises of how to fill these gaps. Here, legal-political judgment and discretion may play a role; the practice of the Commission indicates that general principles of the international legal order were taken into account as well. This section will first illustrate how the Commission discussed at its very beginning how its work on progressive development and codification would relate to the UN Charter (1.) and that principles expressed in treaties were taken into consideration (2.). The section will finally comment on a recent example, the discussion of immunity before foreign courts, which raised the question of how to reconcile state practice and normative considerations (3.).

1. The "blending of customary international law with the new order established by the United Nations"

It is helpful to look at how the ILC constructed the interrelationship of sources at the beginning of its work, when the Commission's institutional practice began to develop. The question of the relationship between customary international law and the UN Charter arose in the context of the Draft Declaration on Rights and Duties of States.

In 1948, Panama submitted to the UN General Assembly a draft declaration on the rights and duties of states. Article 20 of the Draft Declaration provided that "[i]t is the duty of *every State* to take, in cooperation with other States, the measures prescribed by the competent organs of the Community of States in order to prevent or put down the use of force by a State in its relations with another State, or in the general interests."[37]

After Greece, the United Kingdom and the United States of America had expressed their concerns that the declaration's claim to spell out the duty "of every State" was not compatible with the *pacta tertiis* rule, according to which only parties to the Charter were bound by the Charter,[38] the International

37 Preparatory Study Concerning A Draft Declaration on the rights and Duties of States (Memorandum submitted by the Secretary-General) (15 December 1948) UN Doc A/CN.4/2 at 38 (italics added).

38 See Talmon, 'Article 2 (6)' 260 para 22.

Law Commission took the issue under consideration.[39] In the context of the plenary discussion Alfrado argued that

> "the Commission should find a text which would indicate the blending of customary international law with the new order established by the United Nations through its Charter, the Universal Declaration of Human Rights etc."[40]

Other members were reluctant to declare the Charter to constitute already general international law. Brierly, for instance, opposed a suggestion to that effect since the Charter "did not constitute all the common law of nations"[41]. The Commission eventually agreed on the preamble according to which "it is [...] desirable to formulate certain basic rights and duties of States *in the light of new developments of international law and in harmony with the Charter of the United Nations*".[42]

This legal-political compromise through which the Commission attempted to accommodate the normative ambition of the UN Charter with the traditional sources doctrine would go at the expense of legal clarity, Hans Kelsen argued in a critical note. In particular, Kelsen considered the phrase "In the light of new developments of international law and in harmony with the Charter of the United Nations" to be "highly ambiguous"[43]:

> "If the 'new developments' did not lead to a new general international law, the rights and duties established by the old and still existing law cannot be formulated 'in the light' of these new developments; and if the new developments lead to a new general international law, the rights and duties must be formulated in accordance with the new law, not merely 'in the light' of the developments. If the Charter does constitute general international law, [...] [the formulation of the rights and duties]

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39 *ILC Ybk* (1949) 161.

40 ibid 159. Kerno, Assistant Secretary-General, observed that "general international law included primarily customary international law, but it also included conventional law, of which the United Nations Charter formed an important part." (135-136): "The Charter set forth a body of international law which had been accepted by 59 States and all other States in the world had indicated their willingness to abide by it, with the exception of traditionally neutral Switzerland and of Franco Spain which was precluded from admission to membership in the United Nations in consequence of resolutions of the General Assembly. The Principles of the Charter were certainly as broadly accepted as those of customary international law." His concern was that the draft declaration did not reflect the special position of the Charter.

41 ibid 159.

42 ibid 159, and UNGA Res 375 (IV) (6 December 1949) UN Doc A/RES/375(IV), italics added.

43 Hans Kelsen, 'The Draft Declaration on Rights and Duties of States Critical Remarks' (1950) 44 AJIL 263.

> must be identical with that in the Charter, and it is not sufficient to formulate them 'in harmony' with the Charter. If, however, the Charter does not constitute general international law, rights and duties of Members of the United Nations which are not established by general international law must not be inserted in the Declaration; and rights and duties of Members which are established by general international law must be formulated in accordance with general international law, not in harmony with the Charter [...]."[44]

Kelsen criticized the Commission for not taking a clear position on the interpretation of article 2(6) and on the question whether the Charter, as a treaty, imposes obligations on non-member states.[45]

In contrast to the categorical alternatives which Hans Kelsen put to his readers, the compromise which the Commission had adopted suggested a more gradual development in which the legal evaluations and principles of the Charter would slowly pervade the corpus of international law. The draft declaration of the rights and duties of states itself was not very influential, as the General Assembly ultimately abandoned the work on this topic.[46] The described gradual development, however, became characteristic of the Commission's work which has been shaped by an effort to consider the legal evaluations and principles of modern international law in the progressive development and codification of customary international law.

2. The early consideration of principles expressed in treaties

Further examples from the beginning illustrate that a "blending" of customary international law with international legal order as a whole and the values expressed therein took place in the Commission's work. The Commission took account of principles in order to fill gaps and exercise its discretion inherent in progressive development and codification, as, for instance, the

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44 ibid 263.

45 ibid 263: "The texts of Articles 6, 8, 9, 10 and 12 of the Declaration seem to indicate that it presupposes that the Charter establishes general international law. However, other provisions, and especially the fact that the obligations to give the United Nations assistance in its action established by Article 2 (5) of the Charter, is intentionally not formulated as a duty of all states (although under Article 2 (6) of the Charter it could be considered to be an obligation of non-members), allow the contrary assumption." See also chapter 3, p. 200.

46 Sergio Carbone and Lorenzo Schiano di Pepe, 'States, Fundamental Rights and Duties' [2009] Max Planck EPIL para 14.

early work on consular intercourse and immunities and on slave trade in the law of the sea illustrates.

In the context of the work on consular intercourse and immunities, Special Rapporteur Jaroslav Zourek sought to "find formulae which, while representative of customary international law, at the same time would generalize the provisions of the numerous treaties".[47] Reliance solely on custom would "inevitably give an air of incompleteness [...] [Also codifying the principles generally observed by international conventions] would permit the preparation of a much more complete scheme of codification and would have the advantage of generalizing the application of principles derived from an analysis of international conventions".[48] Several members of the Commission agreed with the approach to "deduce principles likely to be accepted by all States by examining international treaties"[49] in order to complete the analysis of customary international law.[50]

An illuminating example of value judgments informed of the normative environment is the slave trade exception to the freedom of the High Seas. Special Rapporteur François was requested by the Commission "to study treaty regulations in this field with a view to deriving therefrom a general principle applicable to all vessels which might engage in slave trade".[51] He then suggested a draft provision according to which a foreign merchant ship must not be boarded unless there was substantive reason to believe that said ship engaged in piracy or unless a treaty provides otherwise.[52] The Commission had a debate on whether there would be also a right to approach a merchant vessel if there was reasonable ground that the ship was engaged in slave trade. Until then, article 3(1) of the 1926 Slavery Convention obliged states "to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves *in their territorial waters* and upon all vessels flying their respective flags."[53]

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47 *ILC Ybk (1956 vol 1)* 249.

48 ibid 250.

49 ibid 250 (Amado).

50 ibid 250 (Spiropolous): "It should not be a codification of existing rules, for there were very few, but rather the deduction of certain rules from the existing conventions." See also Fitzmaurice, 250.

51 *ILC Ybk (1951 vol 1)* 351.

52 *Second Report on the Regime of the High Seas by J P A François, Special Rapporteur* 10 April 1951 UN Doc A/CN.4/42 83 para 43 in *ILC Ybk (1951 vol 2)*.

53 Slavery Convention (signed 25 September 1926, entered into force 9 March 1927) 60 LNTS 254, italics added.

The convention thus addressed only the territorial sea, as opposed to the high seas.[54] The debate in the Commission concerned the question of whether this principle should be extended beyond territorial waters, to the effect that slavery would be treated like piracy and therefore justify the boarding of a foreign vessel.[55] Special Rapporteur François argued that "States were not prepared to go nearly so far in the case of the slave trade as in the case of piracy"[56] and that any such right to approach in case of slavery should be limited to a special maritime zone.[57] Manley Hudson, however, was against a restriction to a particular zone and referred to "the many conventions"[58] and to "the several hundred treaties"[59] on slave trade: "In view of the attitude of world opinion to slavery [...] it should be laid down as a principle that the high seas might not be used by vessels of any State for the transport of slaves."[60] Hudson also pointed out that "France, which had been the major objector in the past, now favoured such a provision."[61] Whereas Hudson also referred to the Universal Declaration of Human Rights[62], other members, namely Jean Pierre Adrien François and Jean Spiropoulus argued that the prohibition of slave trade "was one thing, to recognize the right to stop the suspected vessel was another."[63] In the end, the Commission voted in favour of Hudson's proposal,[64] the substance of which can also be found in article 22(1) (b) of the Geneva Convention on the High Seas[65] and article 110(1)(b) UNCLOS[66].

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54 *ILC Ybk (1951 vol 1)* 352 (Alfaro).
55 Cf. ibid 350 (Cordova).
56 ibid 350.
57 ibid 351.
58 ibid 351.
59 ibid 352.
60 ibid 351, 252 (Sandström).
61 ibid 353; contra François at 351.
62 ibid 353; see also at 352: Kerno, Assistant Secretary-General, referred to the *ad hoc* committee on slavery which was established by the ECOSOC and according to which the principle of the prohibition of slavery "was considerably more far-reaching in its implications than that which inspired the League of Nations to formulate the 1926 Slavery Convention."
63 ibid 353 (quote: François).
64 ibid 354.
65 Convention on the High Seas (signed 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.
66 United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

The discussion indicated that the identification and the codification of customary international law are not confined to recollecting single instances of state practice. Principles expressed in treaties, such as the prohibition of slavery, can inform this process and shift the argumentative burden. In case of a sufficient clear conviction of the international community, the question then turned to whether significant opposition of states would still exist.

3. Reconciling the normative environment and state practice: The recent controversy over immunity of State officials from foreign criminal jurisdiction

The recent discussion in the context of the work on immunity of State officials from foreign criminal jurisdiction illustrates the challenges in evaluating the practice of states and considering the systemic relationship between rules of customary international law on immunity and international crimes, *jus cogens* and the fight against impunity.[67]

The International Law Commission began its work on immunity of State officials from foreign criminal jurisdiction in 2007. It is useful to take the broader context into account. The ICJ addressed different aspects of immunity under customary international law in its recent case-law. In 2002, the ICJ decided in the *Arrest Warrant* case that an acting Minister for Foreign Affairs enjoyed immunity *ratione personae* even when being accused of crimes constituting grave violations of international humanitarian law. The Court pointed out, however, that immunities may not constitute "a bar to criminal prosecution in certain circumstances": immunities do not apply when the individual is tried in his home state, they will not apply in a foreign state if the home state "decides to waive that immunity", they will no longer apply after the person concerned ceased to hold office, at least "in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity".[68] The Court also added that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain

67 Cf. *Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur* 14 June 2016 UN Doc A/CN.4/701 paras 190-217; *ILC Report 2017* at 181.

68 *Arrest Warrant of 11 April 2000* [2002] ICJ Rep 3, 25 para 61.

international criminal courts, where they have jurisdiction."[69] In 2008, the ICJ held that functional immunities, or immunity *ratione materiae*, from which functionaries of a state may benefit, belonged to the State[70] and that is for that state to invoke immunity as a challenge to a foreign court's jurisdiction: "The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned."[71] In 2012, the ICJ characterized state immunity as a procedural rule which does not operate on the same level as substantive law. The Court stressed that "the question of whether, and if so, to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case."[72]

The discussion that took place in 2017 concerned draft article 7 which stipulates the inapplicability of immunity *ratione materiae* in respect to crimes under international law, namely genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance.[73] According to the Special Rapporteur, the draft article uses the phrase "shall not apply" instead of the terms "exception" or "limitation", because "the distinction between limitations and exceptions [...] had been controversial in normative terms."[74] The draft article was controversial within the Commission[75]: it was necessary to have an indicative vote in order to send the draft article to the Drafting Committee. The draft article then was adopted by ma-

69 ibid 25 para 61.

70 *Certain Questions of Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, 242 para 188.

71 ibid 244 para 196.

72 *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 139 para 91.

73 *ILC Report 2017* at 176; see also *ILC Report 2022* at 228.

74 *Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur* para 244; Dire Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' (2019) 32 Leiden Journal of International Law 175; see now *ILC Report 2022* at 237 (the Commission explained that it preferred the phrase "shall not apply" over the phrase "cannot be invoked" because of the "procedural component of that phrase").

75 For an overview of the ILC's work and in particular the voting on draft article 7, see Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 170 ff.; Hervé Ascensio and Béatrice I Bonafé, 'L'absence d'immunité des agents de l'Etat en cas de crime international : pourquoi en débattre encore?' (2018) 122 RGDIP 821-824. On draft article 7 see also Curtis A Bradley, 'Introduction to the Symposium on the Present and Future of Foreign Official Immunity' (2018) 112 AJIL Unbound 1

jority, with 21 members voting in favour of the article, whilst eight members voted against, with one member abstaining.[76] The controversy concerned the question of whether article 7 reflected the *lex lata* and could therefore be regarded to be a codification of customary international law or whether it was more of a progressive development or even a proposal for new law.[77] In 2022, the Commission adopted the draft articles and the commentary on first reading, draft article 7 was adopted without a vote; as summarized in the ILC report, several members "stated that the fact that no vote had taken place in 2022 did not mean that either the law of their legal position had in any way changed".[78]

The disagreement over draft article 7 can be explained by different interpretative choices which proponents and critics of the principle expressed in draft article 7 inside and outside the ILC made in relation to the identification of customary international law.[79] For instance, opinions differed on whether and to what extent civil law proceedings should be included when examining the practice of domestic courts[80] and on whether statutes which served the

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ff. Cf. Rosanne van Alebeek, 'The "International Crime" Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?' (2018) 112 AJIL Unbound 27-32, arguing that over the course of the project the consensus in favour of recognizing international crimes limitations to immunity decreased.

76 See Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 171. For individual explanations of the votes see *Provisional summary record of the 3378th meeting, 20 July 2017* UN Doc A/CN.4/SR.3378 (PROV.) 9-16.

77 *ILC Report 2017* at 169-170; cf. Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 172; 179; Sean D Murphy, 'Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?' (2018) 112 AJIL Unbound 8 ("Draft Article 7 is not grounded in law, but in policy-making by the Commission."); see now for a summary of the debate *ILC Report 2022* at 231 ff.

78 ibid 189, 230 (quote).

79 On interpretative choices in the selection of cases see the chart in Ingrid Brunk Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106(4) AJIL 746-747; for an overview of many relevant decisions of domestic courts see Rosanne van Alebeek, 'Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts' in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 509-517.

80 See Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 175-7; *Fifth*

domestic implementation of the Rome Statute were confined to the Rome Statute or could also be considered for the purpose of identifying customary international law.[81]

Additionally, the recourse to past practice proved to be controversial. To name a few examples for the purposes of illustration: Should the practice of the IMT and other international tribunals be counted or should they be discounted when examining the practice of foreign domestic courts?[82] Are the cases before the military tribunals in Germany or before domestic courts in other jurisdictions after World War II of less relevance because Germany did not invoke immunity or is the very idea that immunities *ratione materiae* must be invoked by a state based on a misreading of the ICJ's *Mutual Assistance in Criminal Matters* case?[83] What is the legal value of the *Blaškić* decision, in which the Appeals Chamber held that "those responsible for such

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report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur paras 114-121; *Comment by Sean Murphy, Summary record of the 3362nd meeting, 23 May 2017* UN Doc A/CN.4/SR.3362 (PROV.) 5; *Comment by Roman A Kolodkin, Summary record of the 3361st meeting, 19 May 2017* UN Doc A/CN.4/SR.3361 (PROV.) 7; critical: Quinmin Shen, 'Methodological Flaws in the ILC's Study on Exceptions to Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisidction' (2018) 112 AJIL Unbound 12.

81 Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 177.

82 See ibid 182; Wuerth, 'Pinochet's Legacy Reassessed' 741, 763: "The willingness of some states to lift *ratione personae* immunity before certain international criminal tribunals has not extended to foreign national courts. [...] Germany, after its unconditional surrender, was under four-party occupation and in no position to assert immunity."

83 In favour of the invocation-requirement ibid 745-756; but see Claus Kreß, 'Article 98' in Kai Ambos (ed), *The Rome Statute of the International Criminal Court* (4th edn, Beck 2021) para 36, arguing, *inter alia*, that the legitimate interests of the state official "will be more safely protected" if immunity must be observed regardless of invocation and that such requirement would not be supported by a general practice accepted as law, and para 62, arguing that Article II(4)(a) and not the absence of a German claim of immunity led to the irrelevance of official capacity which, according to a reading of the *Nuremberg* Judgment had been understood "to be indistinguishable from the inapplicability of functional immunity"; also skeptical of the invocation requirement: Aziz Epik, 'No Functional Immunity for Crimes under International Law before Foreign Domestic Courts' (2021) 19 JICJ 1273 with reference to *Judgment of 28 January 2021* Bundesgerichtshof 3 StR 564/19; see on the practice of domestic courts also Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 183.

crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity"[84], considering that the decision actually concerned only the ability of the ICTY to subpoena state officials,[85] which would make the part of the statement on national jurisdiction an *obiter dictum*? What is the value of the *Pinochet* case where "three of the Opinions specifically raised the *jus cogens* nature of the crime as a basis for the non-applicability of immunity"[86], but which arguably ultimately concerned the CAT and therefore a treaty-based exception to immunity?[87] What is the value of the *Bouterse* case where the Amsterdam Court of Appeal held that a former head of state is not protected by immunity *ratione materiae* in respect of torture and crimes against humanity, considering that the Dutch Supreme Court overturned the result on the basis of lack of jurisdiction without, however, commenting on immunity?[88]

Depending on how one answers these questions, one tends to agree or disagree with the statement that "in 1990 it was long established that functional immunity under CIL is inapplicable to crimes under CIL"[89]. And if one agrees that the recent practice is unclear and may be interpreted as a

84 *Prosecutor v Blaskić* ICTY AC Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997) IT-95-14-AR10 para 41.

85 *Comment by Sean Murphy, Summary record of the 3362nd meeting, 23 May 2017* at 5.

86 Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 184.

87 For this argument see for instance Shen, 'Methodological Flaws in the ILC's Study on Exceptions to Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisidction' 11.

88 Cf. Liesbeth Zegveld, 'The Bouterse Case' (2001) 32 Netherlands Yearbook of International Law 113: "The decision of the Amsterdam Court of Appeal on this matter was thus left intact."; cf. Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a brave new world in international law?' 184: "The Court's consideration of whether the laws could be applied retrospectively itself indicates the non-applicability of immunity. [...] What is at issue is whether the Court exercised its jurisdiction, and, in the case of *Bouterse*, it clearly did but found that there were no grounds for prosecution because the law could not be applied retroactively." But see Wuerth, 'Pinochet's Legacy Reassessed' 758.

89 Kreß, 'Article 98' para 65.

trend in favour of[90] or as a countertrend[91] against draft article 7, the question of what constitutes the default position will become more important. In other words: is the default position the continuing availability of immunity[92] (when being invoked?) or is the default position that there is no immunity in respect of crimes? In the latter case, one would have to examine whether the recent practice has sufficiently established a new rule of customary international law recognizing immunity.

If one understands immunity in relation to officials of a state as a procedural rule, direct conflicts with rules of *jus cogens* character which operate on a different level than the procedural rule of immunity will not be likely.[93] Yet, the character as a procedural rule arguably does not completely preclude considerations of substantive nature.[94] The interpreter arguably can factor in normative considerations relating to the *telos*, the rationale and the scope

90 *Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur* paras 121, 179, 188; but see Roger O'Keefe, 'An "International Crime Exception" to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, not Likely' (2015) 109 AJIL Unbound 167 ff.

91 See *Comment by Sean Murphy, Summary record of the 3362nd meeting, 23 May 2017* at 4: "In fact, some evidence actually seemed to suggest the lack of a trend, for example in recent cases brought before the International Court of Justice and the European Court of Human Rights, or perhaps even a countertrend, as illustrated by a recent narrowing of the scope of some national laws."

92 Cf. Ascensio and Bonafé, 'L'absence d'immunité des agents de l'Etat en cas de crime international : pourquoi en débattre encore?' 825-832 (critical with respect to the rule-exception scheme where immunity would be the rule); Micaela Frulli, 'On the existence of a customary rule granting functional immunity to State officials and its exceptions: back to square one' (2016) 26 Duke Journal of Comparative & International Law 481 ff. (expressing doubts as to the existence of a general rule of immunity), 498: "There is no need to find an exception to a general rule. Instead, existing rules suffice to justify the prosecution of state officials suspected of having committed international crimes."

93 Cf. with respect to state immunity *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 136 para 82, 140 para 93.

94 *Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur* 64-65 para 150; Kreß, 'Article 98' para 35; critical towards the classification as a procedural rule and the distinction between substantive and procedural rules Ascensio and Bonafé, 'L'absence d'immunité des agents de l'Etat en cas de crime international : pourquoi en débattre encore?' 833-840.

of the respective rules[95] and other concepts when evaluating the international practice. However, these normative considerations and the evaluation of practice are best considered as being in a dialectical relationship[96] and should not be considered unrelated from each other. For instance, the Special Rapporteur Escobar Hernández, after having concluded that "the commission of international crimes may indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international law"[97], offered additional arguments in order to responds to doubts as to the analysis of customary international law. She argued:

> "Whether or not there is a customary norm defining international crimes as limitations or exceptions to immunity, a systemic analysis of the relationship between immunity and international crimes in contemporary international law shows that there are various arguments in favour of such a norm."[98]

The "arguments" to which she referred included the protection of the values of the international community, *jus cogens*, the fight against impunity, access to justice and the right of victims to reparation as well as the obligation to prosecute international crimes.[99] As has been rightly pointed out, however, these conceptual considerations neither were used in order to interpret international practice nor were interpreted under consideration of international practice, they were used as additional arguments or grounds for that immunity *ratione materiae* does not apply in relation to specific crimes.[100] Additional

95 Cf. Alebeek, 'Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts' 501, addressing the scope of immunity: "A limitation to the rule may be established without proof of a widespread and consistent State practice."

96 Cf. Ascensio and Bonafé, 'L'absence d'immunité des agents de l'Etat en cas de crime international : pourquoi en débattre encore?' 828.

97 *Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur* para 189.

98 ibid para 190.

99 ibid paras 191-217 (concluding that "there are sufficient grounds in contemporary international law to conclude that the commission of international crimes may constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction").

100 See Alebeek, 'Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts' 518; for the view that one must examine practice in order to analyze the balance struck between competing principles see *Comment by Georg Nolte, Summary record of the 3365th meeting, 30 May 2017* at 3: "There was no easy answer but the balance between two fundamental principles must ultimately be determined by the rules of customary international law."

considerations which were raised by members of the Commission, for instance, the possibility of abuse of the draft article by "enabling politically motivated trials" which "could weaken stability in international relations and run counter to the cause of fighting impunity and promoting human rights"[101], should be taken into account as well.[102]

An interesting solution to the problem of reconciling the competing considerations, taking into account the lack of unanimity within the Commission, was a proposal which resembled the *aut dedere aut judicare* obligation under the CAT. The proposal's starting point is a general obligation under customary international law to prosecute international core crimes. The state of the official must waive the immunity from which the official benefit for a proceeding before a foreign domestic court or prosecute itself (*waive or prosecute*).[103] The proposal seeks to overcome the dissent by returning to a more general obligation to prosecute, over which there is more agreement. When it comes to the obligation's implementation, the state of the official concerned would have a choice between either prosecuting or waiving immunity.[104]

The Commission did not take up this proposal when it recently adopted on first reading the draft articles and the corresponding commentary. Instead, both positions are contrasted and spelled out in detail. The commentary on draft article 7 explains the reasons for including this draft, namely "a

101 *ILC Report 2017* at 170.

102 Cf. ibid 181 where the commentary to draft article 7 states that the international legal order's "unity and systemic nature cannot be ignored", which is why "legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law" should not be overlooked and that "the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States".

103 *Comment by Georg Nolte, Summary record of the 3365th meeting, 30 May 2017* 6-7, on the different reactions see ibid 7-8; for a positive reception see Kreß, 'Article 98' para 81 (pointing out that the proposal reflects the *lex lata* in that there is an obligation to prosecute and that the exercise of universal jurisdiction is "governed by the principle of subsidiarity"; Mathias Forteau, 'Immunities and International Crimes before the ILC: Looking for Innovative solutions' (2018) 112 AJIL Unbound 25 ("interesting suggestion"); cf. Ascensio and Bonafé, 'L'absence d'immunité des agents de l'Etat en cas de crime international : pourquoi en débattre encore?' 843-4 (interesting proposal which requires further exploration).

104 Cf. *Questions relating to the Obligation to Prosecute or Extradite* [2012] ICJ Rep 422, 456 para 95 on the relationship between the obligation to prosecute under article 7 CAT and extradition as an option.

discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae*" in respect to specific crimes [105] and "the fact that the draft articles [...] are intended to apply within an international legal order whose unity and systemic nature cannot be ignored", which would lead to a balancing which takes into account the principle of sovereign equality of states, accountability, individual criminal responsibility and the end of impunity.[106] In contrast, the minority within the Commission advanced a couple of arguments against the draft article: The draft article could not be based on practice or a trend; the availability of immunity as a procedural could not depend on the gravity of the act in question; the practice of international courts could not be relevant for an analysis of immunity before domestic courts; the draft risked undermining inter-state relations and there would be no impunity if the individual concerned was prosecuted before a court in his or her state, before an international court or before a foreign domestic courts, provided that in the latter case the immunity would have been waived.[107]

The draft articles have now been submitted to the governments for comments and observations.[108] It remains to be seen whether the balance between different considerations as suggested by the ILC in draft article 7 will be accepted in international practice and how the international practice will further develop.

B. The form of codification and progressive development and its implications on the interrelationship of sources

This section discusses the form of the products of the ILC and distinguishes between two aspects. Firstly, it will approach what can be called the external

105 *ILC Report 2022* at 232.
106 ibid 234.
107 ibid 235-6.
108 ibid 189; see also Murphy, 'Peremptory Norms of General International Law (Jus Cogens) (Revisited) and Other Topics: The Seventy-Third Session of the International Law Commission' 100-103, referring also to *Judgment of 13 January 2021* French Court of Cassation, Criminal Division Appeal No. 20-80.511 para 25 (custom is said to be against the prosecution of State officials) and the German Bundesgerichtshof *Judgment of 28 January 2021* para 16 ff. (no immunity for lower-ranking foreign officials in relation to war crimes).

form (I.)[109]: This concerns the question of whether the respective work was intended to lead to the conclusion of a convention at a diplomatic conference, to constitute an authoritative code stating what customary international law is or to be used as draft convention open for signatures.[110] Subsequently, this section will turn to the substance of the ILC products and examine to what extent they relate to, reaffirm or build on other international law (II.).

I. The form of the ILC product

This section will first address the risk of "decodification" and how it is associated with the question of the form of the ILC's products (1.). It will then illustrate the importance of the spirit of the time in the discussion of the form of the product (2.) and then engage with the discussion about the ILC's turn to nonbinding instruments, which has been characterized as "codification light", and the role of other actors (3.).

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109 As summarized by Laurence Boisson de Chazournes, 'The International Law Commission in a Mirror - Firms, Impact and Authority' in The United Nations (ed), *Seventy Years of the International Law Commission* (Brill Nijhoff 2020) 136-8, possible forms of the ILC products include draft conventions, draft articles, draft principles, draft guidelines, reports, model rules, draft declarations, resolutions, conclusions.

110 See David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 AJIL 857 ff. (describing the increasing influence for the Commission by choosing the "weak" form and thus bypassing the influence which states can exert on a codification conference); Sean D Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' in Maurizio Ragazzi (ed), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers 2013) 29 ff.; Laurence R Helfer and Timothy L Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence' in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 305 ff. (looking at political dynamics between the General Assembly and the Commission and its impact on the choice of form); Yejoon Rim, 'Reflections on the Role of the International Law Commission in Consideration of the Final Form of Its Work' (2020) 10 Asian Journal of International Law 23 ff.; Luigi Crema, 'The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 162 ff.

1. The form and the risk of "decodification"

There are risks and promises inherent in the codification of customary international law. A written codification can be more precise than unwritten rules, it can enhance the law's clarity as well as certainty, it can contain detailed procedural regulations. Then again, it binds only parties.[111] Codification, therefore, is also associated with risks. The omission to include an unwritten rule in a codification can be read as indication that said unwritten rule no longer is or never was a binding rule.[112] Furthermore, the failure of a codification convention to attract a significant number of ratification not only can be detrimental to the rules of the codification convention but can also introduce uncertainty as to the state of unwritten law.

A good example is the failure of the 1930 Conference to reach an agreement on the breadth of the territorial waters. The Commission's early discussions of the breadth of the territorial waters illustrate the uncertainty introduced by this failed codification attempt. The ILC was divided on the state of customary international law before and after the 1930 conference as well as on the implications of the 1930 conference. While certain members argued that the three-mile rule was a rule of custom before the 1930 conference but no longer subsequent to it,[113] other members interpreted the lack of consensus in 1930 as an indication for that the three-mile rule had never been part of customary international law[114] or that the three-mile rule had been and

111 Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) 2 Anuário Brasileiro de Direito Internacional = Brazilian Yearbook of International Law 128: "International codification, in other words, provokes an unsolvable tension in the quest for certainty and universality in the application of law."

112 Jennings, 'The Progressive Development of International Law and Its Codification' 305, on the "concern over the possibility of the application of the maxim *expressio unios exclusio alterius* to a partial codification" during the 1930 Hague Conference.

113 Spiropolous, *ILC Ybk (1952 vol 1)* 162 and *ILC Ybk (1955 vol 1)* 173, (stating that in the 1930s Greece and other states claimed 6 miles). Zourek argued that only a small number of states claim and defend three miles, which was criticized by Fitzmaurice, ibid 174-175. Hudson argued that the 1930 conference did not reject any rule but only took no decision on the territorial waters' breadth, *ILC Ybk (1952 vol 1)* 170.

114 Kozhenikov, ibid 154 and 170, no custom; Cordova, Zourek, 167, Amado 154, 170 (custom to extend territorial sea between three and 12 miles), and Yepes at 154, see also Liang (Secretary to the Commission) 161.

remained custom.[115] In light of this uncertainty, the ILC reached agreement on general rules and principles which left sufficient room for state practice to further develop. The Commission's ultimate compromise recognized a minimum breadth of the territorial sea of three miles and allowed for the recognition of greater breadths "if it is based on customary law"[116], without further defining customary international law. This compromise responded to the lack of agreement on a uniform breadth and, as Fitzmaurice put it, confirmed the three-mile rule "while not excluding the possible validity of individual claims to greater distances."[117] In this way, the possibility of further development of the law of the sea by state practice was reconciled with the idea that states remain subject to the law and that the law provides for certain rules that can offer orientation. Eventually, the law became settled through the negotiations of further conventions.

2. The question of form and the respective spirit of the time

The risk of "decodification"[118], meaning the uncertainty introduced by unratified codification conventions, was the reason why very early Jennings suggested that the ILC might consider writing authoritative statements of custom, rather than preparing codification conventions.[119]

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115 Alfaro, ibid 169, pointing out that of the thirty-two governments represented at that Conference, seventeen had voted in favour of the three-mile limit, and Lauterpacht, 171.

116 The compromise can be found in *ILC Ybk (1956 vol 1)* 162: "1. Save as provided in paragraphs 2 and 3 of this article, the breadth of the territorial sea is three miles. 2. A greater breadth shall be recognized if it is based on customary law. 3. A State may fix the breadth of the territorial sea at a distance exceeding that laid down in paragraphs 1 and 2, but such an extension may not be claimed against States which have not recognized it and have not adopted an equal or greater distance. 4. The breadth of the territorial sea may not exceed 12 miles."

117 Fitzmaurice, *ILC Ybk (1955 vol 1)* 175; see also for the suggestion to focus on the limits until which a state may lawfully claim its territorial waters to be Padilla Nervo (170), Amado (proposing a later adopted resolution 171, 173, 174, adopted in 194) and Salamanca (179-180). The resolution was adopted 7 to 6.

118 Cf. *Third report on State responsibility, by Mr James Crawford, Special Rapporteur* 15 March, 15 June, 10 and 18 July and 4 August 2000 UN Doc A/CN.4/507 and Add. 1–4 in *ILC Ybk (2000 vol 2 part 1)* 52 para 165 ("decodifying effect").

119 Jennings, 'The Progressive Development of International Law and Its Codification' 305-308. He refers (at 305) to the Preparatory Committee of the 1930 Conference

Taking again an example of the early history of the ILC, the question of the form features prominently in the context of the preparation of a convention on diplomatic relations law. The choice for a codification convention was not a foregone conclusion. A convention, it was argued, would unlikely achieve wide-spread ratification, it would either introduce uncertainty as to the law in existence or freeze the status quo and prevent the further development of international practice.[120] Within the ILC, several members of the Commission favoured a convention[121], other members argued that the form would depend on the subject-matter and on whether the substance-matter would tend rather into the direction of a codification or of a progressive development of the law.[122] Adopting such a pragmatic standpoint, Sir Gerald Fitzmaurice supported those of his colleagues who aimed for a convention in the field of diplomatic relations, while also emphasizing that there were more effective means of codification than the negotiation of multilateral treaties at diplomatic conferences.[123] For the topic of the law of treaties, however,

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which stated: "A particular Government which is prepared to sign some provision or other as a conventional rule might possibly refuse to recognise it as being the expression of existing law, whereas another Government which recognises this provision as existing law may not desire to see it included in a convention, being apprehensive that the authority of the provision will be weakened thereby."

120 *ILC Ybk (1958 vol 2)* 133 (A/CN.4/116) (USA).

121 *ILC Ybk (1958 vol 1)*: Amado and Verdross spoke in favour of a convention (85), Yokota spoke in favour of a convention in spite of the risk of freezing international law (86): "The reasons put forward, particularly the argument that a convention 'would tend to freeze the *status quo*', applied equally well to other branches of international law, and could apply to the law of the sea." According to Zourek, "international conventions had proved to be the only effective way of achieving progress in international law" (87). François pointed out the difficulty of obtaining enough ratifications (88); Tunkin preferred a convention "[w]henever possible" (89); Amado agreed with Tunkin (while "custom was the common law of international relations [...] international law [nevertheless] consisted essentially in written texts (with the force of conventional obligations)" (89).

122 ibid 87: Sandström suggested that the substance of the Commission's work and its categorization as codification or progressive development should be decisive (likewise Hsu, 88); Ago did not think that the commission should always aim at a convention which is prone to non-ratifications and reservations, but would prefer a convention for this case (86).

123 ibid 85: "The method of convening a diplomatic conference was suitable for a subject like the law of the sea in which there were at least two important questions, those of conservation and the continental shelf, which were comparatively new to general international law. In the case of diplomatic intercourse and immunities the position

Fitzmaurice favoured a code over a convention.[124] This may not be surprising, considering Fitzmaurice's appreciation of customary international law: in his view treaties merely constituted sources of obligations rather than sources of law, in contrast to customary international law.[125] His successor Humphrey Waldock and the Commission as a whole adopted the opposite approach, however, and decided that the law of treaties should be codified in a convention; Waldock even made the acceptance of the post as Special Rapporteur dependent on a change back to draft convention articles.[126] This choice for a binding treaty and the decision that questions of interpretation should be addressed shaped the understanding of the nature of the means of treaty interpretation, namely as "rules" and legal norms, as opposed to mere doctrine, legal technique or "technical rules".[127]

The process of decolonialization and the emergence of so-called newly independent states favoured the trend towards conventions.[128] Waldock, for instance, argued that "an expository code, however well formulated, [could

was completely different; it was a subject with which Governments were eminently familiar and one in which there had been State practice for centuries." Rather than sending to a conference, "[t]he General Assembly could simply recommend it to Member States for signature".

124 *ILC Ybk (1956 vol 1)* 218; and *First report by Sir Gerald Fitzmaurice, Special Rapporteur* 14 March 1956 UN Doc A/CN.4/101 in *ILC Ybk (1956 vol 2)* 106-107.

125 Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' 159-160. But cf. Maurice H Mendelson, 'Are Treaties Merely a Source of Obligation?' in William E Butler (ed), *Perestroika and International Law* (1980) 81 ff.

126 See Mark E Villiger, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After' (2009) 344 RdC 28.

127 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* 3 March, 9 June, 12 June and 7 July 1964 UN Doc A/CN.4/167 and Add.1-3 in *ILC Ybk (1964 vol 2)* 53-55; Verdross, *ILC Ybk (1964 vol 1)* 21, argued that the ILC should "decide whether it recognized the existence of such rules; for it was highly controversial whether the rules established by case-law [...] were general rules of international law or merely technical rules"; see also Djeffal, *Static and evolutive treaty interpretation: a functional reconstruction* 112-114.

128 Arnold Jan Pieter Tammes, 'Codification of International Law in the International Law Commission' (1975) 22(3) Netherlands International Law Review 326: "I think that the reason for which the Commission definitely switched from the code to the convention is still valid, namely, that although any new-comer (including a new State) which enters a society must generally comply with its governing order, the legislative convention provides an opportunity to consider *de novo* the legal heritage of a world of States that was very small indeed." Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 131; Bordin, 'Reflections

not] in the nature of things be so effective as a convention for consolidating the law" and that "the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished."[129] Roberto Ago, in hindsight, explained that the change in the social structure of the international community had required codification to go beyond the confines of mere systematization of the law and to aim at the conclusions of conventions which required the consent of newly emerged states.[130]

In spite of this *Zeitgeist* in favour of conventions, the ILC did not lose sight of customary international law.[131] One reason was the disenchantment with the speed of the ratification process. In 1968, Roberto Ago, as a member of the ILC, noted the slow ratification speed of conventions and pointed out that one "reason why ratifications were so tardy was not deliberate opposition, but the complexity of the procedure whereby States established their consent to be bound."[132] Therefore, treaties were said to operate as "agents in the formation of customary international law"[133] and the ILC itself recommended the drafting of convention relating to state-succession precisely because of the potentially positive effect of this endeavour on customary international law.[134] Related to the slow ratification process, customary international law

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of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' 540; Yusuf, 'Pan-Africanism and International Law' 254-5; see on the relationship between the so-called third world and the International Law Commission the new study by Anna Krueger, *Die Bindung der Dritten Welt an das postkoloniale Völkerrecht: die Völkerrechtskommission, das Recht der Verträge und das Recht der Staatennachfolge in der Dekolonialisierung* (Springer 2018).

129 *ILC Ybk (1962 vol 2)* 160 para 17.

130 Roberto Ago, 'Droit des traités à la lumière de la Convention de Vienne' (1971) 134 RdC 306-309; see already *ILC Ybk (1961 vol 1)* 249.

131 The ILC was aware of its own influence: as Humphrey Waldock (ibid 252) emphasized, "[a] draft convention prepared by so large and representative body as the Commission possessed an authority of its own even if the General Assembly decided against submitting it to a conference of plenipotentiaries."

132 *ILC Ybk (1968 vol 1)* 98; see also the memorandum by Roberto Ago "The final stage of codification of international law", *ILC Ybk (1968 vol 2)* 171-178.

133 *ILC Ybk (1970 vol 1)* 167 (Humphrey Waldock); *ILC Ybk (1968 vol 1)* 98 (Mustafa Yasseen): "even if unratified, could be the source of a general custom".

134 See the report of the commission to the General assembly in *ILC Ybk (1974 vol 2 part 1)* 170.

continued to play an important role in international practice.[135] Whereas the Court decided that article 6 of the Geneva Convention on the Continental Shelf did not reflect customary international law in the *North Sea Continental Shelf* cases, the work of the ILC has been referred to as supplementary means in other cases when identifying customary international law.[136]

The other reason was the Commission's decision to prepare non-binding instruments which were not intended to necessarily lead to the negotiation of a treaty. This move to nonbinding instruments might have become politically possible precisely because earlier newly independent states had been in the position, through the negotiations of conventions prepared by the ILC, to take part in the creation of the common international legal order. Also, the ILC early on consulted with regional bodies on the progressive development and codification of international law.[137] Historically, the importance of this consideration at the end of the 1950s and in the 1960s could hardly be overemphasized.

The ARSIWA are perhaps the most important example of nonbinding instruments. In 1974, the ILC decided to favour "draft articles" while leaving open "[t]he final form given to the codification of State responsibility".[138] When the project approached its completion, states[139] and the ILC[140] were divided on whether the project should ultimately result into a convention. Supporters of a binding instrument pointed to the Vienna Convention on the Law of Treaties as role model and emphasized the higher certainty and reliability as compared to customary international law and its inadequacies. Supporters of a non-binding instrument pointed to the difficulty to obtain

135 As stated by Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 135, the Court "rarely applied (the VCLT) as such" since at least one party to the proceeding did not ratify the VCLT or since the VCLT was not applicable to earlier treaties according to article 4 VCLT.

136 *ILC Ybk (1972 vol 1)* paras 39-40 (Waldock); *ILC Ybk (1970 vol 1)* 70 (Waldock, arguing that there was no rivalry between the ICJ and the ILC.); Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 135, for an overview of ILC conventions applied as evidence of custom.

137 See Rosenne, 'The International Law Commission, 1949-59' 133-137.

138 *ILC Ybk (1974 vol 2 part 1)* 272-273; see also Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 142-143.

139 *ILC Ybk (2001 vol 2 part 1)* 46-48; *ILC Ybk (1999 vol 2 part 1)* 104; *ILC Ybk (1998 vol 2 part 1)* 93-99.

140 *ILC Ybk (2001 vol 2 part 2)* 24-25; for an overview see Laurence T Pacht, 'The Case for a Convention on State Responsibility' (2014) 83(4) Nordic Journal of International Law 446 ff.

a high number of ratifications and the risk to introduce uncertainty as to the rules of customary international law in case of a failure to obtain a significant number of ratification (so-called "reverse codification").[141] Special Rapporteur James Crawford suggested in his last report "that an Assembly resolution taking note of the text and commending it to Governments may be the simplest and most practical form, in particular if it allows the Assembly to avoid a lengthy and possibly divisive discussion of particular articles."[142] The Commission ultimately

> "reached the understanding that in the first instance, it should recommend to the General Assembly that the Assembly should take note of the draft articles in a resolution and annex the text of the articles to it [...] The recommendation would also propose that, given the importance of the topic, in the second and later stage the Assembly should consider the adoption of a convention on this topic."[143]

A similar course had earlier been adopted with respect to the draft articles on nationality of natural persons: rather than endorsing the conclusion of a convention, the ILC "decided to recommend to the General Assembly the adoption, in the form of a declaration, of the draft articles on nationality of natural persons in relation to the succession of States."[144] Since then, several projects of the ILC resulted into a guide to practice on reservations on treaties, guiding principles on unilateral acts of states, draft conclusions or draft articles.[145]

As demonstrated by Laurence Helfer and Timothy Meyer,[146] there was a significant decline in recommendations of the ILC to the GA to adopt a convention based on the work of the ILC. Helfer and Meyer show that during 1947-1999 the ILC completed 30 projects and recommended 20 conventions

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141 For a summary of the positions see *Fourth report on State responsibility, by Mr James Crawford, Special Rapporteur* 2 and 3 April 2001 UN Doc A/CN.4/517 and Add. 1 in *ILC Ybk (2001 vol 2 part 1)* 24-25.

142 *Fourth report on State responsibility, by Mr James Crawford, Special Rapporteur* in *ILC Ybk (2001 vol 2 part 1)* 7.

143 *ILC Ybk (2001 vol 2 part 2)* 25. Cf. UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83 para 3, where the UNGA took note of the ARSIWA and "commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action". UNGA Res 74/180 (18 December 2019) UN Doc A/RES/74/180 para 1.

144 ILC Ybk (1999 vol 2 part 2) 20.

145 Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 118.

146 Helfer and Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence' 315-317.

of which 14 conventions were later adopted and entered into force. Within that period, during 1947-1974 most projects (21) were concluded, most conventions recommended (14) and most conventions were adopted and entered into force (12). In contrast, during 2000-2014 the ILC completed 12 projects and recommended the adoption of a convention twice[147]. Similarly, Luigi Crema recently pointed out that, out of 43 concluded topics, 16 topics ended with articles that eventually culminated in a multilateral treaty, 12 topics resulted in articles which have not led to the adoption of a treaty so far, three topics culminated in guidelines or principles, six topics led to studies, two topics (three if one includes the recently adopted *jus cogens* conclusions) resulted in conclusions, and six topics escaped the aforementioned categories.[148]

The last conventions which had been based on the work of the ILC and were adopted are the Rome Statute[149], the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses which entered into force in 2014[150] and the not yet in force 2004 United Nations Convention on Jurisdictional Immunities of States and their Property[151].[152]

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147 The authors refer to the topics of the Prevention of transboundary damage from hazardous activities and of Diplomatic Protection, ibid 315 f., cf. *Report of the International Law Commission: Fifty-third session (23 April–1 June and 2 July–10 August 2001)* UN Doc A/56/10 145; *Report of the International Law Commission: Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)* UN Doc A/61/10 24. In addition, at the sixty-sixth session in 2014, the ILC adopted the draft articles on the expulsion of aliens and recommended to the General Assembly "to consider, at a later stage, the elaboration of a convention on the basis of the draft articles", *ILC Report 2014* at 21. In 2016, the ILC recommended to the General Assembly the "elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters", *Report of the International Law Commission: Sixty-eighth session (2 May-10 June and 4 July-12 August 2016)* UN Doc A/71/10 at 24. In 2019, the ILC recommended a convention on crimes against humanity, *ILC Report 2019* at 10 para 42.

148 Crema, 'The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It' 163-5.

149 See also below, 473.

150 Convention on the Law of the Non-Navigational Uses of International Watercourses (signed 21 May 1997, entered into force 17 August 2014) (1997) 36 ILM 700.

151 United Nations Convention on Jurisdictional Immunities of States and Their Property (signed 2 December 2004) UN Doc A/RES/59/38.

152 See also Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 117-118; Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' 542.

3. *Codification light* as joint enterprise of several actors

The increasing use of nonbinding codifications, such as draft articles or conclusions and the corresponding commentaries, guidelines, principles, studies, has been called "codification light"[153]. This development may be said to correspond *prima facie* to a position of greater authority of the ILC[154] since it bypasses an international conference, which would shift the focus to states representatives;[155] courts, tribunals and adjudicators would be a target audience.[156] At best, this "codification light" comes with the clarity and precision of a written form and with the general application *ratione personae* that is associated with customary international law.[157] To have this effect, however, these nonbinding codifications must be regarded by the relevant actors, courts, the UN and, in particular, the majority of states, to reflect customary international law and not to constitute a quasi-legislative innovation.[158] The ILC is in a central position, but it will not be the only

153 Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 117; cf. Crema, 'The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It' 174 (speaking of a "weakening" of general international law by the ILC).

154 Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' 857 ff.

155 Helfer and Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence' 313 ff. (arguing that the ILC's turn to nonbinding instruments has to be seen against the background of a gridlock in the UNGA which "increases the likelihood of General Assembly inaction"); Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' 866: "[I]t is entirely proper for the ILC to consider the endgame of its work product, and to take account of possible dysfunctions in the state system generally or relating to a particular topic." Of course, states can comment on the work of the ILC in the 6th Committee.

156 Crema, 'The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It' 173, 175-6.

157 Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 150.

158 Crawford, 'The Progressive Development of International Law: History, Theory and Practice' 19-20: "[T]he answer is to be provided via end user interpretation, in other words through the practice of states. The question is whether a proposition put to such users of international law by the Commission is accepted or rejected, and within what time scale. International law, like Schrödinger's cat, cannot exist in the absence of the observer."; Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' 32, 40. See also

actor in the process of "staging the authority"[159] of nonbinding documents. The reception of states, for instance in the 6th Committee of the UNGA[160], of courts and tribunals and of academics is also important and can influence the consolidation of customary international law.

To give two examples[161]: After the ILC had adopted the provision on necessity as a circumstance precluding wrongfulness on its first reading,[162] both Hungary and Slovakia agreed before the ICJ that "the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission"[163], and the Court agreed as well.[164] In turn, the ILC approvingly referred to the ICJ in order to support the retention on a provision on necessity.[165] In contrast, when the European Court of Human Rights analyzed the development of customary international law of state immunity, the European Court noted that "a working group of the ILC acknowledged the existence of some support for the view that State officials should not be entitled to plead immunity for acts of torture committed in

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Danae Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law' (2020) 31 EJIL 190, speaking of an "offer of interpretation" and convincingly argues that the silence of states "may not be construed outright as acquiescence. However, whenever states fail to engage with the ILC's interpretative offer, international courts and tribunals are likely to rely on the ILC's interpretative pronouncements as a subsidiary means [...]" (200).

159 Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' 552 ff.

160 For a recent treatment of the ILC's working methods and interactions with governments in the UN see Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law' 188-189. See also United Nations, *The Work of the International Law Commission Volume I* (9th edn, 2017) ⟨https://www.un-ilibrary.org/content/books/9789210609203⟩ accessed 1 February 2023 73-87.

161 For further examples, in particular the reception of the work of the ILC in the jurisprudence of investment tribunals see Crema, 'The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It' 178-80.

162 *ILC Ybk (1980 vol 2 part 2)* 34.

163 *Gabčíkovo-Nagymaros Project* [1997] ICJ Rep 7, 39 para 50.

164 ibid 40-41 paras 51-52.

165 In this sense, see *Second report on State responsibility, by Mr James Crawford, Special Rapporteur* 17 March, 1 and 30 April, 19 July 1999 UN Doc A/CN.4/498 and Add.1-4 in *ILC Ybk (1999 vol 2 part 1)* 74; *ILC Ybk (2001 vol 2 part 2)* 82.

their own territories in either civil or criminal actions".[166] Yet, the European Court did not stop there and concluded on the basis of its evaluation of international practice that the grant of immunity to State officials "reflected generally recognised rules of public international law."[167]

In conclusion, international actors such as states, courts and tribunals engage with nonbinding instruments of the ILC even when those have been at an early stage and have not been formally adopted by the ILC yet. Ideally, they evaluate the intrinsic quality of said instruments as to whether they fairly reflect customary international law.[168] In doing so, they can contribute to the clarification of international law and shape its further development.

II. The substantive form: the codification choice between openness and closedness

Another important aspect concerns the way in which the ILC products would relate to international law and whether they would constitute a closed system in the sense of a complete codification. This question arose first in the discussion of the law on consular relations because of the dense network of bilateral conventions in this field. Special Rapporteur Zourek proposed a draft article

166 *Jones and Others v The United Kingdom* App no 34356/06 and 40528/06 (ECtHR, 14 January 2014) para 209, see also para 213, referring to the view of then Special Rapporteur Kolodkin who regarded it as "fairly widespread view that grave crimes under international law could not be considered as acts performed in an official capacity [...] However, the statement did not meet with unanimous agreement in the ILC and further comment on the issue is expected from the new Special Rapporteur [...]".

167 ibid para 215.

168 See also Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' 866, 872; Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 153; but see also for a critique of the ECtHR's handling of ILC materials on state immunity Riccardo Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?' in Anne van Aaken and Iula Motoc (eds), *ECHR and General International Law* (Oxford University Press 2018) 264 ff., 268-269, Pavoni also speaks of "outsourcing" of the identification of custom to the ILC (at 267), he borrowed the term "outsourcing" in this context from Talmon, 'Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion' 437.

59[169] according to which the envisioned Convention on Consular Intercourse should affect neither previous conventions nor the parties' ability to conclude future conventions. The provision became subject to debate.[170] By allowing states to conclude future conventions, others argued, the provision might endanger the authority of the draft and prevent the emergence of general international law on this subject.[171] The supporters of the provision pointed to the interests of states in having such a provision, the lack of which risked the convention's acceptance by states; moreover, the convention could serve as a model for bilateral agreements.[172]

The Commission agreed on affirming the applicability of prior conventions,[173] just like previous conventions had done.[174] In relation to future

169 Article 59 reads: "Article 59. Relationship between the present articles and previous conventions 1. The provisions contained in the present articles shall in no way affect conventions previously concluded between the Contracting Parties and still in force between them. Where conventions regulating consular intercourse and immunities between the Contracting Parties already exist, these articles shall apply solely to questions not governed by the previous conventions. 2. Acceptance of the present articles shall be no impediment to the conclusion in the future of bilateral conventions concerning consular intercourse and immunities.", *ILC Ybk (1960 vol 2)* 39-40.

170 *ILC Ybk (1961 vol 1)* Edmonds ("one of the most important provisions in the draft", 170), Yasseen ("direct connection with codification of international law", 170).

171 *ILC Ybk (1960 vol 1)* Daftine-Martary (225) doubting the desirability of the provision which would in no way encourage the formation of general international law) Hsu (226, arguing that the purpose of harmonizing consular practice would be defeated by paragraph 2, allowing states to conclude bilateral agreements); Scelle, proposing the article's deletion (227); Sandström (229, arguing that article 59 would weaken the draft); Yasseen desire to secure acceptance of the draft and to safeguard the authority of the draft (237), see also 238 for the view that multilateral conventions should have greater force than treaties.

172 See eg. ibid Special Rapporteur Zourek (agreeing with Tunkin that the instrument might have an unifying influence, emphasizing the interests of states, 225, see also 230, 238, pointing out the need for a multilateral convention in a world of 100 states), Tunkin (emphasizing the interests of states, alluding to the possibility that the convention might nevertheless have a unifying influence, 225), Fitzmaurice (emphasizing the interests of states, 224-225), Erim (227-228) Yokota (224, 229). But see Amado (arguing that the outcome of the codification and progressive development should not be confined to model rules, 228-229).

173 ibid 243. The proposals by Bartoš and François according to which conflicting bilateral conventions should be considered to be abrogated ipso facto, automatically, failed to be supported by a majority (225-226).

174 See Harvard Law School, 'Codification of International Law: Part II: Legal Position and Functions of Consuls' (1932) 26 AJIL. Supplement 369 (article 33); Convention

conventions, Scelle's proposal to preserve the integrity of the draft convention and to safeguard its fundamental principles by declaring it to be *jus cogens*[175] did not find a majority. Instead, the consensus emerged that the draft convention should not draw the states' attention to future conventions, which is why any reference to the future conventions was deleted and mentioned only by implication in the Commentary.[176] The Vienna Convention on Consular Relations contained a provision according to which the Convention should neither affect previous conventions (article 73(1)) nor "preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".[177] Furthermore, several conventions based on ILC drafts affirm in their respective preamble that "that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".[178]

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on Consular Agents (signed 20 February 1928, entered into force 3 September 1929) OAS Law and Treaty Series No 34, Article 24; Convention on the High Seas (signed 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, Article 30; Convention on the Territorial Sea and the Contiguous Zone (signed 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, Article 25.

175 See Scelle in *ILC Ybk (1960 vol 1)* 240; see also Yasseen in *ILC Ybk (1961 vol 1)* 170. Bartoš (173) did not think that sovereignty of states would enable them to conclude conventions subsequent to the general convention. But see for instance Pal, who could not follow Scelle in making all parts of the draft imperative (235). François, pointing out the difficulty to determine which parts should be considered *jus cogens* (171).

176 ibid 175; *ILC Ybk (1961 vol 2)* 128. See also *ILC Ybk (1961 vol 1)* 174 (Ago, considering any reference to future conventions dangerous, because, as indicated by Bartoš, it would detract from the aim pursued in the codification of consular law).

177 Vienna Convention on Consular Relations (signed 24 April 1963, entered into force 19 March 1967) 596 UNTS Art. 73.

178 Both the Vienna Convention on Consular Relations, ibid 261, the Vienna Convention on Diplomatic Relations, Vienna Convention on Diplomatic Relations (signed 18 April 1961, entered into force 24 April 1964) 500 UNTS 95, and the Vienna Convention on the Law of Treaties, Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, and the United Nations Convention on Jurisdictional Immunities of States and Their Property, United Nations Convention on Jurisdictional Immunities of States and Their Property (signed 2 December 2004) UN Doc A/RES/59/38.

III. Concluding Observations on Form and Substance

Unlike in many domestic law settings, codification in public international law did not drive out customary international law.[179] Experience has taught that customary international law will remain important in the international legal system, even in an age of codification, in particular as long as certain states do not ratify a given convention and as long as the consensual character of a treaty and the *pacta tertiis* principle will be maintained. Furthermore, customary international law may continue to play a role also in the relationship between the parties to conventions, as such conventions often constitute a partial codification that leaves room for customary international law. In addition, the development according to which the work of the ILC would not be intended to lead to a binding treaty and which has been described as "codification light" contributed to the importance customary international law still enjoys in the international legal system.

Probably nothing else like the fact that several provisions of a codification convention, namely the Vienna Convention on the Law of Treaties, have become subject to a re-analysis by the Commission recently[180] demonstrates more clearly that treaties based on the Commission's work are anchored in international life.[181] In this reanalysis no distinction was made between the rules on interpretation of the Vienna Convention on the Law of Treaties and the rules of interpretation under customary international law which are said to be set forth in the Vienna Convention.[182] In its second conclusion on subsequent agreements and subsequent practice and in the corresponding

179 Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' 119, 128.

180 The Study on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" concerned article 31(3)(c) VCLT; the Commission analyzed in a separate study the role of subsequent agreements and subsequent practice (art. 31(3)(a) and (b) VCLT) and the provisional application of treaties (art. 25 VCLT). The new *jus cogens* project includes, but is not limited to, an analysis of articles 53 and 64 VCLT. On the interpretation of the VCLT by the ILC see Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law' 178-182.

181 As observed by Lachs, "codification stimulates development no less than development calls out for codification", Lachs, *The Teacher in International Law: Teachings and Teaching* 187.

182 Cf. also Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law' 180 (in relation to Guide to Practice on Reservations to Treaties).

commentary, the Commission emphasized the multi-sourced character of the rules of interpretation and thereby paid attention to both sources rather than to one at the expense of the other.[183] This is another example of the convergence of customary international law and a convention into general rules and principles. The generality and the focus on rules on rules which characterizes the Commission's work for instance on subsequent agreements and subsequent practice, customary international law, peremptory norms and general principles of law can ensure that the ILC conclusions can be applied in different contexts. Thus, the ILC strenghtens general international international law and a general methodology against the background of the diversification and expansion of international law.[184]

C. The interrelationship of sources in selected projects

A memorandum submitted by the Secretary-General in 1949 expressed the opinion that the codification of the sources of international law had been completed by the adoption of article 38 of the ICJ Statute, and it was regarded to be "doubtful whether any useful purposes would be served by attempts to make it more specific, as, for instance, by defining the conditions of the creation and of the continued validity of international custom or by enumerating, by way of example, some of the general principles of law which article 38 of the Statute recognizes".[185] Nevertheless, it was deemed useful to "assembl[e] the experience of the International Court of Justice and of other international tribunals in the application of the various sources of international law."[186]

183 *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."; see already *ILC Report 2013* at 19. UNGA Res 73/202 (20 December 2018) UN Doc A/RES/73/202 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 interpret treaties, and encourages their widest possible dissemination."

184 See also Crema, 'The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It' 172.

185 *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission* 22.

186 ibid 22.

The ILC has approached the sources in several of its projects. It has assembled legal experience and, by doctrinally systematizing international practice, devised so-called "rules on rules" that can guide legal operators. This section analyzes to what extent the interrelationship of sources was addressed in selected topics. This section will first focus on the ILC's work on the law of treaties (I.); in particular, it will demonstrate that the question of the interrelationship was partly excluded from the topic's scope and it will examine the different ways in which the substance of the work related to other sources. Subsequently, the section will examine the question of the interrelationship in the work on the responsibility of states for internationally wrongful acts (II.) and in the so-called fragmentation report (III.). At the end of this section, the recent projects on customary international law (IV.), on *jus cogens* (V.) and on general principles of law (VI.) will be examined.

I. The law of treaties

The relationship between a given codification and unwritten law can be indicative of the preferences of a given legal community. It will be particularly important if the subject of the codification is the general law of treaties, since here the question arises how any written law shall relate to unwritten law. The present section will focus on how the ILC approached the interrelationship of sources when it worked on the general law of treaties. It is divided into two subsections. First, it will be analyzed to what extent the topic of the interrelationship of sources was addressed and discussed in the context of the design of the general regime (1.). Secondly, the section examines the codification approach(es) as to the relation between a treaty and other sources (2.).

1. The scope of the topic

The Commission decided not to address the relationship between treaty law and other sources explicitly beyond a saving reservation in what became article 35 VCLT. An exception concerns the role of other sources in the context of interpretation of treaty obligation, which the next subsection will focus on.

After his predecessors Brierly and Lauterpacht had not examined, in the context of the ILC[187], the interpretation of treaties and the relationship with other sources, Special Rapporteur Sir Gerald Fitzmaurice dedicated no less than 21 articles of his fifth report to the effects of treaties on third states.[188] Fitzmaurice's objective was to explain exceptions to the *pacta tertiis* rule not by "some mystique attached to certain types of treaties", such as their character as "lawmaking treaty" as opposed to a mere contract, but by a general obligation of states not to interfere in the treaty-relations between states.[189] With respect to the interplay between custom and treaties, Fitzmaurice's report set out

> "to describe a process rather than to formulate a rule. Whether the treaty concerned will have the effects stated, must depend on a number of uncertain factors, such as its precise terms, the nature of its subject matter, the circumstances in which it was concluded, the number of States subscribing to it, their importance relative to the subject matter of the treaty, the history of the treaty subsequent to its conclusion, and of the topic to which it relates-and so forth."[190]

187 Waldock was the first Special Rapporteur who addressed the rules of interpretation of treaties. His predecessors dealt with this topic in their academic capacity outside of the ILC, see Hersch Lauterpacht, 'L'interprétation des traités' (1950) 43 Annuaire de l'Institut de droit international 366 ff.; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYIL 210-212.

188 *Fifth report by Sir Gerald Fitzmaurice, Special Rapporteur* 21 March 1960 UN Doc A/CN.4/130 in *ILC Ybk (1960 vol 2)* 69 ff. One important study in this regard on which Fitzmaurice relied was written by Ronald F Roxburgh, *International conventions and third states* (Longman, Green and Co 1917).

189 *Fifth report by Sir Gerald Fitzmaurice, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 98: "To the Special Rapporteur, the considerable lack of enthusiasm evinced over the supposedly inherently 'legislative' effect of some kinds of treaties, is evidence of a certain uneasiness at the idea. Exactly which classes have this effect, and why and how? [...] The Special Rapporteur does not deny that, in the result, they do; but it seems to him preferable to reach this conclusion, not on the esoteric basis of some mystique attaching to certain types of treaties, but simply on that of a general duty for States-which can surely be postulated at this date (and which is a necessary part of the international order if chaos is to be avoided)-to respect, recognize and, in the legal sense, accept, the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense."

190 *Fifth report by Sir Gerald Fitzmaurice, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 94.

Fitzmaurice did not, however, advocate that a treaty can impose obligations on third states against their respective will or without any acquiescence. With respect to "law-making or norm-enunciating treaties", Fitzmaurice argued that these treaties "constitute vehicles whereby such rules or regimes are or become generally mediated so as also to bind States not actually parties to the treaty as such."[191] Yet, he added "[i]n any such case however, it is the rule of customary international law thus evidenced, declared or embodied that binds the third State, not the treaty as such."[192]

His successor as Special Rapporteur, Humphrey Waldock, departed from Fitzmaurice's approach and found a general duty not to interfere in lawful treaties difficult to reconcile with the general idea of treaties as *res inter alios acta*.[193] Waldock significantly shortened the articles and designed an interrelated regime of only four articles on third-party effects,[194] which came close to the present articles 34-38 VCLT. Draft article 61 stated the *pacta tertiis* rule as general rule, draft article 62 addressed the situation in which parties to a treaty intended to create rights or obligations for a third state and in which said third state consented to the respective provisions. Draft article 63 concerned treaties establishing objective regimes. Finally, draft article 64 was a provision similar to what is now article 38 VCLT, a saving reservation which stated that "nothing in articles 61 to 63 is to be understood as precluding principles of law laid down in a treaty from becoming applicable to States not parties thereto in consequence of the formation of an international custom embodying those principles."[195]

The most controversial proposal concerned the suggestion that treaties could create an objective regime over a region or an area with respect to which the states concluding the treaty would possess or assume a special territorial competence.[196] The tension with the *pacta tertiis* principle should

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191 *Fifth report by Sir Gerald Fitzmaurice, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 80.

192 *Fifth report by Sir Gerald Fitzmaurice, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 80.

193 *ILC Ybk (1964 vol 1)* 28, 32.

194 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 17-34.

195 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 34.

196 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 26: "A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the

be overcome by recourse to tacit assent or recognition of other states.[197] The failure of other states to protest would imply their consent to this regime. In contrast to the draft articles 62 and 63, article 64 was intended to constitute a mere "saving reservation", acknowledging that the content of treaties can become custom without further explaining this process. Since treaties and custom constituted "distinct sources", Waldock did not want to blur the lines between both sources and, therefore, considered such a saving reservation to be sufficient in a convention about treaties.[198]

Waldock's system can be regarded as an attempt to strengthen treaties in relation to custom. Waldock clarified that article 63 on objective regimes was intended "to provide a means for the speedy consolidation of a treaty as part of the international legal order, without having to await the longer process of formation of a customary rule of international law".[199] Article 63 was intended to be "a provision of the law of today".[200] However, the Commission could not agree on this proposal and whether it could be reconciled with the sovereignty of states and the *pacta tertiis* principle.[201]

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parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question."

197 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 32.

198 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 27: "Treaty and custom are distinct sources of law, and it seems undesirable to blur the line between them in setting out the legal effects of treaties upon States not parties to them. It is therefore thought preferable in a draft convention on the law of treaties not to include positive provisions regarding the role of custom in expanding the effects of law-making treaties, but merely to note and recognize it in a general reservation. Such a 'saving' reservation is formulated in article 64." See also 34.

199 *ILC Ybk (1964 vol 1)* at 105.

200 ibid 105 (Waldock).

201 See ibid: While Verdross tried to find common ground between article 63 and 64, in that a treaty provision can become general law (106), others emphasized the differences, and Tunkin even regarded objective regimes as an "obsolete practice" (103), Ago argued that an objective treaty did not itself constitute the legal basis but only lays out conditions necessary to enable a situation to come into existence (106). Reuter pointed out that sovereignty of states could be reconciled with rules binding on third states by way of customary law (83). In this sense also eg Jiménez de Aréchaga (101), Briggs (103).

Given the rejection of draft article 63 on objective regimes, the saving reservation on customary international law became more important. Despite three governments doubting the usefulness of such a saving reservation, the Commission decided to retain the respective article precisely as response to the deletion of the article on objective regimes.[202] This is an example of how the (failed) extension of one legal concept, the concept of the treaty, could have perhaps functionally replaced another, namely customary international law, to a certain extent.

If it had been for Mustafa Yasseen, the interaction between treaties and custom might have been studied in more detail in the draft or even in a separate study.[203] Waldock, however, successfully defended his reluctance to analyze the interrelationship of sources beyond a saving reservation. As he put it, the Commission decided, "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."[204] In his view, "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 [...]".[205]

2. The interrelationship within the law of treaties

While emphasizing the distinct character of the sources, Waldock also acknowledged that treaties should not be interpreted and applied without any regard to other sources of international law[206]. He first conceived this re-

202 Waldock explained that the Commission's "desire to include [...] had been reinforced by the compromise reached over article 60 and the reluctance of some members to drop an article dealing with objective regimes", *ILC Ybk (1966 vol 1 part 2)* at 91, 94; Jiménez de Aréchaga called then-article 62 the survival of the idea of objective regimes (178). See also Jiménez de Aréchaga in *ILC Ybk (1964 vol 1)* 109: "the Commission had decided to drop article 63 on the understanding that its omission would be partly offset by article 64." See also Verdross, 109: "[I]f article 63 disappeared, article 64 would be all the more necessary".

203 ibid 109 paras 44-45 and 112 para 181 and 195 para 54 and *ILC Ybk (1966 vol 1 part 2)* 91 para 73.

204 ibid 94 para 103.

205 *ILC Ybk (1964 vol 1)* 112 para 2.

206 Waldock was the first Special Rapporteur who addressed the rules of interpretation of treaties. His predecessors dealt with this topic in their academic capacity outside

lationship under the concept of intertemporality. As explained by Richard Gardiner, "this concept addresses two questions: first, whether the legal significance of facts in a particular situation is to be assessed as at the time of relevant events rather than at the time at which a difference or dispute is being resolved; and, second, what account is to be taken of changes or developments in international law in any intervening period."[207]

a) From intertemporality to a means of interpretation

Waldock's draft of 1964 was inspired by Max Huber's famous *dictum*:

> "[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled [...] The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."[208]

Waldock proposed draft article 56 which distinguished between the interpretation and the application of a treaty. According to draft article 56(1), a treaty was to be interpreted in light of the law in force when the treaty was concluded. According to draft article 56(2), the treaty's application was to be governed by the rules of international law in force during application.[209]

Since the distinction between interpretation and application received as much criticism as the characterization of the relationship between different norms as question of intertemporal law,[210] Roberto Ago suggested in his capacity as chairman to postpone the consideration of draft article 56 on intertemporal law.[211]

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of the ILC, see Lauterpacht, 'L'interprétation des traités' 366 ff.; Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' 210-212.

207 Gardiner, *Treaty interpretation* 290.

208 *Island of Palmas Case* Netherlands v. U.S.A. (4 April 1928) II RIAA 845.

209 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 8-9. Contrary to what has been suggested by Kontou, the second paragraph was not meant to cover *jus cogens* only, Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press 1994) 135.

210 *ILC Ybk (1964 vol 1)* 33-39.

211 ibid 40.

The Commission then discussed both limbs of intertemporal law as means of interpretation in separate provisions.

Waldock's first drafts on interpretation were still based on the idea of intertemporal law. Accordingly, a treaty should be interpreted "in the context of the rules of international law in force at the time of the conclusion of the treaty" (Draft Article 70) while also taking account of "the emergence of any later rule of customary international law affecting the subject-matter of the treaty and binding upon all the parties", subsequent agreements and subsequent practice (Draft Article 73).[212] By using "take account of", Waldock highlighted the openness of the process of interpretation relation to which several aspects would be relevant.[213]

Several members had reservations about an inclusion of subsequent custom as means of interpretation[214]. The draft articles submitted to the General Assembly distinguished with respect to customary international law between interpretation and application. The general rule of interpretation set forth in draft article 69 referred to "general international law in force at the time of [the treaty's] conclusion".[215] Draft article 68(c) on the modification of a treaty stipulated that the operation of a treaty may be modified "[b]y the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties."[216] In response, four governments

212 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 52-53.

213 *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 61: "The term 'take account of' is used rather than 'be subject to' or any similar term because, if the rule is formulated as one of interpretation, it seems better, at any rate in sub-paragraphs (a) and (b), to use words that leave open the results of the interpretation."

214 *ILC Ybk (1964 vol 1)* 279, Tunkin (73 only subsidiary means); Bartoš 280 (not a rule of interpretation); Yasseen 282 should be modified to be confined to jus cogens, Verdross 296 (art. 73 not a provision on interpretation, later custom would raise the question of interpretation not of the treaty but of the later custom); 296 de Luna (later custom a question of modification not of interpretation); but see Rosenne, 296, who saw no difficulty in the draft provision and recommended otherwise to go back to article 56 (2). But see Pal, 206-297 (not a question of interpretation); Chairman Ago 297 (later custom would involve question of interpretation); Yasseen 297 (article does not belong to interpretation with the exception of subsequent practice, contrary to Ago).

215 See *ILC Ybk (1964 vol 2)* 199. Draft article 69(3) referred to subsequent agreements and subsequent practice, without referring to general international law in force at the time of the treaty's application.

216 ibid 198.

suggested to delete any distinction between prior customary international law as means of interpretation and subsequent customary international law as means of modification, since it would be difficult to determine whether a specific rule of customary international law would have to be regarded as existing at the time of the conclusion of the treaty or at the time subsequent thereto.[217]

Waldock, therefore, suggested eliminating the distinction between customary international law in force at the time of the treaty's conclusion and subsequent customary international law and drafted a new article 69 according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the light of [...] the rules of international law".[218] The Commission agreed to keep the reference to other international law simple and not to distinguish between both limbs of intertemporality[219]. In addition, reference was made only to other rules,

217 *ILC Ybk (1966 vol 2)* 88 Israel (arguing that the reference to contemporary custom as second limb of intertemporal law is not in the proper place and suggesting to move it to article 69); UK (proposing the deletion of paragraph c since it would be difficult to determine the exact point of time when custom has emerged, arguing further that modification requires consent by parties to the treaties); USA (arguing that paragraph c might lead to serious differences of opinion because of differing views as to what constitutes customary law, suggesting therefore the omission of the paragraph, "leaving the principle to be applied under the norms of international law in general rather than as a specific provision in a convention on treaty law"; recognizing that treaties are to be interpreted in accordance with the evolution of international law). Pakistan (arguing that paragraph c should be deleted).

218 *Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* 11 March, 25 March, 12 April, 11 May, 17 May, 24 May, 1 June and 14 June 1966 UN Doc A/CN.4/186 and Add.1-7 in *ILC Ybk (1966 vol 2)* 101; compare *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* in *ILC Ybk (1964 vol 2)* 52 on draft article 70, where the interpretation should be informed by "the rules of general international law in force at the time of its conclusion".

219 Cf. *ILC Ybk (1966 vol 1 part 2)* 185 de Luna (later custom should be included); 187 Briggs (if temporal law is to be addressed, both limbs need to be included); Castrén 188 (delete temporal limitation); 190 Jiménez de Aréchaga and Tunkin (delete temporal limitation); Reuter 195 (against temporal limitation, because of territorial sea, arguing further that it must be presumed that states do not seek to violate their undertakings); El-Erian, 196 (reference to custom would cover not only rules of interpretation but also substantive rules.

rather than rules of general international law, in order to allow for regional and local customary international law to be taken into account.[220]

b) Codification policies on the relationship with other principles and rules of international law

When it came to interpretation, the ILC emphasized the interrelationship of a treaty with other rules of international law. This focus has been articulated perhaps best by Yasseen, when explaining that "reference to the rules of international law was indispensable [...] it was impossible to understand the treaty except within the whole international legal order of which it formed a part, which it influenced and by which it was influenced. A treaty was an act of will; the parties had reached agreement, but their agreement was not *in vacuo*; it was situated in a legal order."[221]

A different codification policy can be identified in relation to a treaty's termination and denunciation and the withdrawal of a party which can now be found in article 42 VCLT. According to article 42 VCLT, these questions are solely governed by the treaty in question or the Vienna Convention. This provision purported to constitute "a safeguard for the stability of treaties"[222]. Thus, the provision therefore could have had the potential to create a vacuum around the Vienna Convention;[223] however, since the ILC decided to exclude matters of state succession and state responsibility and to pursue only a partial codification,[224] a significant scope of application for customary international law was preserved.

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220 ibid 188 Castren, Tunkin 190, Amado 191, Yasseen 197; for a reference explicitly to custom see Verdross 191, contra: Amado, 191.

221 ibid 197.

222 *ILC Ybk (1966 vol 2)* 236 on draft article 39 which resembles what is now article 42 VCLT. See also 237 on draft article 40, according to which the invalidity, termination or denunciation of a treaty, the withdrawal of a party to it, or the suspension of its operation shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law.

223 On this topic see Klabbers, 'Reluctant Grundnormen: Articles 31(3)(C) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' 148-156.

224 *ILC Ybk (1966 vol 2)* 176-177, 267-268 on draft article 69 which is now article 73 VCLT; *ILC Ybk (1963 vol 2)* 189 para 14.

II. Responsibility of States for Internationally Wrongful Acts

The codification of the law of state responsibility was among those topics which was considered from the very beginning in a memorandum submitted by the Secretary-General as one possible subject of codification.[225] The ILC included in its first session the topic of state responsibility in its provisional list of 14 topics selected for codification,[226] and the UNGA requested "the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility."[227]

1. The work of García-Amador

The first Special Rapporteur, Francisco V. García-Amador, appointed in 1955, followed up on the codification efforts during the League of Nations and approached state responsibility in the context of injuries to aliens.[228] At the same time, he argued that "it is necessary to introduce in the traditional law other changes that might have been determined by the profound transformation undergone by international law"[229] and to focus on the position of the individual as subject of international law.[230] His reports therefore set out to attempt both: laying out both general features of state responsibility and the content of substantive obligations, in particular human rights.[231] However,

225 *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission* 56.

226 *ILC Ybk (1949)* 281.

227 UNGA Res 799 (VIII) (7 December 1953) UN Doc A/RES/799 (VIII).

228 Nissel, 'The Duality of State Responsibility' 821: "After the Second World War, the United Nations picked up the codification ball from where the League of Nations dropped it."

229 Francisco García-Amador, 'State Responsibility in the Light of the New Trends of International Law' (1955) 49 AJIL 346.

230 ibid 342; *ILC Ybk (1956 vol 1)* 228-229; on the significance of human rights see *International responsibility: report by F V Garcia Amador, Special Rapporteur* 20 January 1956 UN Doc A/CN.4/96 in *ILC Ybk (1956 vol 2)* 201-203; *ILC Ybk (1957 vol 2)* 112-115.

231 *International responsibility: Second report by F V Garcia Amador, Special Rapporteur* 15 February 1957 UN Doc A/CN.4/106 in *ILC Ybk (1957 vol 2)* 113;

García-Amador's reports did not have much of a practical effect in the ILC.[232] This can be explained in part by the Commission's occupation with other topics, such as the law of the sea, and in part by the fact that García-Amador's approach was controversial within the Commission, in particular as far as it concerned questions of substantive obligations of protection of aliens.[233]

At the outset, García-Amador did not distinguish between sources.[234] He clarified that the draft article on international obligations "did not mean the 'sources' to be restricted exclusively to treaties and custom [...] the term 'sources' can be construed so broadly that the narrowest construction that can be envisaged is the one contained in Article 38 of the Statute of the International Court of Justice; that provision has the signal virtue of modifying the narrow positivist idea of sources which used to prevail."[235]

While not distinguishing between sources explicitly, García-Amador designed in his reports a system of responsibility which included not only wrongful acts, consisting of the non-fulfilment of international obligations, but also what he called arbitrary acts[236], where international responsibility would be based not exclusively on the non-fulfilment of an international obligation but "on something different: the absence of a reason or purpose to justify the measure, some irregularity in the procedure, the measure's

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International responsibility: Third report by F V Garcia Amador, Special Rapporteur 2 January 1958 UN Doc A/CN A/111 in *ILC Ybk (1958 vol 2)* 49.

232 Daniel Müller, 'The Work of García Amador on State Responsibility for Injury Caused to Aliens' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 69.

233 Nissel, 'The Duality of State Responsibility' 823-835; Alain Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 75-76; Müller, 'The Work of García Amador on State Responsibility for Injury Caused to Aliens' 72; Marina Spinedi, 'From one Codification to another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility' (2002) 13(5) EJIL 1109; on the contested topic of the protection of aliens abroad see below, p. 562.

234 See Draft Article 1 of his second report, *ILC Ybk (1957 vol 2)* 105: "The expression 'international obligations of the State' shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law."

235 *International responsibility: Third report by F V Garcia Amador, Special Rapporteur* in *ILC Ybk (1958 vol 2)* at 50.

236 *Fourth Report on State Responsibility by Francisco V Garcia Amador,* 26 February 1959 UN Doc A/CN.4/119 in *ILC Ybk (1959 vol 2)* 7-8 paras 22-25.

discriminatory nature or, according to the circumstances, the amount, the degree of promptness or form of the compensation."[237] The prohibition of abuse of rights which was characterized in his report as a general principle of law or as a principle of international law[238] would "find its widest application in the context 'unregulated matters', that is, matters which 'are essentially within the domestic jurisdiction' of States."[239] When proposing his draft conclusion on abuse of rights, he admitted that "the distinction between cases of non-performance of concrete, exactly defined and specific international obligations and cases of 'abuse of rights' is a times very slight and difficult to establish."[240] The resulting draft conclusion then related the abuse of rights to conventional and general rules of international law, expressing the "understanding that an act or omission of this kind can only engage the responsibility of the State if such act or omission involves a breach of a rule established by treaty or of a rule of general international law stipulating the limitations to which the (legitimate) exercise of the right in question is subject."[241] In case that the Commission would prefer not to dedicate a draft article to abuse of rights, he suggested that it should be made clear that the concept of international obligations included abuse of rights as a general principle of law or a principle of international law.[242] The Commission's subsequent work on state responsibility, however, would not address substantive obligations or abuse of rights as ground for responsibility specifically, and instead focused on the consequences of a violation of international obligations.

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237 *Fifth State responsibility report by FV Garcia-Amador, Special Rapporteur* 9 February 1960 UN Doc A/CN.4/125 and Corr. 1 in *ILC Ybk (1960 vol 2)* 60 para 78.

238 *Fifth State responsibility report by FV Garcia-Amador, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 66 para 100, see also 58-59.

239 *Fifth State responsibility report by FV Garcia-Amador, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 60 para 77. He referred to the question of expropriation (at 60 para 78) and to nuclear tests within a state's territory or on the high seas (64 para 93) as examples.

240 *Fifth State responsibility report by FV Garcia-Amador, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 66 para 99.

241 *Fifth State responsibility report by FV Garcia-Amador, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 66 para 99.

242 *Fifth State responsibility report by FV Garcia-Amador, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 66 para 100; see also *International responsibility: Second report by F V Garcia Amador, Special Rapporteur* in *ILC Ybk (1957 vol 2)* 105, 107 para 11 (defining international obligations as those resulting from "any of the sources of international law").

2. The focus on the rules of responsibility as secondary rules

In the codification of the law on state responsibility a significant change of method took place in the 1970s under Special Rapporteur Roberto Ago. Instead of treating substantive obligations and violations such as denial of justice as an aspect of the project, Ago suggested to separate primary norms from secondary norms[243]: The latter would constitute the abstract regime of international responsibility which followed from the violation of a so-called primary obligation. Following this approach and confining itself solely to those secondary rules, the ILC emphasized that the source of the obligation would not matter, which expressed itself in the often used formula "treaty, custom or other"[244], later changed into "whatever [the obligation's] origin"[245].

Ago's successor, Wilhelm Riphagen, attempted to introduce a certain nuance to a strict separation between primary and secondary rules. He regarded international law to be modelled "on a variety of interrelated sub-systems, within each of which the so-called 'primary rules' and the so-called 'secondary rules' are closely intertwined - indeed, inseparable."[246] Riphagen contended that the different sources are suited to different types of obligations: whereas obligations of customary international law were often implied by the intercourse of states of "mostly have the function of keeping the States apart, obligations founded on treaties may have quite a different function and may reflect a notion of sharing a common substratum, or at least a notion of organizing a parallel exercise of sovereignty in respect of certain interna-

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243 According to Dupuy, the separation was recognized already by Anzilotti, see Pierre-Marie Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States' (1992) 2 EJIL 143. On this distinction see also below, p. 559.

244 *ILC Ybk (1971 vol 2)* at 346 (Report to the General Assembly): "First, it would be made clear that the source of the international legal obligation which had been violated (customary, treaty or other) did not affect in any way the determination as to whether the violation was an internationally wrongful act."

245 eg *ILC Ybk (1976 vol 1)* 8 (Ago), 236 (Yasseen, criticizing the change which would be less clear than the reference to the formal sources); *ILC Ybk (1980 vol 2 part 2)* at 32. *ILC Ybk (2001 vol 2 part 2)* at 55 para 3 (commentary to article 12 ARSIWA, arguing that the term "origin" is not attended by the doubts and doctrinal debates the term "source" has provoked).

246 *Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr Willem Riphagen, Special Rapporteur* 12 and 30 March and 5 May 1982 UN Doc A/CN.4/354 and Add. 1 and 2 in *ILC Ybk (1982 vol 2 part 1)* 28 para 35.

tional situations."[247] Based on his argument that the primary obligation may affect the secondary obligations and that certain types of primary obligations relate to a particular source, Riphagen appeared to have argued in favour of a distinction between sources for the purpose of determining international responsibility. The better view is, however, that Riphagen's focus was on the relationship between primary rules and secondary rules.

His successor, Vincenzo Arangio-Ruiz had reservations about Riphagen's approach on "self-contained regimes".[248] Ultimately, the Commission adopted under Special Rapporteur Crawford, as put by Simma and Pulkowski,[249] "a pragmatic maybe", in effect leaving the question of self-contained regimes and of the relationship between special and general law[250] to the study group of fragmentation. The ARSIWA in their final version do not distinguish between sources for the purposes of international responsibility.[251]

III. Fragmentation of international law: difficulties arising from the diversification and expansion of international law

At the end of the 1990s, international legal scholars began to discuss challenges which originated from the proliferation of international court of tri-

247 *Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr Willem Riphagen, Special Rapporteur* in *ILC Ybk (1982 vol 2 part 1)* 29 para 46.

248 *Fourth report on State responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur* 12 and 25 May and 1 and 17 June 1992 UN Doc A/CN.4/444 and Add.1-3 in *ILC Ybk (1992 vol 2 part 1)* 37 para 102, 40 para 112. The object and purpose of the treaty and the relationship between special rules on responsibilities and general rules could, in the field of countermeasures, be taken into account by the principle of proportionality, 41 para 116.

249 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 493-494.

250 See article 55 ARSIWA on *lex specialis*, *ILC Ybk (2001 vol 2 part 2)* at 140; cf. Helmut Philipp Aust, 'The Normative Environment for Peace - On the Contribution of the ILC's Articles on State Responsibility' in Georg Nolte (ed), *Peace through International Law The Role of the International Law Commission. A Colloquium at the Occasion of its Sixtieth Anniversary* (Springer 2009) 45 on the relationship between primary and secondary rules.

251 On the distinction according to the type of obligations see also above, p. 36.

bunals and the diversification of public international law.[252] The debate was taken up by the International Law Commission which decided to establish a study group in order to study the difficulties arising from the diversification and expansion of international law.[253] Martti Koskenniemi as chairman of the study group finalized a report, accompanied by conclusions of the Study Group. The ILC as a whole took note of the conclusions without, however, adopting the conclusions or the report as its own.[254] The report contributed to alleviating "fragmentation anxieties"[255] and highlighted the "omnipresence of general law" the assessment of which would remain necessary in order to understand to what extent the *lex specialis* would modify or replace the general law.[256]

The approach of the report was to seek relationships between "rules and principles (norms) of international law [...] between special and general norms, between prior and subsequent norms, and with rules and principles

252 Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44(4) ICLQ 848 ff.; Benedict Kingsbury, 'Is the Proliferation of International Courts and Tribunals a systemic Problem' (1998) 31 NYU JILP 679 ff.; Jonathan I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1998) 31 NYU JILP 697 ff.; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998) 31 NYU JILP 791 ff.; Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1998) 31 NYU JILP 919 ff.; on the fragmentation debate considered from a historical perspective see Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22(1) Leiden Journal of International Law 1 ff.; see also Crema, 'The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It' 172 (arguing that "[t]he recent work of the ILC has been dedicated to help international law to find its centre, fighting back these centrifugal phenomena.").

253 Bruno Simma, 'Fragmentation in a Positive Light' (2004) 25(4) Michigan Journal of International Law 847 (on the history of the study group's name and the ultimate positive connotations of the subject-matter by speaking of "difficulties" rather than of "risks").

254 *ILC Report 2006* at 176.

255 Cf. Martti Koskenniemi and Päiv Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553 ff.

256 *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* 64 paras 119-120.

with different normative power"[257] through legal reasoning.[258] Legal reasoning was understood as "purposive activity" which "should be seen not merely as a mechanic application of apparently random rules, decisions or behavioural patterns but as the operation of a whole that is directed toward some human objective".[259]

Most statements in the report on the "normative environment (system)"[260] concerned the interpretation of treaties, which is why customary international law and general principles of law were discussed mainly in relation to the interpretation and application of treaty law.[261] The report points out that the written law will not necessarily lead to the extinction of prior customary international law on a given subject.[262] The three sources, treaty, custom and general principles of law, were not ranked in "a general order of priority"[263], even though legal reasoning will often progress through concentric circles "from the treaty text to customary law and general principles of law".[264] The presumptions according to which parties "refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way"[265] and according to which "parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States"[266]

257 *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* 206 para 410.

258 ibid 20 paras 27-28.

259 ibid 24 para 35.

260 ibid 208 para 413; on the idea of law as a system and as an aim towards which interpretation strives see also Armin von Bogdandy and Ingo Venzke, 'Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung' (2010) 70 ZaöRV 44.

261 But 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* 64 para 120: "No rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum."

262 ibid 115 para 224.

263 ibid 166 para 342.

264 ibid 223 para 463.

265 ibid 234 para 465, referring to *Georges Pinson case* France v. United Mexican States (19 October 1928) V RIAA 327 ff.

266 *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* 234 para 465.

open "an especially significant (role) for customary international law and general principles of law"[267] as "customary law, general principles of law and general treaty provisions form an interpretative background for specific treaty provisions"[268].

While highlighting the importance of general principles of law and customary international law as part of the normative background against which a treaty is to be interpreted and applied, the report did not examine in detail to what extent this normative environment is important for customary international law and general principles of law. It recommended studying the scope and nature of "general international law" which might include not only custom and general principles of law in the sense of article 38(1)(c), but also "principles of international law proper and [...] analogies from domestic laws, especially principles of the legal process (such as *audiatur et altera pars*)".[269] "Principles of international law proper" were not introduced by the report as a new source of international law, but as an attempt to move from mere form to substance, to take general principles abstracted from the international legal order into account when interpreting international law.[270] As will be demonstrated below, the ILC decided to follow this suggestion in the context of its study on customary international law only to a limited extent. It is too early to tell whether these recommendations will be reflected more prominently in the Commission's work on general principles.

267 ibid 235 para 466.

268 ibid 211 para 421.

269 ibid 254; For a critique of this terminology see Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 EJIL 1010, 1016.

270 See already Brownlie, *Principles of Public International Law* 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 traced 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."

IV. The identification of customary international law

This section focuses on the Commission's recent work on the identification of customary international law. In this context, mention must be made of Manley O. Hudson who delivered a working paper on customary international law to the ILC in 1950 in which he suggested "that perhaps the differentiation between customary international law and conventional international law ought not to be too rigidly insisted upon" and that therefore the ILC "may deem it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available."[271] In this sense, the ILC later identified custom in a legal environment that became increasingly shaped by treaties. Hudson suggested four elements, namely

> "a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) the continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; (d) general acquiescence in the practice by other States."[272]

In response to his colleagues' questions about the requirement of "lawful practice", he clarified that "a single State could not decide of its own accord that the constituents of a custom were present."[273] The result of the ILC's

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271 *Article 24 of the Statute of the International Law Commission A Working Paper by Manley O Hudson* 3 March 1950 UN Doc A/CN.4/16 + Add.1 25: "A principle or rule of customary law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary law. For present purposes, therefore, the Commission may deem it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available."

272 ibid 26.

273 Yepes wondered whether custom would cease to be a source of law if it had to be consistent with international law, *ILC Ybk (1950 vol 1)* 5-6, see also 5 (Hudson, Scelle), against this criterion, see Amado at 275.

preoccupation was a brief treatment of customary international law[274]. In 2011, the ILC decided to reapproach this topic, with Sir Michael Wood as Special Rapporteur.

1. The role of normative considerations in the identification of customary international law

The ILC addressed the interrelationship of sources in the context of its recent work on customary international law only to a limited extent. Even though normative considerations are not completely absent, it is submitted here that the ILC could have given more room to the question of interpretation and the role of normative considerations.

a) The scoping of the topic by the Special Rapporteur

At the beginning of the project, it seemed as if the interrelationship of sources ("merging of sources"[275]) would be given a prominent role.[276] As the ILC report indicated, "[s]everal members agreed with the proposal of the Special Rapporteur to study the relationship between customary international law and general principles of international law and general principles of law."[277] In his second report, however, the Special Rapporteur considered it to be important "as the work on the topic proceeds, to avoid entering into matters relating to other sources of international law, including general principles of law".[278] In response, several members "raised concerns about omitting

274 Ways and means for making the evidence of customary international law more readily available, in *ILC Ybk (1950 vol 2)* 367 ff.

275 *Report of the International Law Commission: Sixty-third session (26 April-3 June and 4 July-2 August 2011)* UN Doc A/66/10 Annex A, 306.

276 Cf. *First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur* 17 May 2013 UN Doc A/CN.4/663 16-17 para 36 also available in *ILC Ybk (2013 vol 2 part 1)* 125 (the distinction between custom and general principles of law would be important, but not always clear in case-law and literature); *ILC Report 2013* at 99.

277 ibid 96.

278 *Second report on identification of customary international law by Michael Wood, Special Rapporteur* 5 para 14 also available in *ILC Ybk (2014 vol 2 part 1)* 170.

a detailed examination of the relationship between customary international law and other sources of international law, in particular general principles of law."[279] The Special Rapporteur addressed in his third report the relationship between treaties and custom and noted that general principles of law may crystallize into rules of customary international law, which is why the Special Rapporteur described general principles of law a "transitory source".[280] General principles were excluded from further consideration.[281]

b) The adopted draft conclusions

Against this background, it is not surprising that the present conclusions of the ILC excluded general principles of law and addressed only treaties in a separate conclusion.

aa) The recognition of normative considerations

The present conclusions are concerned with the "identification" and "determination" of customary international law and "do not address, directly, the

279 *ILC Report 2013* 243; Statement of the Chairman of the Drafting Committee, Mr. Gilberto Saboia of 7 August 2014 ⟨https://legal.un.org/ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf⟩ accessed 1 February 2023 at 3-4.

280 This phrase was coined by Pellet, Alain Pellet, 'Article 38' in Andreas Zimmermann, Karin Oellers-Frahm, and Christian J Tams (eds), *The Statute of the International Court of Justice A Commentary* (2nd edn, Oxford University Press 2012) 848 para 288, 850 para 295.

281 *Third report on identification of customary international law by Michael Wood, Special Rapporteur* 27 March 2015 UN Doc A/CN.4/682 41 para 55 footnote 137 ("a source of law distinct from customary international law, and as such are beyond the scope of the present topic") also available in *ILC Ybk (2015 vol 2 part 1)* 119. On Sir Michael Wood's treatment of general principles see Michael Wood, 'What Is Public International Law? The Need for Clarity about Sources' (2011) 1(2) Asian Journal of International Law 214; Michael Wood, 'Customary international law and general principles of law' (2019) 21(3-4) International Community Law Review 307 ff.

processes by which customary international law develops over time".[282] 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".[283]

The ILC carefully signalled that the identification of customary international law is more than a mere collection of practice and *opinio juris*, and requires one to be aware of the wider normative framework in which a given rule interacts.

> "The two-element approach does not in fact preclude a measure of deduction as an aid, to be employed with caution, in the application of the two-element approach, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law, or when concluding that possible rules of international law form part of an 'indivisible regime'."[284]

In order to illustrate that rules and principles of customary international law interrelate with each other, the ILC referred to the *Pulp Mills* case, where the ICJ related the "principle of prevention, as a customary rule" to "the due diligence that is required of a State in its territory" and with respect to "activities which take place in its territory, or in any area under its jurisdiction"[285]; the ILC also referred to the *Territorial and Maritime Dispute* case for that rules can be connected to each other and can form together one legal regime.[286]

Another example of the relevance of normative considerations can be found in conclusion 3 and the corresponding commentary, even though the very term "normative consideration" is not used. Conclusion 3 requires for an assessment of "evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law" to have regard "to the overall context, the nature of the rule and the particular circumstances in which the evidence in question can be found."[287] The commentary to this conclusion calls for contextual assessment that takes account "the subject

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282 *ILC Report 2018* at 124 para 5.

283 ibid 124 para 6.

284 ibid 126 para 5.

285 *Pulp Mills on the River Uruguay* [2010] ICJ Rep 14, 55-56 para 101, with reference to *Corfu Channel Case* [1949] ICJ Rep 4, 22 and to *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 242 para 29.

286 *Territorial and Maritime Dispute* [2012] ICJ Rep 624, 674 para 139, arguing that article 121 UNCLOS as a whole forms part of an indivisible regime.

287 *ILC Report 2018* at 126.

matter that the alleged rule is said to regulate. That implies that in each case any underlying principles of international law that may be applicable to the matter ought to be taken into account".[288] The Commission referred here in particular to the *Jurisdictional Immunities* case where state immunity was "derived from the principle of sovereign equality of States and, in that context, had to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and person within that territory".[289] The commentary points out that the assessment of evidence may also be informed by the "nature of the rule" in the sense that the identification of a prohibitive rule may often require the evaluation of inaction and its acceptance as law rather than of affirmative practice.[290]

bb) The relationship between customary international law and treaties

While not explicitly engaging with general principles of law, the conclusions address the significance of treaties for the identification of customary international law.

Conclusion 11 stipulates:

> "1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
> (a) codified a rule of customary international law existing at the time when the treaty was concluded;
> (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
> (c) has given rise to a general practice that is accepted as law (opinio juris), thus generating a new rule of customary international law."
> 2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law."[291]

288 *ILC Report 2018* at 127 para 3.

289 ibid at 127 footnote 682; see also *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 123-124 para 57; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1980] ICJ Rep 73, 76 para 10.

290 *ILC Report 2018* at 128 para 4.

291 ibid at 143.

The commentary clarifies that the "use of the term 'rule set forth in a treaty' seeks to indicate that a rule may not necessarily be contained in a single treaty provision, but could be reflected by two or more provisions read together."[292]

With respect to the question of whether States act with *opinio juris* in pursuance of their treaty obligations, the ILC did not endorse a general presumption[293] and merely reminded the readers that the practice of States to a convention "could presumably be attributed to the treaty obligation, rather than to acceptance of the rule in question as binding under customary international law" which is why the practice of non-parties or in relation to non-parties "will have particular value".[294]

2. Concluding observations: normative considerations addressed with caution

The ILC commentary is not completely silent on normative considerations, in particular in respect to relations to other rules of customary international law.[295] The ILC highlighted the relation between a specific concretization, such as state immunity, and a more general rule or principle, such as equality of states, and recognized that rules in a treaty can reflect or give rise to rules of customary international law.

However, treaties and general principles of law are not simply material sources for customary international law but contribute to a normative environment which constantly informs, and is informed by, the identification,

292 ibid at 144 para 4. In the view of the present author, this comes close to an assessment of whether rules of a treaty spell out a principle which can be important for the identification of customary international law.

293 The Special Rapporteur came close to endorsing a general presumption in his third report: the practice of state parties to a treaty among themselves "is likely to be chiefly motivated by the conventional obligation, and thus is generally less helpful in ascertaining the existence or development of a rule of customary international law", *Third report on identification of customary international law by Michael Wood, Special Rapporteur* 28 para 41 also available in *ILC Ybk (2015 vol 2 part 1)* 113 para 41.

294 *ILC Report 2018* at 146 para 7.

295 Cf. already *ILC Ybk (1999 vol 1)* 290 (Tomka): "Moreover, it was difficult to conceive of two customary rules being contradictory, with one requiring a certain type of conduct and the other requiring a different type. By definition, there could not be two customary rules with conflicting content. There could be a conflict between treaty rules, but that would be an issue of the application and applicability of treaties."

interpretation and application of customary international law. If the ILC had adopted a different scope, it could have exemplified the meaning of the reference to "overall context", "nature of the rule" and "particular circumstances". It could have considered the ways in which a rule of customary international law relates to other principles of international law or to general principles of law.[296] Taking into account new legal principles spelled out in treaties might be useful in order to interpret a rule of customary international law and its constitutive elements, practice and *opinio juris*. Such normative considerations are potentially relevant when it comes to weighing and evaluating practice. It surely makes a difference as to whether the practice is in conformity with other international obligations. Normative considerations may also be relevant for determining whether silence can be regarded as acquiescence.[297] This could have led the ILC to adopt a draft conclusion which involves the interpretation of customary international law and addresses the interrelationship of sources. Such a draft conclusion could have looked similar to article 31(3)(c) VCLT on the interpretation of treaties: "In identifying and interpreting customary international law the normative environment as composed of the general principles of international law should be taken into account."[298]

V. Peremptory norms of general international law (*Jus cogens*)

Another project that concerns also the interrelationship of sources is the *jus cogens* project under the chairmanship of Dire Tladi.[299] From the perspective of the interrelationship of sources, *jus cogens* raises two questions. Firstly,

296 As Kolb put it, "pas de texte sans context, pas de norme sans context (environment normative)", Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* 457.

297 Cf. conclusion 10(3), *ILC Report 2018* at 140.

298 A similar draft conclusion was proposed by *Comment by Georg Nolte, Summary record of the 3226th meeting, 17 July 2014* UN Doc A/CN.4/SR.3226 (PROV.) at 6, also available in *ILC Ybk (2014 vol 1)* 131 para 25: "In identifying rules of customary international law, account is to be taken of general principles of international law." Cf. for a similar critique Palchetti, 'The Role of General Principles in Promoting the Development of Customary International Rules' 53-56, 59. See also earlier Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19(3) EJIL 504.

299 The ILC adopted the draft conclusions and the commentaries on second reading in 2022 and submitted both to the UNGA, *ILC Report 2022* at 10-11.

which source can be the basis of a *jus cogens* norm? Secondly, are the effects of *jus cogens* confined to treaty law or do they extend to customary international law and even general principles of law as well?

The International Law Commission took as a starting point the definition set forth in the articles 53 and 64 VCLT. According to article 53 VCLT, a treaty is void if it conflicts with a peremptory norm of general international law, also article 64 speaks of "a new peremptory norm of general international law", which may invalidate priorly concluded treaties. Article 53 VCLT defines peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Interestingly, the phrase "accepted and recognized" was the result of the Drafting Committee's decision to add to the word "recognized" the word "accepted" because "it was to be found, together with the word 'recognized', in Article 38 of the Statute of the International Court of Justice."[300]

The Commission agreed with the Special Rapporteur that "[c]ustomary international law *is* the most common basis for peremptory norms of general international law" (conclusion 5(1)) and that "[t]reaty provisions and general principles of law *may* also serve as bases for peremptory norms of general international law" (conclusion 5(2)).[301] With respect to treaties, the commentary suggested that "[t]he role of treaties as an exceptional basis for peremptory norms of general international law (*jus cogens*) may be understood as a consequence of the relationship between treaty rules and customary international law."[302] The commentary stated it was "appropriate to refer to the possibility" that general principles of law serve as a basis and that these "are a part of general international law since they have a general scope of

300 *United Nations Conference on the Law of Treaties, First session Vienna, 26 March - 24 May 1968, Official Records* (vol A/CONF.39/11, 1969) 471 para 4; see also *ILC Report 2022* at 35. The ILC considers the "acceptance and recognition" to be one criterion for the identification of peremptory norms of international law, ibid 37.

301 ibid at 12, 30-35 (italics added); see also *Second report on jus cogens by Dire Tladi, Special Rapporteur* 16 March 2017 UN Doc A/CN.4/706 21-31, 46; *ILC Report 2017* 196 (general agreement on customary international law, divergent views with respect to the other sources), 199 (on the view in the debate that a norm of *jus cogens* should be equally present in all three sources).

302 *ILC Report 2022* at 34; *ILC Report 2019* at 163.

application".[303] In conclusion, the ILC conclusions accept all three sources as potential legal bases for peremptory norms of general international law, while at the same time highlighting the role of customary international law and the "scarcity of practice" in relation to treaties and general principles of law as such bases.[304]

The ILC introduced a certain differentiation also with respect to the legal effects. Several scholars argue that *jus cogens* represents the idea of normative hierarchy and thus prevails over and invalidates a contrary rule of custom which is not of a peremptory character.[305] But this approach which focuses on normative hierarchy is not unanimously shared. It has been argued by Robert Kolb that the "jus cogens mechanism centered on derogation (vel non-derogation)"[306] from special law, such as treaties, and is less suited to address collisions of general, "objective" norms.[307] The legal effect of *jus cogens* would not be described as nullity which is the effect applicable to legal acts such as treaties. Rather, a rule of custom will not emerge if a rule to the contrary is of peremptory character; likewise, a rule of custom will no longer be supported by a general practice accepted as law if a rule to the contrary of a peremptory character has emerged.[308] In Kolb's view, conflicts with general principles of law would be "hardly imaginable".[309]

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303 *ILC Report 2022* at 34-5; *ILC Report 2019* at 161-162, it also acknowledged the existence of the view "that there was insufficient support from either the position of States or international jurisprudence" for general principles of law as legal bases.

304 *ILC Report 2022* at 35.

305 See Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* 363; Karl Zemanek, 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?' in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press 2011) 394-395, but see also 400-405 (critical of merging the concept of *jus cogens* with the concept of constitutional principles); cf. Alexander Orakhelashvili, *Peremptory norms in international law* (Oxford University Press 2008) 340-58.

306 Robert Kolb, *Peremptory international law - jus cogens: a general inventory* (Hart 2015) 67.

307 ibid 67.

308 ibid 69 see also at 66, pointing out that international courts so far have not given precedence to a *jus cogens* norm over customary international law; cf. *Al-Adsani v the United Kingdom [GC]* App no 35763/97 (ECtHR, 21 November 2001) paras 62-67; *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 140-142 paras 92-96.

309 Kolb, *Peremptory international law - jus cogens: a general inventory* 72.

The ILC conclusions support the view that *jus cogens* had effects not only on treaties (conclusions 10-13) but also on customary international law (conclusion 14).[310] However, whereas a treaty is or becomes void in case of conflict with a norm of jus cogens, the ILC avoided the term "void" in relation to customary international law and instead argued that a rule of customary international law "does not come into existence" (conclusion 14(1)) in case of a conflict with an already existing norm of *jus cogens* or "ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law" (conclusion 14(2)).[311] The commentary describes conclusion 14(2) as a "separability provision"[312]. This separation principle applies only to an already existing norm of customary international law, as an emerging rule would not have come into existence in the first place in case of a conflict with *jus cogens*. In a similar way, a treaty which at the time of its conclusion conflicts with *jus cogens* "is void in whole, and no separation of the provisions of the treaty is permitted" (conclusion 11(1)); in case of a conflict with a new peremptory norm, a treaty becomes void unless the provision conflicting with *jus cogens* are separable from the treaty and were not an essential basis of the consent of the parties to be bound and if the continued performance of the remainder of the treaty would not be unjust (conclusion 11(2)).[313] Separability is characterized to be an exception in relation to treaties which conflict with new *jus cogens* norms.

These conclusions indicate that the ILC recognized the different *modus operandi* of customary international law as compared to treaty law, even though the ultimate effect of peremptory norms on norms under treaties and customary international law is not different. The ILC does not endorse, however, the view that the lower ranked customary international law can also be important for defining the scope and extent of the peremptoriness[314]. Instead, the ILC emphasized the hierarchical superiority of *jus cogens*;[315] conclusion 14(1) in light of the corresponding commentary suggests that

310 *ILC Report 2022* at 13-14, 48 ff.; *ILC Report 2019* at 144-145; *Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur* 12 February 2018 UN Doc A/CN.4/714 56-59; *ILC Report 2018* at 232 para 126.

311 *ILC Report 2022* at 55-56 (conclusion 14(1) and (2)).

312 ibid 58.

313 See ibid 51 (conclusion 11(2)). The conclusion echoes article 44(3) VCLT.

314 Cf. on this point Kolb, *Peremptory international law - jus cogens: a general inventory* 73-74.

315 *ILC Report 2022* at 56.

a norm of *jus cogens* can only be modified by a norm having the same character.[316]

The draft conclusions do not address conflicts between *jus cogens* and general principles of law. The Special Rapporteur, even though he did not address such conflicts in his reports, expressed his willingness to engage into this subject which certain members of the Commission were interested in.[317] The Drafting Committee supported the Special Rapporteur's conclusions on the effect of *jus cogens* in relation to customary international law and decided, after a debate on whether general principles of law should be addressed as well, to postpone a decision, taking account of the ongoing project on general principles of law.[318] Based on the understanding of general principles adopted in this study, it is suggested not to mechanically affirm the possibility of a conflict between *jus cogens* and general principles of law only in order to cover all three sources.[319] Since a general principle needs to be balanced against other, sometimes competing principles and be interpreted under consideration of more specific concretizations, an interpreter will unlikely arrive at a situation where a general principle will conflict with a peremptory norm.

Last but not least, the commentary on all legal effects of conflicts between *jus cogens* and treaties, customary international law, unilateral acts of states and obligations created by resolutions, decisions or other acts of international organizations refers to conclusion 20.[320] According to this con-

316 *ILC Report 2022* 55 (conclusion 14(1)), 57 f.; *ILC Report 2019* at 183.

317 *ILC Report 2018* at 238 para 163, see also 230 para 115: "Some members supported such non-inclusion on the ground that no conflict could possibly be conceived of in the case of general principles of law."

318 Peremptory Norms of General International Law (Jus Cogens). Statement of the Chair of the Drafting Committee Mr Claudio Grossmann Guiloff of 31 May 2019 (2019) ⟨https://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_jc.pdf⟩ accessed 1 February 2023 4.

319 See also *Comment by Georg Nolte, Summary record of the 3417th meeting, 2 July 2018* UN Doc A/CN.4/SR.3417 (PROV.) at 12: Nolte did not consider it "necessary to address the consequences of peremptory norms on general principles of law. He could not conceive of a situation in which a general principle of international law could conflict with a norm of jus cogens. If such a situation were to be asserted by a State, the general principle of law would surely be interpreted in a way that would render it consistent with jus cogens." In this sense, see also Kolb, *Peremptory international law - jus cogens: a general inventory* 72, according to whom conflicts with general principles of law would be "hardly imaginable".

320 *ILC Report 2022* at 50, 60, 62, 64.

clusion, "[w]here it appears that there may be a conflict between [...] [*jus cogens*] and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former." This conclusion does not distinguish between sources;[321] as the commentary emphasizes, conclusion 20 "does not apply only in relation to treaties, but to the interpretation and application of all other rules of international law."[322]

Furthermore, the commentary on legal effects also refers to conclusion 21.[323] This conclusion recommends a procedure to be followed by a state which invokes a *jus cogens* norm as a ground for the invalidity or termination of another rule of international law, a state shall notify other states concerning its claim "in writing", it should explain which measures are proposed, and depending on whether any state raises an objection within the time frame of three months, except in cases of urgency, the state can take this measure or the states concerned should seek a solution of their dispute through the means indicated in Article 33 UN Charter. Conclusion 21(3) provides that "[i]f no solution is reached within a period of twelve month, and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions, the invoking State should not carry out the measure which it has proposed until the dispute is resolved."[324] This conclusion which is modelled after articles 65-67 VCLT on the procedure with respect to the invalidity, termination, withdrawal from or suspension of the operation of a treaty attempts to strike a balance:[325] it cannot impose a legally binding procedure on states which can only be done by treaty. The commentary is very clear on this point, it stresses that articles 65 to 67 VCLT, "in particular the provisions pertaining to the submission to the International Court of Justice of a dispute, cannot be said to reflect customary international law"[326] and that the conclusion "is couched in hortatory terms, to avoid any implications that its content is binding on States."[327] At the same time it seeks to address the risk of unilateral invalidation of rules by way of reference to a conflict between said rules with jus cogens and to avoid the impression that

321 ibid 79.
322 ibid 80 and 81 (conclusion 20 refers "to obligations under international law, whether arising under a treaty, customary international law, a general principle of law, a unilateral act or a resolution, decision or other act of an international, organization").
323 ibid 50, 53, 60, 62, 64.
324 ibid 81 (conclusion 21) and 82 on article 65-67 VCLT.
325 ibid 82-3.
326 ibid 82.
327 ibid 83.

the ILC conclusions undermine somehow the procedures established under article 65-7 VCLT.

VI. General Principles of Law

1. General Principles of Law in the progressive development and codification

General principles of law played a role, albeit a limited one, in the work of the ILC. When drafting the Model Rules on Arbitral Procedure, for instance, article 10 on the applicable law copied article 38 of the ICJ-Statute and included a reference to the general principles of law.[328] At the beginning of the work on the continental shelf, the ILC attempted to explicitly base the law on the continental shelfs on general principles of law as opposed to customary international law.[329] Yet, this proposal was not well received. Sweden, for instance, agreed with the ILC in that there would be no customary law, but Sweden found itself "unable to reconcile" this position with the position that the continental shelf would be based on general principles of law.[330]

The record of plenary discussions indicates that members of the Commission did argue on the basis of general principles[331] and resorted to concepts familiar in one's own domestic law. In the discussion on the high sea, for instance, the member El-Khouri referred to Syrian municipal law for "that the owner of a property was the rightful owner of all above it to the summit

328 *ILC Ybk (1958 vol 2)* 83 (84), Article 10.

329 "Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community." *ILC Ybk (1951 vol 2)* 142.

330 *ILC Ybk (1953 vol 2)* 263: "The Swedish Government is unable to reconcile these two views. Moreover, the Commission gives no particulars of the "general principles of law" to which it refers."

331 *ILC Ybk (1949)* 206: Scelle emphasized, based on his monist understanding, that custom "was actually a repetition by States of acts covered by their municipal law. Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law and at both stages of its development it could be applied by the Court in international matters."; *Fifth State responsibility report by FV Garcia-Amador, Special Rapporteur* in *ILC Ybk (1960 vol 2)* 65 (on abuse of rights).

of the sky and all below it to the bottom of the earth. If the principle were applied to the high seas, which belonged to no man, it must be admitted that both the sky above them and the sea-bed and subsoil below them belonged to no man, but were rather the public property of the entire world."[332]

An interesting debate arose in the context of drafting a provision on fraud in relation to the law of treaties, which is now article 49 VCLT.[333] Whereas the draft article arguably expressed a general principle of law, as the debate progressed, it was realized that the principle's applicability and concrete manifestation would depend on the international legal institutions to which it will be applied, in this case international treaties at the international level where international courts, unlike domestic courts in the domestic setting, have no compulsory jurisdiction.[334] Because of the necessary adaptation, "(i)nternational rules should not be modelled too closely on the internal law of States, seeing that the situations they were designed to regulate must be of a different character."[335] In a similar way, Yasseen required the possibility of the application of a principle in question in the international legal order, and he stressed that "there must be an environment similar to that in which it was applied in internal law."[336] In the context of this discussion, Special Rapporteur Waldock arrived at the conclusion that his draft on fraud followed fairly the concept in fraud in English law which was wider than that commonly accepted in continental legal systems.[337] On the basis of this comparative legal exercise in which the Commission had been engaged during its discussion he concluded that the wide understanding of fraud had no place in the relations between states on the international plane where stability of treaty relations would matter.[338]

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332 *ILC Ybk (1956 vol 1)* 137.

333 Article 49 VCLT reads: "If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty."

334 *ILC Ybk (1963 vol 1)* 27-38.

335 ibid 41 (Tunkin).

336 ibid 42-43 (Yasseen).

337 ibid 37.

338 ibid 37: "A narrow definition would at the same time serve to obviate the dangers of abuse whereby States would seek to invoke fraud as a mere pretext to free themselves from obligations deriving from treaties which had proved less advantageous than originally expected. It was also desirable in order to maintain a clear distinction between fraud and other elements vitiating consent, such as coercion."

That general principles of law such as the principle of good faith inspired the progressive development and codification of international law can also be seen in the fact that the ILC included the maxim according to which no one shall take advantage of his or her own wrong in the articles 23(2)(a), 24(2)(a), 25(2)(a) ARSIWA.

2. The new topic of General Principles of Law

The ILC recently decided to include the topic "General Principles of Law" in its programme of work.[339] So far, the Special Rapporteur presented three reports.[340] In 2023, the ILC adopted the draft conclusions and the commentaries on first reading and transmitted the draft conclusions to governments for comments and observations by 1 December 2024.

a) Overview of the draft conclusions

As provisionally adopted[341], draft conclusion 1 denotes the scope of the project's topic, draft conclusion 2 stipulates that "for a general principle to exist, it must be generally recognized by the community of nations."[342] Draft conclusion 3 provides that general principles comprise those "(a) that are derived from national legal systems; (b) that may be formed within the international legal system." Draft conclusion 4 addresses the identification of general principles of law derived from national legal system, calling for

339 *ILC Report 2018* at 299 para 363.

340 *First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 5 April 2019 UN Doc A/CN.4/732; *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*; *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 18 April 2022 UN Doc A/CN.4/753.

341 See *ILC Report 2022* at 306-7; *Statement of the Chairman of the Drafting Committee, Mr. Ki Gab Park of 29 July 2022* 18-9; see ILC Report 2023 at 11 ff.

342 The ILC decided to replace the formula "civilized nations" with "community of nations", see *Report of the International Law Commission: Seventy-second session (26 April–4 June and 5 July–6 August 2021)* UN Doc A/76/10 162 ("Draft conclusion 2 employs the term 'community of nations' as a substitute for the term 'civilized nations' found in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, because the latter term is anachronistic").

the ascertainment of "the existence of a principle common to the various legal systems of the world" and its "transposition to the international legal system". Draft conclusion 5 specifies the determination of the existence of such a general principle, calling for "a comparative analysis of national legal systems" that is "wide and representative" and includes "the different regions of the world" as well as an assessment of "national laws and decisions of national courts, and other relevant materials". According to draft conclusion 6, "[a] principle common to the various legal systems of the world may be transposed to the international legal system in so far as it is compatible with that system."[343] Draft conclusion 7 addresses the identification of general principles of law formed within the international legal system, requiring an ascertainment that the community of nations has recognised the principle as intrinsic to the international legal system.[344] At the same time, the conclusion stipulates that its just summarized first paragraph "is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system." Draft conclusion 8 explains the function of decisions of international and national courts and tribunals as subsidiary means for the determination of such principles. Draft conclusion 9 explains the function of teachings of the most highly qualified publicists as subsidiary means. Draft conclusion 10 describes the functions of general principles. According to this conclusion, "[g]eneral principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part" (draft conclusion 10(1)).[345] Furthermore,

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343 See *Statement of the Chairman of the Drafting Committee, Mr. Ki Gab Park of 29 July 2022* at 6; ILC Report 2023 at 21 (stressing that transposition does not occur in an automatic fashion).

344 This category of general principles was disputed within the drafting committee. The Drafting Committee's Chairman described this conclusion as "a compromise solution" the adoption of which was based "on the understanding that the discussion within the Committee and the differing views among members would be elaborated in the commentary." See ibid at 7, on the different views see also *ILC Report 2022* at 318-9, 323; ILC Report 2023 at 24 f.

345 The Drafting Committee did not take up the Special Rapporteur's formulation of the "gap-filling" role, "as the Committee considered this term to be colloquial and not entirely accurate [...] It was considered important to avoid the misconception that general principles of law played an ancillary role." The term "mainly resorted to" and the qualifier "mainly" "aims to convey the idea that this is the main role played by general principles in practice, while preserving a certain degree of flexibility, since they may play other roles." See *Statement of the Chairman of the Drafting Committee, Mr. Ki Gab Park of 29 July 2022* at 12-3; ILC Report 2023 at 29; cf.

general principles are said to "contribute to the coherence of the international legal system. They may serve, *inter alia*, (a) to interpret and complement other rules of international law; (b) as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules."[346] Draft conclusion 11 addresses the relationship between general principles of law and treaties and customary international law.[347] It provides that general principles "are not in a hierarchical relationship" with the other two sources, that a general principle of law "may exist in parallel with a rule of the same or similar content in a treaty or customary international law" and that any conflict between a general principle "and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law."[348]

b) Comments and reflections on the draft conclusions

The project is still ongoing, but several points deserve emphasis: There is no unanimity as to the category of general principles of international law. Both the Special Rapporteur's third report and the Report of the Commission illustrate concerns within the Commission and among states with respect to the second category of general principles.[349] Still, it is noteworthy that despite

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Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur at 16 ff.

346 Cf. *Statement of the Chairman of the Drafting Committee, Mr. Ki Gab Park of 29 July 2022* 13; ILC Report 2023 at 29 f. ("While rules dervied from other sources of international law also contribute ti the coherence of the international legal system, certain general principles appear to be aimed at performing this function in a more direct manner.").

347 ILC Report 2023 at 33 ff.

348 See ILC Report 2023 at 33; cf. *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 35 ff.

349 ibid 9-10; *ILC Report 2022* at 318-9 ("The existence of this category of general principles of law [...] appears to find support in the jurisprudence of courts and tribunals and teachings. Some members, however, consider that Article 38, paragraph 1 (c), does not encompass a second category of general principles of law, or at least remain sceptical of its existence as an autonomous source of international law."); ILC Report 2023 at 25; see also *Comment by Shinya Murase, Summary record of the 3587th meeting, 4 July 2022* UN Doc A/CN.4/SR.3587 (PROV.) 5 (article 38(1)(c) referred only to "domestic law principles"); *Comment by Huikang Huang, Summary*

the lack of unanimity, general principles formed within the international legal system were included by the Special Rapporteur and the ILC. The commentary to draft conclusion 7 justifies the existence of this category of general principles by way of reference to several arguments: examples in judicial practice in support of this category, "the international legal system, like any other legal system, must be able to generate general principles of law that are intrinsic to it, which may reflect and regulate its basic features, and not have only general principles of law borrowed from other legal systems", the lack of indications in the text of article 38 or in its traveaux préparatoires that would exclude such principles.[350]

When it comes to the methodology, the commentary stresses the similarities between both categories of general principles; both categories require "an inductive analysis of existing norms", furthermore, "the methodology is also deductive" as "the compatibility with the international legal system" in case of general principles of the first category needs to be examined, whereas in the case of general principles of the second category "it must be shown that such principles are intrinsic to the international legal system."[351]

At the same time, the commentary points to concerns expressed in the Commission.[352] Those who remained sceptical expressed, for instance, the "concern that no sufficient State practice, jurisprudence or teachings existed to support fully the existence of the second category" and that the distinction between customary international law and such principles was unclear.[353] It was also argued that "during the drafting of the Statute of the International Court of Justice, the proposal for creation of general principles of law within the international legal system was not accepted".[354] However, the Chilean proposal was based on the motivation to include a reference to "international law", and the rejection of several delegates was motivated by the view "that

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record of the 3590th meeting, 7 July 2022 UN Doc A/CN.4/SR.3590 (PROV.) at 7; on doubts see *Comment by Mathias Forteau, Summary record of the 3588th meeting, 5 July 2022* at 12; *Comment by Ki-Gab Park, Summary record of the 3588th meeting, 5 July 2022* UN Doc A/CN.4/SR.3588 (PROV.) at 18; *Comment by August Reinisch, Summary record of the 3589th meeting, 6 July 2022* UN Doc A/CN.4/SR.3589 (PROV.) 18.

350 *ILC Report 2022* at 322; ILC Report 2023 at 22 f.

351 ibid at 322; ILC Report 2023 at 23; see also *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* at 38.

352 *ILC Report 2022* at 323; ILC Report 2023 at 25.

353 ibid at 323; see now ILC Report 2023 at 25.

354 ibid at 323.

Article 38 had always been regarded as carrying an implicit mandate to apply international law."[355]

When it comes to the subsidiary means for the identification, the functions of general principles and the relationship with other sources, the draft conclusions do not distinguish between the two categories of general principles. It is noteworthy that the Drafting Committee did not follow the Special Rapporteur's emphasis on the "gap-filling" function which the Special Rapporteur considered to be "the essential function" and the "basic role" of general principles.[356] Some of the examples cited by the Special Rapporteur in support of this "gap-filling" function can also be read as examples illustrating that recourse to general principles can help establishing default positions and operate as the general law.[357] In contrast to a strong emphasis on the gap-filling function of general principles, the view has been expressed in the Commission that "general principles of law did not have a monopoly on filling gaps, since treaties and customary international law could also play a similar role" and that the main role of general principles might rather concern "the interpretation and application of existing rules", providing "coherence to the international legal system."[358] In addition, it was argued that a strong focus on the gap-filling function was in tension with the Special Rapporteur's

355 *Documents of the United Nations Conference on International Organization, San Francisco, 1945 Vol XIII* (United Nations Information Organizations 1945) 164, the delegate of Chile had proposed the insertion of the phrase "and especially the principles of international law" in article 38(1)(c) ICJ Statute. Cf. on this amendment and the accepted amendment to include a reference to the function of the Court, namely "to decide in accordance with international law", Pellet and Müller, 'Article 38' 833.

356 Cf. *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 15 ff. (quote at 16).

357 Cf. ibid 19, where the Special Rapporteur refers to the *Russian Indemnity* case where the Tribunal held that "the general principle of the responsibility of States implies a special responsibility in the matter of delay in the payment of a monetary debt, *unless* the existence of contrary international custom is established" (italics added). See also ibid 20, reference to *Beagle Channel* case, where "the Court considers it as amounting to an overriding general principle of law that, in the absence of express provision to the contrary, an attribution of territory must *ipso facto* carry with it the waters appurtenant to the territory attributed." See also the reference to the *Proceedings concerning the OSPAR Convention*: "An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*."

358 *ILC Report 2022* at 312-3; see also *Comment by August Reinisch, Summary record of the 3589th meeting, 6 July 2022* at 16-17; *Comment by Eduardo Valencia-Ospina,*

assumption of a lack of hierarchy between the sources[359] and that "finding evidence of State recognition of the general principle of law in question would be challenging."[360] In response to the Special Rapporteur's proposal to have one conclusion on the "essential function" of gap-filling and another conclusion on "specific functions" of general principles,[361] several members suggested merging the conclusions on functions and not to distinguish between essential and specific functions, certain members also argued that "the functions listed in the draft conclusion were not specific to general principles of law, but rather functions common to all sources of international law."[362] Against the background of this discussion, the present draft conclusion 10 provides that general principles are "*mainly* resorted to when other rules of international law do not resolve a particular issue in whole or in part"[363] and stresses the role of general principles in interpreting and complementing other rules and as a basis for primary rights and obligations as well as a basis for secondary and procedural rules. Different views were expressed, however, on the question of whether general principles of law could serve as an independent basis for rights and obligations.[364] Certain members were reluctant and regarded general principles to be a subsidiary source[365], other members argued that general principles of law can serve as an independent source, but this particular function should not be "unduly emphasiz[ed] [...] in part because it was not common, and in part because the Commission's work should not encourage attempts to turn to general principles of law

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Summary record of the 3589th meeting, 6 July 2022 UN Doc A/CN.4/SR.3589 (PROV.) 4-5.

359 *Comment by Sean Murphy, Summary record of the 3587th meeting, 4 July 2022* UN Doc A/CN.4/SR.3587 (PROV.) 8; *Comment by Claudio Grossman Guiloff, Summary record of the 3590th meeting, 7 July 2022* UN Doc A/CN.4/SR.3590 (PROV.) 4.

360 *ILC Report 2022* 310.

361 ibid at 307 footnote 1188.

362 ibid 313.

363 ibid 308 footnote 1189 (italics added); see now ILC Report 2023 at 29, the formula "mainly" indicates that general principles "may be directly resorted to depending on the circumstances".

364 ibid 313.

365 *Comment by Huikang Huang, Summary record of the 3590th meeting, 7 July 2022* at 5; but see now ILC Report 2023 at 29, 31 f., 33, where the commentary stresses that the role of general principles is not necessarily confined to an ancillary role, that "like any other source of international law, general principles of law may give rise to substantive rights and obligations" and that "no hierarchical relationship exists" between the three sources.

to find rights and obligations that did not appear in treaties or arise from customary international law."[366] In particular, the concern was raised that the ILC's work on general principles formed within the international legal system could entail the "risk of dissipating the requirement for State consent to international obligations".[367]

The relationship between the sources is addressed at an abstract level. The present draft conclusion 11 on the relationship between general principles and the other two sources does not take up the Special Rapporteur's suggestion of a separate conclusion according to which "[t]he relationship between general principles of law with rules of the other sources of international law addressing the same subject-matter is governed by the *lex specialis* principle"[368], certain members had expressed reservations against such a focus since the relationship could be governed by other principles as well, such as the *lex posterior* principle.[369] The present draft conclusion 11 now highlights the lack of hierarchy between general principles of law and the other two sources, the parallel existence between a general principle of law and a rule in a treaty or in customary international law and "the generally accepted techniques of interpretation and conflict resolution in international

366 *Comment by Sean Murphy, Summary record of the 3587th meeting, 4 July 2022* at 9 ("While he was not taking the position that general principles of law could never serve as an independent source of rights and obligations, he believed that the Commission should avoid unduly emphasizing such a function, in part because it was not common, and in part because the Commission's work should not encourage attempts to turn to general principles of law to find rights and obligations that did not appear in treaties or arise from customary international law.").

367 ibid at 7 ("Such a methodology was not likely to resolve existing concerns about the second category, and ran the risk of encouraging decision-makers to identify miscellaneous principles as general principles of law that overwhelmed the other sources of international law, as well as the risk of dissipating the requirement for State consent to international obligations – perhaps even at the risk of unravelling the system of international law."); *Comment by August Reinisch, Summary record of the 3589th meeting, 6 July 2022* at 19; see also *Comment by Claudio Grossman Guiloff, Summary record of the 3590th meeting, 7 July 2022* at 3.

368 Cf. *ILC Report 2022* 307; *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 35 ff.

369 Cf. *ILC Report 2022* at 312; see also for reservations *Comment by Mathias Forteau, Summary record of the 3588th meeting, 5 July 2022* at 14; *Comment by Sir Michael Wood, Summary record of the 3588th meeting, 5 July 2022* UN Doc A/CN.4/SR.3588 (PROV.) at 16 (sceptical of sole focus on lex specialis); *Comment by Ki-Gab Park, Summary record of the 3588th meeting, 5 July 2022* at 18; *Comment by August Reinisch, Summary record of the 3589th meeting, 6 July 2022* at 17.

law" which are said to govern potential conflicts between general principles of law and a rule in a treaty or in customary international law. Within the commission, the usefulness of draft conclusion 11 on the relationship between general principles on the one hand and treaties and customary international law on the other hand was debated.[370]

The commentary to draft conclusion 11 now describes the interplay to a certain extent, in that a general principle of law which has been codified in a treaty can continue to inform the interpretation and application of said treaty and that similar considerations apply to customary international law.

The creative role of the law-applying authorities has been described to a certain extent with respect to principles underlying general rules of conventional and customary international law in the Special Rapporteur's second report. According to the Special Rapporteur, "the approach here is essentially deductive"[371]. But in contrast to customary international law, where the deductive approach "can be employed only 'as an aid' in the application of the two-elements approach"[372], the deduction in relation to the ascertainment of general principles is different:

> "This deduction exercise is not an aid to ascertain the existence of a general practice accepted as law, but the main criterion *to establish the existence* of a legal principle that has a general scope and may be applied to a situation not initially envisaged by the rules from which it was derived. Similar considerations may apply to principles inherent in the basic features and fundamental requirements of the international legal system [...]"[373]

The expression of "the main criterion *to establish the existence*" comes very close to acknowledging the creative role of courts but there have not been further elaborations on this expression in the third report or in the commentary on draft conclusion 7. Rather than a focus on the role of law-applying authorities, one can find an emphasis on state consent and of the recogni-

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370 *ILC Report 2022* at 312 (certain members suggested that "the content of draft conclusion 11 could be dealt with in the commentary and that the discussion on parallel existence was not relevant to the topic since the Commission was not engaged in a general discussion on sources."); see also the scepticism expressed by *Comment by Sir Michael Wood, Summary record of the 3588th meeting, 5 July 2022* at 15; *Comment by Aniruddha Rajput, Summary record of the 3589th meeting, 6 July 2022* UN Doc A/CN.4/SR.3589 (PROV.) at 14; but see now ILC Report 2023 at 34 f.

371 *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 52 para 166.

372 ibid 52 para 167.

373 ibid 53 para 168 (italics added).

tion requirement. The Special Rapporteur proposed that the requirement of recognition "takes place on two levels", as it relates to the acceptance of a principle in domestic legal systems and to the principle's transposition.[374] The commentary stipulates that "recognition is implicit when the compatibility test is fulfilled" and that the recognition of the transposition can be inferred if a principle of the common legal systems is suitable for application within international law.[375]

It remains to be seen how the project will further develop. Since general principles of law are one of the three sources according to article 38(1) ICJ Statute, legal operators and in particular courts need to apply them. The ILC could provide guidance, as it did with respect to customary international law or to the interpretation of treaties in light of subsequent agreements and subsequent practice. The ILC's focus on international practice can lead to a product which will reaffirm and strengthen the acceptability of general principles as a source of international law but its focus may at the same time leave questions unanswered. Not every aspect can be proven by decisions of courts and tribunals which are important evidence in the debates within the ILC.[376] For instance, the ILC draft conclusions and the commentary have

374 *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 30; cf. on the different views on the Commission *ILC Report 2022* at 310; *Comment by Sean Murphy, Summary record of the 3587th meeting, 4 July 2022* at 6 ("requirement of recognition was pertinent both to the principle's existence across national legal systems and to the principle's transposition")*Comment by August Reinisch, Summary record of the 3589th meeting, 6 July 2022* at 15 ("He supported the Special Rapporteur's view that transposition was not a formal act, but rather an implicit recognition that a principle was suitable to be applied in the international legal system."); *Comment by Eduardo Valencia-Ospina, Summary record of the 3589th meeting, 6 July 2022* at 3 ("the transposability requirement could not result from the requirement that States must "recognize" a given principle, because the former was passive, whereas the latter was active."); see also *ILC Report 2021* at 163 (commentary to draft conclusion 4: "[the requirement of recognition] is necessary to show that a principle is not only recognized by the community of nations in national legal systems, but that it is also recognized as applicable within the international legal system").

375 See ILC Report 2023 at 22; cf. *ILC Report 2022* at 311.

376 Cf. *Comment by August Reinisch, Summary record of the 3589th meeting, 6 July 2022* at 16 ("[...] any perceived 'proof' in a specific decision should always be treated with caution, since judicial and arbitral decisions might be ambiguous and unclear in terms of the extent to which they relied on classical concepts of general principles of law formed within national legal systems or, indeed, on principles formed within the international legal system.").

so far not addressed in detail the differences between general principles of law and the other sources which relate to the generality and abstractness of many general principles.[377] At the same time, a certain institutional self-restraint does not have to be criticized. Just like customary international law, general principles can evolve unconsciously and, in the words of Wolfgang Friedmann, "remain implicit, insofar as they are assumed rather than spelled out"[378]. If general principles of law constitute a concept that is intrinsic to the idea of law as such, potentially present in any legal order and an expression of the law in action, then a codifier can arguably not authoritatively set in stone which principles exist[379] and how principles operate.[380]

D. Concluding Observations

This chapter examined the interrelationship of sources in the work of the ILC. It began by exploring the implications and repercussions of the codification project on the interrelationship of sources and the place of normative considerations.[381] Subsequently, it analyzed how the form given to an ILC project favoured customary international law.[382] The chapter then delved into selected topics in order to explore the interrelationship of sources as a *motif*.[383]

In particular, this chapter demonstrated that the progressive development and codification of international law entail judgment calls which the ILC has made under consideration of the normative environment and principles

377 *Comment by Sean Murphy, Summary record of the 3587th meeting, 4 July 2022* at 8 ("General principles of law were not just another source of law; they advanced more abstract legal concepts than were generally found in treaties or custom. Given their abstract and fundamental nature, general principles of law were arguably lex generalis."); on arguments based on the difference between principles and rules see *Comment by Ki-Gab Park, Summary record of the 3588th meeting, 5 July 2022* at 18-9.

378 Wolfgang Friedmann, 'The Uses of "General Principles" in the Development of International Law' (1963) 57 AJIL 283.

379 For the proposal to focus on a list of general principles see *Comment by Huikang Huang, Summary record of the 3590th meeting, 7 July 2022* at 6.

380 Cf. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 330.

381 See above, p. 317.

382 See above, p. 340.

383 See above, p. 354.

expressed in the international legal order.[384] The recent discussions in the context of immunity from foreign criminal jurisdiction illustrate the challenges that can arise, both in relation to normative considerations and when interpreting possible forms of evidence of customary international law.[385]

Furthermore, this chapter highlighted by way of example factors which explained that codification in public international law did not lead to the elimination of customary international law. Perhaps counterintuitively, the choice for conventions as form for the product's outcome may have been favourable to customary international law in the long run, since conventions and diplomatic conferences provided all states with the opportunity to take part in shaping, and to become invested in, the international legal order. The decision to include "rules" on interpretation in what became the VCLT implied a scope of application of customary international law as legal basis for these rules when the VCLT was not applicable as the ratification process of codification conventions proved to be tardy.[386] Another reason for the continuing relevance of customary international law is what this chapter referred to as "codification light",[387] meaning the ILC's increased use of nonbinding documents the authority of which rest on their accordance with customary international law. This chapter illustrated that several actors take part in "staging the authority" of a nonbinding codification. For all of these reasons, codification in international law cannot withdraw itself from the international practice and the risk which von Savigny[388] alluded to, namely that an artificial codification is out of touch with the views of a legal community, is minimized in public international law.

A certain policy seems to be to avoid a potential sources bias. The ILC did not distinguish between sources in its work on state responsibility, also because of the focus on secondary rules, or in its analysis of subsequent agreements and subsequent practice after the adoption of the Vienna Convention. In its recent *jus cogens* project, all sources are considered to be potentially relevant, even though a preference is expressed for customary international law as legal basis and differences between the sources as far as legal effects of *jus cogens* are concerned are acknowledged. Last but not

384 See above, p. 320.
385 See above, p. 330.
386 See above, p. 344.
387 See above, p. 348.
388 See above, p. 129.

least, the decision to dedicate one project to general principles of law aligns with this approach.