Chapter 13: Concluding observations

A. Reflections on the interrelationship of sources

This chapter will present final observations and conclusions of a research perspectives on the interrelationship of the sources.

I. The interrelationship of sources as a focus of research

The interrelationship of sources, which denotes the relationship between the sources and their interplay, is a topic that is relevant in any legal order. The present study is primarily concerned with the interrelationship of sources in the international legal order, but it also takes inspiration from comparative legal perspectives.

As illustrated throughout this study, source preferences can be the result of a specific understanding of the law, they can be indicative of the spirit of the time, the legal culture and the doctrinal and legal theoretical preferences of the respective legal community.[1] A recalibration in the relative significance of each source can be a deliberate choice or nothing more than an incidental consequence of certain doctrinal preferences that favour, for instance, the development of the written law by interpretation or the development of functional equivalents to concepts of the unwritten law. For instance, arguments in favour of a rigid distinction between primary rules and secondary rules[2] and in favour of understanding the primary purpose of customary international law as source of secondary rules of interpretation and responsibility can lead to the result that customary international law may be arrested in a separate compartment without meaningful relationships to the developments at the level of the primary rules. According to a different view, customary international law should be understood primarily as a source of primary obligations.[3] In the end, and as result of these diverging views,

1 On comparative legal perspectives see above, pp. 97 ff.

2 See above, p. 610.

3 On skepticism of whether rules on rules, such as the rules of responsibility or of treaty interpretation can be conceptualized as custom see d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and

custom might be relevant for neither primary nor secondary rules. Customary international law then might not be needed for so-called rules on rules which could be understood instead as canons, doctrinal propositions or doctrine or *Dogmatik*[4], and it might not be needed at the level of primary obligations because of the proliferation of treaties and the development of functional equivalents to concepts of customary international law based on doctrine or treaty interpretation. Continuing to recognize custom's relevance as a source both of primary rules and of secondary rules, however, can ensure that international lawyers will not lose their familiarity with customary international law, as domestic lawyers did in certain domestic legal systems,[5] and can continue to practice the identification of customary international law and thereby to reinforce the methodology of identification.[6]

Moreover, the scope of law in a legal community can have repercussions on the interrelationship of sources. To give an example: once it was decided that what became the VCLT should address questions of interpretation and that the "rules" of treaty interpretation were to be understood as legal rules that wourd be incorporated in a treaty, the question of the rules' status as customary international law had to arise.[7] In contrast, if the "rules" of interpretation had been understood as mere methods, canons, doctrine or *Dogmatik*, then there would have been no need to argue that the rules are part of customary international law in cases where one party to a dispute is no party to the VCLT. One's understanding of the interrelationship of sources can also concern the scope of law in a legal community. This scope can depend on whether, for instance, one understands convergences of jurisprudence as a mere factual

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Interpretation' 1030 footnote 7; Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' 128-129.

4 Cf. for a treatment of *Dogmatik* or "foundational doctrines" d'Aspremont, *Epistemic forces in international law: foundational doctrines and techniques of international legal argumentation*; Dana Burchardt, 'Book review of Jean d'Aspremont, International Law as a Belief System' (2018) 29 EJIL 1145 (on the equivalence of foundational doctrine and *Dogmatik*).

5 See above, p. 131.

6 On the legal regime governing identification ("*Identifikationsrecht*"), see Christian J Tams, 'Die Identifikation des Völkergewohnheitsrechts' in *Freiheit und Regulierung in der Cyberwelt - Rechtsidentifikation zwischen Quelle und Gericht, Deutsche Gesellschaft für Internationales Recht Zweijahrestagung 34. 2015 Gießen* (CF Müller 2016) 323 ff; *ILC Report 2018* at 122 ff.

7 Cf. above, p. 343.

phenomenon or as an indication of the existence of an underlying general rule.[8]

For these reasons, it is important to contextualize sources discussions by taking into account also the institutional context in which courts and tribunals interact and the challenges to which scholars respond and which inform the debate. Law is a common enterprise of the legislator, courts, scholars and addressees, and discourses within and on law should be brought together rather than being kept separated.

II. Forms of interplay and convergences

What then can be said about the interrelationship of sources in the international legal order based on the previous chapters?

One conclusion of this study is that treaties, customary international law and general principles of law are not unrelated sources and forms of law. Rather, this study suggests that the sources should be understood as an interrelated system in which the relationship between sources can be characterized more often as one of convergence[9] than as one of competition or rivalry.[10] By and large, it is more likely to observe a convergence of functionally equivalent rules of different sources, a convergence of treaty and custom into one common principle and an accommodation contentwise by way of interpretation (principle of systemic integration). In addition, general international law provides for principles and rules for the interpretation, the coordination between different obligations (*lex specialis*, *lex posterior*, *ius cogens*) and for the consequences of a breach of an international obligation and the invocation of international responsibility. This general part[11] applies in relation to a specific rule, subject to derogation within the limits of *jus cogens*.

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8 Cf. on the debate in international investment law above, p. 595.

9 For an emphasis on the interplay see also Edurardo Jiménez de Aréchaga, 'International law in the past third of a century' (1978) 159 RdC 13; Grigory Ivanovich Tunkin, 'Is General International Law Customary International Law only?' (1993) 4 EJIL 536; Sands, 'Treaty, Custom and the Cross-fertilization of International Law' 85.

10 On competition and rivalry as description of the relationship between written law and customary law in the German legal system see above, p. 137; on the water-oil approach that was used in order to describe the discussion of the relationship between common law and statutory law in the UK, see chapter 2, p. 103.

11 See above, p. 240.

To specify these observations: One form of convergence occurs when functionally equivalent rules based on different sources are interpreted and applied in light of each other and each other's concretizations. Examples of the convergence of functionally equivalent rules of different sources are, for instance, the convergence between the equidistance-special circumstances rule of article 6 of the Geneva Convention on the Continental Shelf and customary international law in the jurisprudence of the ICJ.[12] Such convergence can also be observed when the law is in the hands not of one court or tribunal but of multiple tribunals, as the example of the convergence between the international minimum standard and the fair and equitable treatment standard in international investment law illustrates.[13]

The right to self-determination as well as the prohibition of the use of force and the right of self-defence are in the ICJ jurisprudence examples of the convergence of treaty and custom into one common principle.[14] The Court regarded the right to self-determination as a product of the UN Charter and customary international law. Furthermore, the ICJ argued in the *Nicaragua* case that customary international law developed under the influence of the Charter, and the Court added in the *Nuclear Weapons* opinion that self-defence under article 51 UNC, just like self-defence under customary international law, is subject to the requirements of necessity and proportionality, both of which are not laid down in article 51 UNC explicitly.

The general rules of interpretation as reflected in articles 31-33 VCLT are another example of convergence. When the ILC conducted its study on the how courts and tribunals considered the subsequent agreements and subsequent practice in the interpretation of a treaty, the ILC did not distinguish as to whether the courts and tribunals interpreted and applied article 31 (3) (a), (b) VCLT or the functionally equivalent in customary international law. The recently adopted draft conclusions on subsequent agreements and subsequent practice do not make such distinction either.[15]

Some of these observations are reminiscent of the principle of systemic integration and the fragmentation report of the ILC Study Group which was primarily concerned with the interpretation and application of treaties against the background of the normative environment.[16] Based on the afore-

12 See above, p. 290.
13 See above, p. 586.
14 See above, p. 285.
15 See above, p. 353; *ILC Report 2018* at 19.
16 See also above, p. 368.

mentioned chapters it is submitted that the same considerations apply *mutatis mutandis* also for customary international law and general principles which together with treaties form part of an interrelated system.[17] While the emergence of a conflict between treaty law and customary international law or general principles of law cannot be categorically excluded, it is not very likely that developments in customary international law and in the context of (in particular widely ratified) conventions will occur in isolation from each other.

III. The institutionalization and the interrelationship

The so-called institutionalization of international law manifests itself in the proliferation of courts and tribunals, international organizations, general codification institutions like the ILC or regional codification institutions. Considering that there are also domestic courts[18], multiple non-state organizations such as the International Law Association, the Institute du Droit International, the International Committee of the Red Cross, one cannot but find that there is a large "community of interpreters"[19]. The institutionalization is an important condition which affects the interrelationship of sources and their development. It has been pointed out that the introduction of general

17 See now *ILC Report 2022* at 80: the commentary to conclusion 20 on the interpretation and application cosistent with norms of *jus cogens* indicates that this conclusion, while constituting "a concrete application" of article 31(3)(c) VCLT, applies not only to rules under a treaty but "to all other rules" as well, see also above, p. 382; but cf. also for a different view Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* 497: "Customary rule should be interpreted independently from its conventional counterpart, according to the rationale it independently possesses. The applicable methods of interpretation have to do with the nature of customary rules."

18 For recent treatments of the identification of customary international law by domestic courts cf. Odile Ammann, *Domestic Courts and the Interpretation of International Law* (2nd edn, Brill Nijhoff 2019) 283 ff.; Cedric MJ Ryngaert and Duco W Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 Netherlands International Law Review 1 ff. Staubach, 'The Interpretation of Unwritten International Law by Domestic Judges' 113 ff.

19 Cf. Georg Nolte, 'Faktizität und Subjektivität im Völkerrecht Anmerkungen zu Jochen Froweins "Das de facto-Regime im Völkerrecht" im Licht aktueller Entwicklungen' (2015) 75 ZaöRV 730; cf. Peter Häberle, 'Die offene Gesellschaft der Verfassungsinterpreten' (1975) 30 Juristenzeitung 297.

principles of law was linked to the establishment of international courts and tribunals and their practice of taking recourse to such principles.[20] Moreover, as Georges Abi-Saab has put it, customary international law is no longer a wild flower, it has become more of a greenhouse plant, as the diversity of the international community has, perhaps paradoxically, led to a certain centralisation of the customary process and its concentration within the UN system.[21]

This development may give rise to the question of whether customary international law results less from unfiltered state practice and more from a discourse between different actors, including states, courts and tribunals, the organs of the United Nations and certain non-state actors and institutions, resembling "a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them", similar to the UK common law.[22] The question then is whether one should distinguish in international law between a custom *in foro* and a custom *in pays*.[23] However, the judicial identification, interpretation and application of customary international law is still based on the disciplining idea that one applies law enacted by others. One should, therefore, not confuse the question of who is involved in the interpretation of international law with the question of what is to be interpreted, which remains in the context of customary international law the practice of states (and certain international organizations).[24] The fact that several actors are involved here can produce

20 See above, chapter 3, p. 166 ff.

21 Georges Abi-Saab, 'La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté' in Marcelo G Kohen and Magnus Jesko Langer (eds), *Le développement du droit international: réflexions d'un demi-siècle* (Presses Universitaires de France 2013) vol 1 88, Abi-Saab argued that, contrary to the famous description of Pierre-Marie Dupuy, the traditional custom, which Dupuy called the wise custom, was truly wild, whereas what Dupuy called the "wild custom" which originated in the context of the UN under the influence of UNGA resolutions was the truly wise, commissioned custom; see Pierre-Marie Dupuy, 'Coutume sage et coutume sauvage' in *Mélanges offerts à Charles Rousseau: la communauté internationale* (Pedone 1974) 75 ff.

22 For the quote see Simpson, 'Common Law and Legal Theory' 376; see above, p. 112; similar Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' 85 ff.

23 See above, p. 107.

24 The ILC Conclusion 4(1) on customary international law refers for the requirement of practice "primarily to the practice of states", Conclusion 4(2) acknowledges that

positive effects: interpretations are evaluated as to their merits, leading to the kind of consensus in the sense of general agreement on which customary international law crucially depends.[25]

For this joint interpretative exercise to produce positive effects, agreement as to the criteria on the basis of which one identifies customary international law is necessary. The International Law Commission made an important contribution in this regard when adopting the draft conclusions on the identification of customary international law. By setting forth criteria as well as forms of evidence of a general practice accepted as law, the conclusions can support a certain rationalization of the identification process. The outcome of such process can be evaluated and criticized by others as to its persuasiveness against the background of the ILC conclusions. In this sense, the conclusions and the support they received in the General Assembly[26] express the understanding that customary international law is not simply judge-made law. The draft conclusions on general principles of law can have a similar effect. The draft conclusions' focus on the identification and the emphasis on the element of recognition also express the understanding that general principles of law are not just judge-made law and exist and can be identified outside the judicial context.[27]

At the same time, as both sets of conclusions are concerned with the identification, they are not intended to comprehensively address all aspects relating to these sources, such as the formation or interpretation of custom and general principles of law. This study's conclusions for the understanding of each source are spelt out in more detail below, together with other aspects of the interrelationship for which the institutionalization of international law is an important condition.

"[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law."; *ILC Report 2018* at 130. Note also that according to conclusion 6 verbal practice, while being recognized for instance in the case of diplomatic protest, is only one form of practice which also includes physical practice, ibid 133. See Nolte, 'How to identify customary international law? - On the final outcome of the work of the International Law Commission (2018)' 15-16 on the proximity between verbal practice and inaction, and stressing: "Verbal practice can thus be practice where verbal action is part of the formation and expression of the rule, but not just a statement about it."

25 See also above, p. 348.

26 UNGA Res 73/203 (20 December 2018) UN Doc A/RES/73/203 para 4.

27 See also *ILC Report 2022* at 309, where the Special Rapporteur argues that the work on general principles of law as a source of international law is not limited to the judicial perspective.

IV. Customary international law

With a view to better understanding customary international law, the present study submits that it is helpful to reflect, in addition to the criteria set forth in the ILC draft conclusions, on the interpretative decisions, the doctrinal and normative considerations which inform the identification of customary international law.

This study presented several examples that can be found in international legal practice. For instance, the interpretation or evaluation of a practice and the formulation of a rule depend on the observer's doctrinal preconceived understanding (*Vorverständnis*). To give an example, if one observes a general practice according to which individuals are tried before international tribunals for international crimes which were committed by the individuals' subordinates, one can arrive at different conclusions: The practice can indicate that international criminal law does not distinguish between perpetrators and accomplices in the sense of a unitarian perpetratorship model. The practice can also indicate, however, that, while a differentiation between perpetrators and accomplices is to be made, an attribution based on a common purpose or common plan or control over the crime can be established.[28]

One's perspective on international practice also depends on the question that needs to be answered or on the hypothesis that needs to be verified or falsified.[29] One's default position can be important if one wants to ascertain a rule or an exception to the rule. To take the *Jurisdictional Immunities* case[30] as an example: it can matter whether one proceeds on the basis of state immunity as a general rule and examines whether practice supports an exception to this rule for torts committed by troops during an armed conflict. This was the perspective of the ICJ. Alternatively, one could, as it is possible to read the opinion of Judge *ad hoc* Gaja, proceed on the basis of a tort exception to immunity as a general rule and examine whether practice supports an exception to this tort exception for conduct of troops in armed conflicts. The choice of the default position is important as it shifts the burden of reasoning and of justification to the exception.

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28 See above, p. 526.

29 See also recently Katie A Johnston, 'The Nature and Context of Rules of and the Identification of Customary Inernational Law' (2021) 32(4) EJIL 1168 (arguing that the way in which the two elements are evaluated may depend on whether one examines a permissive or prohibitive rule), 1174.

30 See above, p. 275.

Moreover, those who identify customary international law can employ different techniques in relation to conflicting practice. If the outweighing part of international practice supports the existence of a rule, the examples of practice that cannot be reconciled with the rule can be regarded as a violation of this rule which does not challenge the rule's validity, as it was done by the ICJ in the *Nicaragua* judgment.[31] These examples of practice were not used in order to shape the scope of the rule differently in an attempt to make the rule reflecting the practice as a whole. Conflicting practice or a conflict between *opinio juris* and certain practices can also lead one to define the scope of a rule by acknowledging an exception. In this sense, the ICJ could not identify an absolute prohibition of the use and threat of use of nuclear weapons; the *Nuclear Weapons* advisory opinion can be read to the effect that there is a general prohibition of the use and threat of use of nuclear weapons, which is subject to a possible exception of extreme circumstance of self-defence in relation to which the Court could not conclude that the prohibition would also apply.[32] Alternatively, one could, following the *Kupreškić* Trial Chamber, either emphasize normative considerations and thusly arrive at an absolute prohibition of reprisals against civilians or, following the approach adopted by the *Martić* Chamber, hold that such reprisals must not violate a stringent set of criteria, while leaving the question of the abstract legality open.[33]

It has been demonstrated that customary international law can be understood as a body of law in the sense of a normative system which contains principles and rules of varying degrees of generality, rather than as a set of unrelated rules.[34] The ICJ stressed, for instance, the interrelation between the principle of non-intervention and the equality of states. It characterized immunity as consequence of the equality of states and limitation to the territorial jurisdiction of states. In *Chagos*, the ICJ emphasized the relationship between the right to self-determination and respect for territorial integrity. Moreover, an interpreter will consider whether general principles expressed in international law or domestic law as well as past concretizations of customary international law or functionally equivalent rules can assist her in identifying, concretizing and applying customary international law in a given case. In order to identify customary international law, a systematic under-

31 See above, p. 277.
32 See above, p. 277.
33 See above, p. 499.
34 See above, p. 262, p. 374.

standing of the international legal order is required, and this understanding must not be confined to customary international law, it must extend to treaties and general principles of law as well.[35]

Based on the previous chapters, it is submitted that customary international law can be subject to interpretation and that the interpreter has to consider the *telos* of the respective rule, the way in which this rule relates to customary rules of higher or lower levels of generality, and relevant general principles of law, including those expressed in the international legal order. Courts can, to a certain extent, shape the development of customary international through considerations of general principles of law when concretizing customary international law to a particular case. Principles play an important role, but they need to be employed with great care under consideration of the institutional and normative context and structural principles of the international legal order, such as sovereign equality of states and the protection of human rights.[36] In the end, customary international law, while it may protect rights and interests of a minority against the majority in specific cases, remains the law of a majority and has to reflect the distribution of power within a legal community without, however, giving up its prescriptive and normative

35 Cf. *Jurisdictional Immunities of the State* 139 para 90, where the ICJ considered the jurisprudence of the European Court of Human Rights when analyzing customary international law. The European Court examined customary international law from the perspective of the ECHR, see above, 425.

36 See also Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' 498-499, arguing that international law "certainly possesses the basic characteristics to partake in a specifically legal discourse" and yet caution against "analogizing strong conceptions of legal systems developed in a domestic context" and to remain aware of structural differences and in particular the importance of sovereignty of states as one "major constitutional principle"; see also Paulus, 'The International Legal System as a Constitution' 72: "[...] the transfer of domestic constitutional principles to international law is fraught with difficulty, in particular because international law must always take into account at least two levels of analysis: the interstate level of classical international law and the interindividual level of world citizens at large."

character.[37] It must remain rooted in practice expressing the convictions of states and their citizenry in order to be acceptable and legitimate.[38]

Certainly, the conclusions advanced here will not make the recourse to customary international law, its identification and application easier, as it is submitted to consider in this process general principles of law, treaties and different interpretative decisions. However, reflection of these considerations, which otherwise may be tacitly employed or remain implicit, can improve both the quality of the identification process and the critique rendered against the outcome. The critique can be delivered with a higher degree of precision than it is at times, when it remains on a rather general level, confined to the discussion of the abstract relationship of the two elements of customary international law.

V. Treaties

The importance of treaties does not need to be stressed. International organizations, courts and tribunals are established on the basis of treaties. When interpreting and applying the treaty, the general rules of treaty interpretation as reflected in articles 31-33 VCLT direct the interpreters to the normative environment in which the treaty is situated. At first sight, a treaty's compromissory clause that authorizes a court or tribunal to interpret and apply the treaty may imply a confinement in that the authorization does not extend to the application of other sources or the whole of international law. The interpretation and application of the treaty may, however, be informed by customary international law and general principles of law. In this sense, a treaty can indirectly strengthen the rule of law in the international community

37 Cf. Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 BYIL 132 for the view that short-term circumstances which he associated with treatymaking may average out during customary international law's emergence over a period of time; for a similar point see Føllesdal, 'The Significance of State Consent for the Legitimate Authority of Customary International Law' 127 (arguing against instant custom because of the risk of domination). See recently Hadjigeorgiou, 'Beyond Formalism Reviving the Legacy of Sir Henry Maine for Customary International Law' 189-90.

38 Cf. Andreas L Paulus and Matthias Lippold, 'Customary Law in the Postmodern World (Dis)Order' (2018) 112 AJIL Unbound 312.

and contribute to the development of general international law.[39] A "treatification"[40] of the international legal order does not have to go at the expense of the unwritten law, customary international law and general principles of law. A codification convention may, to take up Baxter's famous description, arrest the "change and flux in the state of customary international law" and "photograp[h] the state of the law"[41]. At the same time, the ILC project on subsequent agreements and subsequent practice[42] illustrates that codification conventions such as the VCLT together with customary international law can become subject to a re-analysis. The extent to which unwritten international law remains relevant depends, of course, on the actors in the international legal system. For instance, the respective law-applying authorities can refer to general principles of law and customary international law or focus on the *lex specialis* character of the treaty which can reduce, even though, arguably, not completely[43], the need to work with other sources. This study demonstrated, for instance in the context of the European Court of Human Rights, that functional equivalents to concepts of general international law can be developed on the basis of treaty law.[44]

Last but not least, rules in a treaty can be a codification, contribute to the crystallization or give rise to new rules of customary international law.[45] As both sources are distinct, a treaty may not simply be equated with customary international law. Whether rules in a treaty have become to reflect customary international law must remain the subject of an analysis on the basis of the methodology relating to customary international law.[46] A treaty may also give expression to principles of a potentially general scope which are suited

39 See in particular the section on compromissory clauses above, p. 239; Kolb, 'The Compromissory Clause of the Convention' 413. See in particular the jurisprudence on the European Court of Human Rights above, p. 425.

40 Cf. Salacuse, 'The Treatification of International Investment Law' 155 ff.; Patrick Dumberry, 'A few observations on the remaining fundamental importance of customary rules in the age of treatification in international investment law' (2016) 35(1) ASA bulletin = Schweizerische Vereinigung für Schiedsgerichtsbarkeit 41 ff.

41 Baxter, 'Multilateral Treaties as Evidence of Customary International Law' 299.

42 See above, p. 353.

43 Cf. Bruno Simma, 'Self-containted regimes' (1985) 16 Netherlands Yearbook of International Law 112 ff.

44 See above, p. 446; on the politics of the interrelationship, see below, p. 697.

45 See above, p. 280, p. 376.

46 See also above, p. 376.

to guide and inform the identification of customary international law more generally.[47]

VI. General principles

The approach adopted in this book proposes, informed by comparative historical analysis and legal theory, to understand general principles of law in their interrelation with treaties and customary international law, rather than as conceptual alternative at the expense of customary international law.

Principles can be ascertained inductively and extrapolated from more specific rules, they can also be necessary premises or implied as necessary consequences of more specific rules. The content of general principles can be concretized by more specific rules of treaty law and customary international law or the practice of states. It is necessary that the principle, in order to qualify as a general principle of law, is recognized by the community of nations. The *modus operandi* of general principles formed within the international legal system is similar to the *modus operandi* of general principles of law that are identified in the municipal legal orders[48] or to the *modus operandi* of legal principles discussed in legal theory. It is here submitted that article 38(1)(c) ICJ Statute can be read as declaratory recognition of the role general principles of law play in the interpretation and application of law.

General principles of law perform very different functions. They constitute the necessary elements, premises and precepts that enables a legal order to fulfil its function in a society. General principles of law are an expression of the integrity of law, different from mere power, politics or arbitrariness, of the inner rationality (*Eigengesetzlichkeit*) of law. General principles may thusly derive from the very idea of law (*pacta sunt servanda*; legal responsibility as consequence of a violation); they may express a certain respect towards the other governed by law, which expresses itself in principles concerning the *inter partes* relations, such as principles of fairness in the judicial process, abuse of rights, of no one should be benefit from his own wrongdoing, *audiatur et altera pars* etc. These principles may be regarded as important, admittedly, rudimentary recognition by law of the respect every human being is entitled to. In addition, they give expression to legal evaluations and "value

47 See for instance the jurisprudence of the ICTY above, p. 487.

48 See *ILC Report 2022* at 322 (commentary to draft conclusion 7); ILC Report 2023 at 23.

judgments"[49] which manifest themselves in particular rules and the legal order and which may guide and inform the interpreter's interpretation of other rules.[50] Structural principles of the international legal order, such as sovereign equality of states and the protection of human rights, may also compete in certain circumstances and call for a reconciliation for the specific case by the legal operator through the interpretation and application of more specific rules.[51] The idea of principles as mere gap-fillers is misleading as the very identification of a gap entails a normative judgment which can be informed by way of reference to principles of the legal system.[52]

Recourse to general principles can, together with customary international law, give meaning to broadly framed treaty obligations[53] or to obligations under customary international law[54] by, inter alia, establishing a relation to the judicial and legal experiences and normative developments in municipal law or in other fields of international law.[55] The use of general principles can help in clarifying the normative concept or framework of a rule, to operationalize the application of a rule through, for instance, proportionality analysis.[56] In addition, general principles can help in coordinating specific obligations

49 German language makes a distinction between *Wert* and *Wertung*, as the latter is something made, whereas the origin of the former remains hidden. The english term *value* arguably encompasses both and is overinclusive. Therefore, Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' 498 suggest the term "value judgment" as translation of *Wertung*. On the problematic use of the terms *Wert* see Ulrich Fastenrath, 'Subsidiarität im Völkerrecht' in Peter Blickle, Thomas O Hüglin, and Dieter Wyduckel (eds), *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft: Genese, Geltungsgrundlagen und Pespektiven an der Schwelle des dritten Jahrtausends* (Duncker & Humblot 2002) 493 footnote 88.

50 See also Schwarzenberger, 'The fundamental principles of international law' 224-225, describing how principles can cease to be mere abstraction from binding rules and can become normatively superior for future rules.

51 Cf. also Paulus, 'The International Legal System as a Constitution' 86, pointing out that a constitution "cannot solve the value conflicts of the founding principles of a legal order but may provide mechanisms for how to balance them [...]".

52 See above, p. 142; cf. Lauterpacht, *The Function of Law in the International Community* 64–86 (distinguishing between a formal completeness and a material completeness of a legal system).

53 See above on in the interpretation of FET in light of general principles of international law, p. 586.

54 See above, p. 487.

55 See for instance the doctrine of indirect perpetratorship above, p. 534.

56 See above, p. 425.

by providing a framework and a common ground for reconciliation.[57] A general principle such as the prohibition of arbitrariness can also provide an appropriate standard of review when one has to interpret other law.[58] Last but not least, the recourse to principle can help in defining default positions which the distributes the burden of reasoning.[59]

Whether general principles of law can be characterized as "source" depends on the meaning attached to this term and on the functions assigned to this concept. Jean d'Aspremont, for instance, has argued that general principles of law do not constitute a source of law and that they should be regarded solely as "mode of interpretation" that can be helpful for content-determination.[60] In addition, if one associates the concept of a source of law with a unidirectional movement by which the law "flows" from its "source", one may call the characterization of general principles as a source into question, as principles emerge from an interpretation of the law and unfold themselves as to their respective meaning in relation to, and in interaction with, other principles, rules and the respective normative context. Yet, the description of just an interpretative tool undervalues both principles' importance as necessary premises of the legal system as such, for instance *pacta sunt servanda*, good faith, abuse of rights, and the role they play in establishing an understanding of specific obligations. As general principles of law offer ideas and legal inspirations for general norms' interpretation, for their concretization and

57 See above, p. 438.

58 See above on the prohibition of arbitrariness as standard of review when more specific obligations under the ECHR do not exist, p. 410, or when the European Court evaluates states' compliance with the ECHR in the implementation of UNSC resolutions, p. 441; cf. on good faith review Dapo Akande and Sope Williams, 'International adjudication on national security issues: what role for the WTO?' (2003) 43(2) Virginia Journal of International Law 407 ff. on good faith review; see also Stephan W Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck Yearbook of International Law 61 ff.; *Certain Questions of Mutual Assistance in Criminal Matters* 229 para 145, and Decl Keith 278-279 paras 4-5.

59 Cf. on default positions above, p. 266, p. 497, p. 551.

60 d'Aspremont, 'What was not meant to be: General principles of law as a source of international law' 179; similar already Weil, 'Le droit international en quête de son identité: cours général de droit international public' 148-149, 151 (general principles of law were only a material source and no formal source); cf. also *ILC Report 2022* at 310 ("Several members agreed that general principles of law were a primary and independent source, while others expressed doubts").

development, it is appropriate to rank general principles of law on one level with treaty and custom as a source of international law.[61]

VII. The distinctiveness of sources and their interrelations

Understanding the sources of international law as an interrelated system presupposes the distinctiveness of the sources which includes differences as to the identification process and the sources' *modus operandi*.[62]

Article 38 ICJ Statute and its counterpart in the PCIJ Statute already subtly emphasize differences in their respective text with respect to way in which consent is described.[63] Different sources can assume similar functions but have different strengths and weaknesses. The treaty recommends itself in particular for detailed, technical regulations, it can crystallize and specify pre-existing understandings[64] and introduce new ideas, principles and values to the international legal order which can contribute to shaping the identities of relevant actors.[65] Even though rules of customary international law can operate on the same level as rules of treaty law, customary international law constitutes a different normative sphere.[66] It is a general practice accepted as law which can include treaties, and treaties can be assessed as to whether they express trends in the international community.[67] Customary international law is linked to the idea of one legal community, it expresses a specific community mindset in which general law serves as foundation. In this sense, certain advocates of customary international law seem to regard this concept

61 Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' 9 (describing general principles as "norm source").

62 Cf. in a similar sense Bos, 'The Recognized Manifestations of International Law A New Theory of "Sources"' 73-76 on "mutual independence" and "coherence between the recognized manifestations of international law" (at 76).

63 See above, p. 213.

64 Jutta Brunnée, 'The Sources of International Environmental Law: Interactional Law' in Samantha Besson and Jean d'Aspremont (eds), *Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 966.

65 See above, p. 81.

66 Cf. von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 166 ("a normative layer above", when describing customary international law in the work of Hans Kelsen).

67 On custom as consensus of the international community see Kohen, 'La pratique et la théorie des sources du droit international' 93-94; Philip Allott, 'The Concept of International Law' (1999) 10 EJIL 38-42.

to be important as mindset of the legal operators that entails a commitment to, and the professional conscience to be part of, a community that goes beyond a specific treaty in question.[68] General principles of law can be more abstract than rules of customary international law, yet they can also be very precise in case of procedural principles such as *res judicata*. They can operate as inspirations and as reasons in a subtle way: they operate within normative structures[69] and yet, they can have a transformative or norm-creating potential[70]. They can help in defining default or starting positions and are therefore also relevant for the identification of customary international law which not only includes inductive analysis but also deductive elements. Whether general principles are part of the law, part of the *corpus iuris*, may depend on the degree of positivization they have received. It might not always be possible to clearly distinguish between a rule of customary international law of high generality and a general principle of law, and this study subscribes to the view that there is no necessary logical or categorical

68 See above in the context of international investment law, p. 609; for the view that the crimes set forth in the Rome Statute needed to be interpreted in accordance with customary international law if the international community's *ius puniendi* is to be enforced, and for the implications of this view on immunities, see above, p. 521, p. 554; as was pointed out in the second chapter, the function of the unwritten law in relation to the written law can differ, it could be the basis for independent rules, p. 120, or indicate the way in which the written law should be applied, p. 119. Recently, Walters, 'The Unwritten Constitution as a Legal Concept' 35 argued in favour of more attention to unwritten constitutional law as "a discourse of reason in which existing rules, even those articulated in writing, are understood to be specific manifestations of a comprehensive body of abstract principles from which other rules may be identified through an interpretive back-and-forth that endeavours to show coherence between law's specific and abstract dimensions and equality between law's various applications".

69 As noted by Mosler, 'The international society as a legal community' 89: "But generally, principles require implementation by rules." In the right institutional setting, for instance in an adversarial adjudicatory context, principles can function like rules in the sense that on their bases cases can be decided, Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' 11-12, referring to *Temple of Preah Vihear* 23, 26, 32 where the case was decided on the basis of general principles such as acquiescence and estoppel.

70 Cf. Schwarzenberger, 'The fundamental principles of international law' 224, pointing out that certain principles like sovereignty "may have ceased to be mere abstractions of binding rules. Potentially, they become overriding rules form which [...] other binding rules may legitimately be derived."

distinction between a rule and a principle.[71] Nevertheless, it is also submitted that customary international law and general principles of law are distinct concepts. In general, norms of customary international law will be more specific as to their preconditions and legal consequences since they have been hardened by practice. They may also represent a concretization or a reconciliation of different principles. At the same time and just like rules in a treaty, rules of customary international law can be the expression of a more general principle or give rise to new principles.

The distinctiveness of the sources implies that general principles of law and the other sources can, as suggested by the ILC, exist in parallel.[72] The relationship between different norms will be governed by the well-established conflict rules *lex specialis* and *lex posterior* and by interpretation in the sense of systemic integration.[73] This distinctiveness relates to the applicability and does not exclude an interplay as far as content-determination is concerned.[74]

Based on this study's understanding of sources as an interrelated system, it is not possible to understand customary international law without general principles, nor the latter without the former and the specific structures shaped in particular by treaties. General principles of law as understood here do not replace customary international law, they often depend on specific norms based on treaties or custom. Therefore, it may be misleading to think of general principles as an option which makes it possible, for instance, to circumvent the requirements of customary international law.[75] In addition to the ILC draft conclusions on general principles of law which focus on the identification of general principles,[76] it is submitted that the specific context in which the principle is to be applied is particularly relevant when searching

71 See for instance the example very broad principles and rules in the context of maritime delimitation, pp. 290 ff. See also above, chapter 2.

72 *ILC Report 2022* at 308 Fn. 1189, 312, 316; ILC Report 2023 at 33 f.

73 See on the work of the ILC Study Group above, p. 368.

74 For an illustration in the ICJ jurisprudence see above, pp. 258 ff.

75 See also recently Xuan Shao, 'What We Talk about When We Talk about General Principles of Law' (2021) 20 Chinese Journal of International Law 223, 244, 249, 253.

76 On the two-step methodology for general principles of law that are derived from national legal systems and transposed to the international legal system "in so far as they are compatible with that system", see *ILC Report 2022* at 308 Fn. 1189 (draft conclusion 6); on the general principles which formed within the international legal system with respect to which "it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system", see ibid at 308 Fn. 1189 (draft conclusion 7(1)); see now ILC Report 2023 at 20 ff.

for a general principle of law. The identification of a general principle does not take place within a vacuum. Arguably, the specific context informs the identification of a general principle of law. A principle that may be a fit for one specific context may not necessarily be an appropriate fit in other contexts. It is, therefore, submitted that a certain context-sensitivity should be preserved with respect to general principles of law and that an analysis should also focus on the interrelation between a general principle and the specific normative and institutional context.[77] General principles remain important in the judicial setting and outside of it when one approaches and interprets the law as a court would interpret it. The fact that principles may be balanced and interpreted differently and that reasonable minds may disagree on the identification of a particular rule of customary international law may explain the contestability of an interpretation of the law. However, mere contestability alone does not necessarily impede the authority and persuasiveness of the law and its sources.

VIII. The politics in relation to the interrelationship of sources

This study demonstrated that legal operators may address the interrelationship of sources in different ways and for different reasons.[78] Certain courts and tribunals, rather than applying just their respective treaty and remaining confined to their field of law, considered other sources and searched for inspirations in other areas of international law.[79] Investment tribunals, for instance, referred to the international minimum standard and other BITs in order to objectivize what they considered to be fair and equitable.[80] This is understandable as the genuine judicial legitimacy rests on the idea that courts apply law enacted by others.[81] The ICTY's recourse to customary interna-

77 See also above, p. 505 and recently Megumi, 'The New Recipe for a General Principle of Law: Premise Theory to "Fill in the Gaps"' 10 ff.

78 On source preferences see already above, p. 679.

79 On "the spirit of systemic harmonization" as "new posture of international courts and tribunals" see Anne Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization' (2017) 15(3) International Journal of Constitutional Law 671 ff.

80 See above, p. 592.

81 Cf. Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* 125-126; Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* 261-262; Habermas, *Fak-*

tional law can be explained in a similar sense when it based the individual responsibility for violations of international law in non-international armed conflicts on customary international law.[82] Certain ICC chambers, however, emphasized in certain situations that, first and foremost, they would have to apply a treaty and used this argument in order to distance themselves from customary international law as identified by the ICTY.[83] As demonstrated above, the ICC jurisprudence raises the question of whether the ICC can and should rely solely on the Rome Statute or focus on the alignment of the Statute and customary international law.[84] Another interesting example for a study of the interrelationship of sources is the case-law of the European Court of Human Rights. The European Court partly establishes relations between the ECHR and customary international law, and partly develops functional equivalents to concepts of customary international law.[85] These examples illustrate that courts and tribunals can make different choices as to the calibration of the interrelationship of sources. These choices can also be indicative of how a particular community or regime regards its relationship with the wider international community. A research perspective on the interrelationship of sources will continue to review these developments.

There are, furthermore, not only conscious engagements with but also unconscious contributions to the development of the sources and their interrelationship. Throughout the study it could also be observed that courts and tribunals do not always refer to customary international law and general principles of law when they considered other treaties or decisions of other courts and tribunals or domestic law.[86] Drawing analogies from other legal materials does not necessarily have to be considered as prohibited, though. Arguably, within the confines of legal reasoning, courts and tribunals can seek inspiration from nonbinding materials, provided that the use of these inspirations is disciplined by legal methodology which is applied to the interpretation of the binding rule. This process can contribute to the emergence of new general principles and new rules of customary international law, which of course would depend on the states' reactions to these decisions. Courts and

tizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats 317-319; Maus, 'Die Trennung von Recht und Moral als Begrenzung des Rechts' 199, 208.

82 See above, p. 484.

83 See above, p. 536.

84 See above, pp. 517 ff.

85 See above, p. 426, p. 443.

86 See above, p. 408 ff., p. 493 ff., 604 ff.

tribunals apply preexisting law and yet they can contribute to law's further development by concretizing law to a particular case.[87] While courts have an important function in this regard, they should approach the judicial task not with a view to positivizing new principles or contributing to new customary international law, but with a view to serving the law. In doing the latter, they may accomplish the former.[88] If a court invokes the authority of customary international law or a general principle of law, this court's use of such rule or principle will, of course, be judged according to its persuasiveness. Here, the ILC conclusions in their focus on the identification can play an important role. A legal reasoning can derive persuasiveness from recourse to a general principle of law, but this specific use of such general principle as opposed to a competing principle needs to derive its persuasiveness from the legal reasoning.[89]

One consequence of the interrelationship of sources is the constant availability of international law based on customary international law and general principles of law on the basis of which disputes could be adjudicated by a court.[90] This general international law will provide for a general content[91] and its application can also be informed by trends and developments in more advanced treaty regimes. This consequence results from the efforts undertaken by international legal practitioners and scholars alike who continue to cultivate and administer unwritten international law, even though the degree of attention dedicated to each source has differed from time to time.[92] The continuing acceptance of unwritten law, the effort to seriously grapple with

87 See also above, p. 118; on the Kelsenian perspective according to which the application of law is not completely determined by the norm that is applied see above, p. 196 and p. 668.

88 See above, p. 154; cf. also Lauterpacht, *The Function of Law in the International Community* 110-111, quoted above, p. 210.

89 See above, p. 154.

90 Cf. already *Eastern Extension, Australasia and China Telegraph Company, Ltd* IV RIAA 114: "International law [...] may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and so to find [...] the solution of the problem."

91 On the description of virtues attributed to customary international law, which include for instance to ensure "a minimum content of law" and "a minimal relevance of law", see d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' 20, 29.

92 On different stages in the scholarly discussion see above, p. 635 ff.

the identification of customary international law and general principles of law and to create meaningful relationships between the sources may be seen as unique characteristics of the international legal order in comparison to other legal orders.

At the same time, this development, the cherishing of unwritten law, can be criticized. It can be said to reduce the pressure to ratify treaties and go at the expense of a different international legal order in which lawmaking would be characterized by a higher degree of formalization and rules would be embedded in procedural frameworks established by treaties. The governance through custom can make it at least for certain states an option to abstain from treaties, without risking to end up with no law at all, and to strategically advocate for the recognition of only specific provisions as reflection of customary international law. As Vaughan Lowe has observed with respect to the United Nations Convention on the Law of the Sea, "rights tend to pass into customary international law more easily than obligations".[93] If a state, however, decides not to join a treaty and to remain on the customary law route, it must be aware that customary international law can, in the long run, be shaped by recourse to principles expressed in treaties. States cannot be bound by a treaty against their will, but they cannot withdraw from the rule of law in the international community either.[94]

As long as the international legal order remains by and large structured by decentralised lawmaking, in spite of the unquestionable progress of the institutionalization, customary international law will arguably remain signif-

93 Vaughan Lowe, 'Was it Worth the Effort?' (2012) 27 The International Journal of Marine and Coastal Law 879; see also William Michael Reisman, 'The Cult of Custom in the Late 20th Century' (1987) 17 California Western International Law Journal 134: through custom, "[w]e can stay in the world without the need for a veto and still have our way: We can use custom to get the international law we want without having to undergo the "give" part of the "give-and-take" of the legislative process." See also above, p. 85.

94 Cf. Andrew T Guzman and Jerome Hsiang, 'Some Ways that Theories on Customary International Law Fail: A Reply to László Blutman' (2014) 25(2) EJIL 554: "As a matter of observation, states rarely accept non-consensual laws or external norms as binding law. Yet it is also undeniable that CIL serves and persists as a fundamental building block of international law." They elaborate on the "non-consensual nature" of customary international law. One could say, however, that customary international law indirectly affirms and strengthens the consensual concept of the treaty. See above, p. 242 ff., on the judgment between Croatia and Serbia, where the ICJ did not endorse the retroactive application of the Genocide convention and instead based its jurisdiction on a concept of customary international law, the succession into responsibility.

icant. Because of the slow speed of ratifications, customary international law and general principles of law have retained their importance in legal practice. Ultimately, however, it is for each international lawyer to evaluate whether the benefits associated with the unwritten law and its sources outweigh their potential shortcomings and difficulties.

IX. The interrelationship of sources and general international law

It is submitted that a focus on the interrelationship of sources can potentially add to one's understanding of the concept of general international law. Even though the term "general international law" is often invoked, there are different ways to understand this term.[95] Paul Reuter distinguished different kinds of generality, generality *ratione personae*, generality as synonym for abstractness, and generality as temporal continuity (*celui de la permanence dans le temps*).[96] According to the ILC Study Group on fragmentation, "'general international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations' [...] it might also refer to principles of international law proper and to analogies from domestic law, especially principles of the legal process".[97] In the context of the work on peremptory norms of general international law, the ILC pointed out that "the meaning of general international will always be context-specific" and emphasized for the purpose of the *jus cogens* project the generality *ratione personae*.[98] Conclusion 5 which deals with the bases of peremptory norms

95 See critical Wood, 'The International Tribunal for the Law of the Sea and General International Law' 354 ("a certain degree of imprecision"); Matz-Lück, 'Norm Interpretation across International Regimes: Competences and Legitimacy' 206.

96 Paul Reuter, 'Principes de droit international public' (1961) 103 RdC 469; cf. also Métall, 'Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre' 423, distinguishing between *allgemeines Völkerrecht*, which is characterized by generality *ratione personae*, and *generelles Völkerrecht* which is characterized by generality or abstractness as opposed to a concretized rule.

97 *Fragmentation of international law: difficulties arising from diversification and expansion of international law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi* 254; cf. also Tunkin, 'Is General International Law Customary International Law only?' 541: "general international law now comprises both customary and conventional rules of international law", Tunkin referred to codification conventions and the UN Charter.

98 *ILC Report 2019* at 159; on generality *ratione personae* see also Josef L Kunz, 'General International Law and the Law of International Organizations' (1953) 47(3)

of *general international law* and the corresponding commentary emphasize that customary international law "*is* the most common basis", while also recognizing that "treaty provisions and general principles of law *may* also serve as bases"[99].

It is submitted that the ILC's *jus cogens* conclusion 5 is convincing in that it does not tie the concept of general international law to one particular source.[100] General international law is perhaps best described as a status which certain norms have acquired.[101] As persuasively argued by Georges Abi-Saab, norms of general international law are not defined by their origin but by what they have become and received, namely general acceptance. It is not only by way of customary international law but also by treatymaking that states can structure the legal environment and shape the expectations of the participants in the international legal system.[102] Once a rule or principle has been elevated to the level of general international law, the particular source, or origin, loses relevance, rules and principles from different sources can converge into one normative concept.[103]

General international law is a concept with many characteristics some of which have been just described in the previous paragraphs or illustrated throughout this book. For instance, one important aspect is the function of general international law as a general part which encompasses rules on rules, such as the general rules of interpretation, of responsibility, of validity of legal acts and which will apply in relation to and together with any specific rule.[104] Based on this study, it is, in addition, submitted that general international law may be characterized also by a certain generality *ratione materiae* by which the present author does not mean the abstractness of its rules but rather the rules' reflection of the principles and judgment calls of the international legal

AJIL 456; Gionata Piero Buzzini, 'La "généralité" du droit international général: réflexions sur la polysémie d'un concept' (2004) 108 RGDIP 381.

99 *ILC Report 2019* at 158, draft conclusion (italics added), see also 161-163 on the different views on general principles of law and treaty provisions.

100 The ILC adopted on second reading the 23 draft conclusions on the identification and legal consequences of peremptory norms of general international law in 2022, *ILC Report 2022* at 5.

101 Cf in a similar sense Yasuaki, *International Law in a Transcivilizational World* 105, 112, 155, 159.

102 Abi-Saab, 'Les sources du droit international: essai de déconstruction' 75.

103 ibid 78.

104 See above, p. 240 ff. See also Christian Tomuschat, 'What is 'general international law'?' in *Guerra y paz: 1945-2009: obra homenaje al Dr. Santiago Torres Bernárdez* (Universidad del Pais Vasco, Servicio Editorial 2010) 342-344.

order. Arguably, several aspects that have been examined in the context of this study on the interrelationship of sources describe a process of a certain *generalization* of international law.

This book has illustrated the convergence into a common principle, by way of reference to the prohibition of the use of force, the right to self-determination[105] or the general rules of treaty interpretation[106]. Courts and tribunals consider principles and trends expressed in treaties when identifying customary international law, which serves the purpose of keeping customary international law and its application in a given case up to date. By way of interpretation, a relationship between a human rights treaty like the ECHR and immunities under customary international law is established by the European Court which considers both in light of each other.[107] Courts and tribunals from specific branches of international law interpret and apply general international law and seek inspiration in other fields of international law. If international law is interpreted in good faith, driven by the motivation to get the other law right and not to impose one-sidedly one particular regime's rationale on other areas of international law[108], this process can lead to a certain *generalization* of the specific law. In this sense, the specific law's interpretation and application are related to the wider normative environment. This process can also serve the general law which is then interpreted and applied in new contexts. Whether this process in fact occurs or continues to occur must be the object of continuous research.

In order to answer the question of the relative significance of each source, of written and unwritten international law in the international community, a constant examination of the international legal practice in specific areas of the international legal order is necessary. In particular, the challenging task of international legal scholarship committed to general international law will be to examine whether and to what extent concepts of general international law are applied in specific contexts or replaced with functionally equivalent concepts.[109] This scholarship must also identify when normative innovations developed in different treaty contexts have further developed

105 See above, p. 285 ff.
106 See above, p. 35 ff.
107 See above, p. 426 ff.
108 Cf. von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' 23; von Bernstorff, 'Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: a Theory of Global Judicial Imperialism?' 50.
109 See above, p. 462 ff.

general international law. It is submitted that general international law should not be understood exclusively in contradistinction to special law, but also as reflection of the international legal order as a whole, including its values as expressed through the interpretation and application of treaties, customary international law and general principles.

B. Conclusions

1. The interrelationship of sources, meaning the relationship between the sources and their interplay, is a topic which is relevant in any legal order. The answers to the questions regarding the sources' relationship can be indicative of the spirit of the time, the legal culture and the doctrinal and legal theoretical preferences of the respective legal community.

2. The three formal sources enshrined in article 38(1) ICJ Statute do not stand in isolation from each other. In legal practice and in international law scholarship, different forms of interplay, relative significance and balance can be observed. Conflicts or even rivalries between these sources are more the exception than the rule. By and large, it is more likely to observe a convergence of functionally equivalent rules of different sources, a convergence of treaty and custom into one common principle and an accommodation contentwise by way of interpretation (principle of systemic integration). In addition, general international law provides for principles and rules for interpretation, the coordination between different obligations (*lex specialis*, *lex posterior*, *ius cogens*) and for the consequences of a breach of an international obligation and the invocation of international responsibility. This general part applies in relation to a specific rule, subject to derogation within the limits of jus cogens.

3. The so-called institutionalization of international law is of great significance for the development of the interrelationship of sources. A large "community of interpreters" engages with the sources. The value of the ILC conclusions on customary international law and the ILC project on general principles of law can consist in providing orientation and in particular agreed criteria on the identification of customary international law or general principles of law which can enhance the quality of the work of law-applying authorities.

4. The recently adopted ILC draft conclusions on the identification of customary international law provide helpful guidance and in structuring and rationalizing the identification process. With a view to better understand

customary international law, the present study submits that it is helpful to additionally reflect on the interpretative decisions, the doctrinal and normative considerations which inform the identification of customary international law. In particular, the jurisprudence of the ICJ demonstrates that customary international law does not consist of separated but of interrelated rules and principles.

5. A treaty not only can provide for a rule which codified, crystallized or became a rule of customary international law which is in its content almost identical to the treaty-based rule. A treaty can also give expression to principles of potentially general applicability which are suited to guide and inform the identification of customary international law.

6. General principles can be identified not only in municipal legal orders but also in the international legal order. Article 38(1)(c) ICJ Statute can be read as declaratory recognition of the importance of legal principles in the interpretation and application of law. General principles of law are not mere gap-fillers, their meaning, functions and importance reveal themselves in the interplay with treaties and customary international law.

7. If one analyzes the interrelationship of sources, one must not lose sight of the sources' distinctiveness and differences. Each source of international law is subject to a particular methodology and doctrine. In particular, it may not be easily assumed, but must remain subject of a rigorous demonstration, that the substance of a rule of a treaty is also part of customary international law. In addition, customary international law and general principles of law remain separate and distinct concepts, even though the distinction may be difficult to make from time to time. When taking recourse to general principles, a court must remain aware of its task to apply, and not to make, the law. The identification of customary international law must continue to reflect the balance of power in the international community, without, however, giving up the prescriptive and normative character of customary international law.

8. An important topic for a research perspective on the interrelationship of sources is the way in which law-applying authorities address the interrelationship of sources, express source preferences and contribute to the development of the law. Furthermore, Article 38 with its sources and subsidiary means for the determination of the rules of law is a blueprint for a decentralized organized legal community. Because of the interplay of sources, there is always a minimum law, consisting of customary international law and general principles of law, on the basis of which disputes can be adjudicated. At the same time, there is the risk that the importance of unwritten law can reduce

the ratification pressure, which can go at the expense of a more formalized international legal order.

9. It is the task of international legal scholarship committed to general international law to study the interrelationship of sources not only on a very abstract level, but also in specific contexts, to diagnose developments in the balance between the sources, and to make use of these insights for a study of the development of general international law.