Chapter 11: Concluding observations on the perspectives in different fields of international law

The preceding chapters addressed very different fields of international law. This chapter will start with a couple of observations on the comparison of these fields, followed by observations relating this part to the other parts of this study.

A first observation concerns the importance of principles of international law. Both the ICTY and investor-state tribunals attempted to identify principles of the international legal order which would assist them in applying the respective applicable law. Whereas the ICTY was concerned with the identification of customary international law, investor-state tribunals interpreted and applied bilateral treaties. General principles were equally relevant for the content-determination which also demonstrates that they cannot be reduced to gap-filling when no rule of a treaty or of customary international law exists. One similarity between both contexts may be seen in the fact that tribunals' recourse to other treaties in order to search for inspiration and principles is a consequence of states' decisions to set up these tribunals without defining the law to be applied in great detail. These decisions left ample room for tribunals for interpreting and applying the law. The way in which the tribunals approached this task is very much in alignment with the description of the *modus operandi* of general principles in the second chapter. However, in particular the discussion in the context of international investment law on the paradigms which are promoted by and which are implicit in the recourse of principles highlights an important aspect. Even if one requires courts to apply only principles already recognized by the community of nations, there may remain room left for courts and tribunals, and paradigms or other second-order considerations that inform the choices should be discussed.

The role of customary international law varied in the contexts of the preceding chapters. It played a particularly dominant role in the jurisprudence of the ICTY and its role seemed to have decreased to some extent under the Rome Statute. Yet, the chapter also demonstrated that even then customary international law can remain important as long as the Rome Statute is not universally ratified and as long as the ICC has the ambition to be not just a treaty body but an international court which enforces the *ius puniendi* of the international community. A community aspect can be found in the

defenses of customary international law submitted by scholars in the context of international investment law as well. According to such reading, it is customary international law which is concretized and implicitly relied on by BITs and which provides for the normative justification for cross-reliance of tribunals when they interpret bilateral treaties.

Yet, it has also been demonstrated that not all agree with this reading. ICC Chambers have demonstrated a tendency in favour of a *lex specialis* approach that focuses on the treaty, rather than on general international law. In international investment law, certain scholars doubted the appropriateness of customary international law as source of primary obligations. As it will be demonstrated in the twelfth chapter, other scholars doubt the appropriateness of customary international law as source of secondary obligations.

This brings one to the politics as to the sources and to source preferences. The discussions are similar to discussions that have been referred to in the second chapter and the third chapter of this study. Source preferences can be an expression of a preference for a specific style of legal reasoning and for a specific legal culture. Source preferences can also be the result of different institutional reasons. For instance, the ICTY could have adopted a reasoning which would have been based less on customary international law when it comes to the individual criminal responsibility for violations of international law. Resorting to customary international law would not have been necessary if the ICTY had decided to base the individual responsibility on a general principle of law according to which every serious violation of international entails the individual responsibility. Whether such argument would have found acceptance is difficult to say in hindsight. In any case, customary international law was closer to state consent than a deductive reasoning based on principles on a level of high generality. In international investment law tribunals arguably referred to other, external sources in order to objectivize their conclusion as to what constitutes fair and equitable treatment. The example of the ICC demonstrates that distancing oneself from customary international law may be the result of one's support for a different theory of criminal liability. At the same time, it is noteworthy that the ICC Appeals Chamber in *Al-Bashir* did not confine its reasoning on the immunity of a sitting head of state to the applicable UNSC resolution and instead presented a reasoning which focuses on customary international law, mindful of the judgment's implications for the development of customary international law. Future scholarship may examine how and for which reasons courts and tribunals approach the interrelationship of sources in different contexts.

The chapter on the ECHR appears to be different at first sight in that the ECHR is a regional treaty. One central element regarding the interrelationship of sources, therefore, concerns the relationship between regional law and general law. Yet, this relationship may ultimately be not so different from the relationship between *lex specialis* and *lex generalis*, at least from the perspective of public international law.[1] The chapter demonstrated that the European Court engaged with other sources of international law when interpreting and applying the ECHR, partly because of a *renvoi* of the ECHR for instance in article 7(2) ECHR, partly because the European Court examined the effects of states' application of international law on individual rights under the ECHR. Positive obligations under the ECHR can strengthen states' compliance with other international law.[2] At the same time, the chapter depicted how the ambition of the ECHR as an instrument of the European public order was articulated when addressing other sources of international law. The ECHR not only is shaped by general international law, it can also contribute to shaping general international law. In the future, it will be particularly challenging to assess to what extent functional equivalents based on an interpretation of the ECHR have contributed to the development of general international law.

On a more abstract level, the preceding chapters show the intertwinement of the several branches of international law. Different interpreters introduce different perspectives when they consider international law from the standpoint of their respective field and when they identify and address customary international law. They engage with other fields, the European Court approaches international criminal law, the ICTY considers the jurisprudence on the ECHR as do investor-state tribunals. All are, to varying degrees, also concerned with general international law. Treaties not just depart from customary international law, but rely on and partly contribute to it as well.

This intertwinement is not without challenges for international lawyers. International lawyers who seek to study the development of the general law will have to go into specific fields and try to disentangle the general from the specific in the interpretation and application of special law and identify to what extent interpretative choices and decisions lend themselves to generalization or are primarily concerned with particular problems of the

1 *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* 109 para 212.

2 See above, p. 423.

respective field of international law. At the same time, specialists should be aware of the international legal foundations of their particular order and, when engaging with other international law, do so in good faith, considering external international law not only from the perspective of their respective regime but in its own right.