Chapter 4: Concluding observations on the comparative and historical perspectives

At the end of the part on comparative and historical perspectives on the interrelationship of sources and of written and unwritten law, a few preliminary observations are in order.

The comparative legal perspectives illustrate the shift of source preferences, the relative importance of written and unwritten law and the recalibration of the sources' relationship the outcome of which may depend on the spirit of the time, the legal culture, the institutional support for one source or the other. Moreover, different source preferences can also be the reflection or symptom of a larger political conflict, as the third chapter pointed out with respect to the debate at the 1930 codification conference.[1] The reasons for source preferences thus can be manifold: they can relate to the relative (un)certainty as to written or unwritten law, they do not even have to strictly relate to the specific sources or forms of law but can be an expression of doctrinal or legal-political preferences or resulting from one's own concept of law, as was illustrated, for instance, reference to the examples of Gény, Saleilles, the comparison between Kelsen and Esser, or Kelsen and Lauterpacht. Therefore, the study of the interrelationship of sources should not stop at sources doctrine but examine the legal reasoning and context more broadly.

The preceding two chapters delved, by way of example, into different contexts. The international legal order has, just as municipal legal orders, its own history. It is submitted, though, that the experiences in international law and in municipal are not strictly separated und unrelated. The Blackstonian assimilation of customs and maxims of law within the concept of common law may have informed Lord Phillimore's thinking when he critiqued what appeared to him to be an artificial distinction between customary international law and general principles of law.[2] Moreover, it has been pointed out that the triad of sources already set forth in the Prize Court Convention and the inclusion of general principles of justice and equity were intended to reflect

1 The substance-matter of this debate will be approached below, p. 558.
2 See above, p. 107, p. 174.

experiences made in municipal law with respect to the judicial administration and development of law.[3]

This study, therefore, considers general principles of law in light of the discussion in legal theory and in municipal legal systems. Certainly, one cannot find all aspects discussed in relation to general principles in legal theory[4] in the discussion of the Advisory Committee of Jurists[5]. Nor can it be completely excluded that a different understanding of general principles of law exists in the international legal order. Yet, it is submitted that the experiences both in domestic legal orders and in the international legal orders informed and continue to inform the discussion of general principles of law which are intrinsically connected to legal reasoning and the systematization of the law.

This view finds support to some extent, for example, in the context of the ILC's recent work on general principles of law the focus of which does not lie on legal theory but on the practice of states and the reasoning of courts and tribunals.[6] According to the draft conclusion six as adopted on first reading, "[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*."[7] In a similar sense, it has been argued in the second chapter that general principles need to adapt to a normative context and are qualified by other principles and rules.[8] Draft conclusion 7 recognizes the possibility that principles "may be formed within the international legal system" and that it is "necessary to ascertain that the community of nations has recognised the principle as intrinsic to the international legal system."[9] The commentary to draft conclusion 7 provides that the identification of a general principle of law that may have formed within the international legal system starts with an

3 See above, p. 168.
4 See above, p. 138.
5 See above, p. 171.
6 On this project, see below, p. 386.
7 *ILC Report 2022* at 308 footnote 1189 (italics added); see now ILC Report 2023 at 20. See also *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 9 April 2020 UN Doc A/CN.4/741 23 para 75 (arguing that a principle derived from domestic legal orders "must be compatible with the fundamental principles of international law" and "capable of existing within the broader framework of international law."
8 See above, p. 142 and p. 147.
9 *ILC Report 2022* at 308 footnote 1189, 317, 322; see now ILC Report 2023 at 22 ff.

analysis of "existing rules in the international legal system".[10] In a similar sense, the views presented in the second chapter have argued that new legal principles can emerge within the same legal system, as abstractions of more specific rules and of legal practice.[11]

However, where certain authors discussed in the second chapter emphasized the creative role of the courts in the positivization of principles[12], the ILC conclusions emphasize that courts' decision are subsidiary means for the determination of principles.[13] The creative role of the law-applying authorities was described to a certain extent in the Special Rapporteur's second report. Addressing the identification of principles underlying general rules of conventional and customary international law, the Special Rapporteur argued that "the approach here is essentially deductive"[14]; 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"[15], the deduction in relation to the ascertainment of general principles is said to be 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 [...]"[16]

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10 ibid 322; ILC Report 2023 at 23.

11 Cf. above, p. 141. Cf. also *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 38 para 119 (such principle has been recognized by the community of nations if one can ascertain that it "is widely acknowledged in treaties and other international instruments; underlies general rules of conventional or customary international law; or is inherent in the basic features and fundamental requirements of the international legal system."), 47 para 147 ("This principle inspires and finds reflection in various international instruments, and has been often referred to in the case law"), 52 para 165 ("[w]hat matters is the clear acknowledgment through treaties and other international arguments of the existence of a legal principle of general scope of application").

12 See above, p. 144.

13 *ILC Report 2022* at 307 footnote 1189; ILC Report 2023 at 25 ff. See also *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur* 32 para 97 (decisions as evidence "that a principle common to the principal legal systems of the world is transposed to the international legal system").

14 ibid 52 para 166.

15 ibid 52 para 167.

16 ibid 53 para 168 (italics added).

"The main criterion *to establish the existence*" comes very close to acknowledging the creative or, depending on one's understanding of this term, law-making role of courts. The draft conclusions, however, are mainly concerned with the identification of existing general principles of law, rather than with their formation and emergence. Yet, by recognizing the possibility that general principles may form within the international legal system and by emphasizing at the same time that a general principle must be recognized by the community of nations, the draft conclusions can be read as support of the idea of the dual character of general principles, the reconciliation between stability and change, between the accumulation of legal experience and the law in action, between restraining and liberating the judicial function.