Chapter 7: Concluding observations on the institutional perspectives

The preceding two chapters examined two institutions in greater detail, the International Court of Justice and the International Law Commission. They share commonalities in that they are both organs of the United Nations, the ICJ being a principal organ (articles 7(1), 92 UNC) and the ILC a subsidiary organ of the UNGA (articles 7(2), 22 UNC). Moreover, their mandates are not confined to one field or area of international law; in principle, they can be concerned with all questions of international law, not only incidentally through the lenses of a particular regime. In other aspects, the institutions are different. The ICJ is primarily concerned with the application of the law to a specific set of facts, whereas the ILC examines international law on a more general level. The ICJ has to apply the *lex lata*, whereas the ILC engages in the progressive development and codification of international law and can propose solutions *de lege ferenda*.

The preceding chapters demonstrated that institutions are not necessarily neutral when it comes the interrelationship of sources. In particular, the setting in which the ICJ operates favours to a certain extent conventions over other sources, when it comes to the intervention system or the Court's jurisdiction based on the Statute in conjunction with compromissory clauses. The ICJ was nevertheless willing and able to pronounce itself on questions of general international law, in particular, but not only when parties to the dispute agree on the existence of a rule of customary international law. As general principles of law ascertained in municipal legal orders do no feature prominently in the Court's judgments, states will presumably invoke other concepts or general principles of international law when they make case their case. Turning to the ILC, one could have thought that the establishment of the ILC in order to progressively develop and codify international law would go to the detriment of customary international law and that, therefore, the very establishment of the ILC expressed a preference against one source (customary international law) and benefited treaties. The practice since the ILC's establishment has developed differently, however. The ILC contributed to the acceptability of customary international in the international community, and by studying not only questions of treaty law and customary international law but also general principles of law in a separate project, the ILC avoided

a sources bias which could have arisen if, for instance, general principles had not been chosen as a separate topic.

In conclusion, both the ICJ and the ILC consider principles expressed in treaties when identifying, for the purposes of judicial application or for the purpose of progressively developing and codifying, customary international law.

Whereas the preceding chapters studied the "generalist" perspective, the next chapters will be concerned with the interrelationship of sources through the lenses of specialized courts and tribunals.