Part E.

Doctrinal Perspectives and Conclusions

Chapter 12: Doctrinal perspectives on and discussions of the interrelationship of sources

A. Introduction

This section focuses on different trends in the discussion of the interrelationship of sources which illustrate the contingency of the sources discourse and its reflection of contemporary challenges. The chapter will first address the early interest in general principles (B. I.). Subsequently, the chapter will illustrate how scholars developed different approaches to new norms (B. II.) that were discussed in relation to UN General Assembly Resolutions. The enter into force of several codification conventions that had been prepared by the ILC as well as the *North Sea Continental Shelf* judgment of the International Court of Justice shifted the discussion to the relationship between customary international law and treaty law (B. III.). The interest in customary international law which was increased by the Nicaragua judgments of the International Court of Justice inspired both refinements in the discussion of the relationship between treaty and custom and critique which emphasized the merit of treaty law and of general principles of law (C.). While approaches during the 1990s and early 2000s discussed the sources against the background of community interests, so-called postmodern positivist approaches have subsequently emerged which place less emphasis on value-based approaches and more emphasis on methodological self-restraint and on the written law (D.).

B. Shifting research interests in specific sources

I. The early interest in general principles of law prior to the rise of codification conventions

One standard work of reference on general principles originated in the 1950s and was written by Bin Cheng who situated the concept of general principles within the discussions of the judicial interpretation and application of the law

and of the law in action, or in his words, "living law".[1] His cognitive, scholarly interest was directed at the identification of principles in the judgments and decisions of international courts and tribunals by way of induction. Accordingly, he identified four principles which he deemed to be a necessary component of any legal order, namely the principle of self-preservation, the principle of good faith, the principle of responsibility and the principles governing judicial proceedings, from all of which sub-principles could be derived in judicial practice.[2] Cheng discussed the relationship between rules and principles and argued that principles could be understood as "bases of positive rules of law. The latter are the practical formulation of the principles and, for reasons of expediency, may vary and depart, to a greater or lesser extent, from the principle from which they spring."[3] Therefore, the first step in identifying a general principle was "a process of induction from the positive law of any single system".[4] Cheng stressed that this process must examine the positive law's *ratio legis*.[5] The relationship between general principles and other sources of international law was briefly addressed: forming the bases of positive rules and governing the interpretation of other rules, general principles were said to be of "superior value", but rules in derogation of general principles were said to remain binding.[6]

Other scholars stressed the potential of general principles for emerging fields which were not traditionally govern by public international law. Against the background of the *Abu Dhabi* arbitration[7], Arnold Duncan McNair "sub-

1 Cheng, *General Principles of Law as applied by International Courts and Tribunals* 16-17.

2 ibid 29 ff., 105 ff., 163 ff., 257 ff., 390.

3 ibid 376.

4 ibid 376.

5 ibid 376-377.

6 ibid 393. He discussed this question after pointing out that general principles can be modified, and stressed that the possibility of derogation will not likely occur very often. The interrelationship was not discussed in great detail cf. Elihu Lauterpacht, 'Review of Books General Principles of Law as Applied by International Courts and Tribunals' (1953) XXX BYIL 545, arguing that the title of Cheng's study would be misleading and that Cheng would depart from the term by not distinguishing between general principles of law and general principles of international law; for a similar critique see Friedmann, 'The Uses of "General Principles" in the Development of International Law' 286 footnote 21.

7 *Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi* 1 ICLQ 247, 250-251; see generally Rudolf Dolzer, 'Abu Dhabi Oil Arbitration' [2006] Max Planck EPIL para 8; on the doctrine of internationalized contracts see above, p. 571.

mitted that the legal system appropriate to the type of contract under consideration is not public international law but shares with public international law a common source of recruitment and inspiration, namely, 'the general principles of law recognized by civilized nations'."[8] Francis Mann, however, was skeptical and stressed that general principles of law would not constitute a legal system of their own, "unless they are equiparated to public international law."[9] According to Jenks, the emergence of newly independent states and the cultural diversity would not necessarily detrimental to general law, customary international law or general principles as long as this new development would be taken into account in the identification of those sources.[10]

Wolfgang Friedmann also stressed the significance of general principles for the further development of new branches of international law.[11] He did not expect "a flood of international arbitral or judicial decisions spelling out these principles" as general principles "are and will remain implicit insofar as they are assumed rather than spelled out in international transactions and agreements."[12] He distinguished between general principles of interpretation and of approach, general principles as minimum standards of procedural fairness, and substantive principles.[13] As the distinction between public and

8 Arnold Duncan McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 BYIL 6, see also 19.

9 Mann, 'The Proper Law of Contracts Concluded by International Persons' 44-45; cf. on this debate also Clarence Wilfred Jenks, *The Proper Law of International Organizations* (Stevens & Sons 1962) 152-154.

10 Jenks, *The common law of mankind* 104 ff., see also 120 where Jenks proposed nine general principles which he partially justified by reference to diverse municipal legal orders, namely, the principle of sovereignty being subject to law, the principle of *audiatur et altera pars* and the independence of the judiciary, the principle of self-defence being subject to proportionality, the principle of *pacta sunt servanda*, the principle of respect of acquired rights, the principle of consultation prior to action affecting the interests of others, the principle of liability for unlawful harm to one's neighbour, the principle of respect for human rights, including equality before the law, and the principle that international law is a body of living principles; see also Friedmann, *The Changing Structure of international law* 297-340 on a discussion of universality in light of different legal families and political ideologies.

11 See for instance ibid 190; Wolfgang Friedmann, 'General Course in Public International Law' (1969) 127 RdC 149.

12 Friedmann, 'The Uses of "General Principles" in the Development of International Law' 283.

13 ibid 283, 287, 297. He distinguished general principles from natural law which would only be a "camouflage of the real problem", Friedmann, *The Changing Structure of international law* 77.

private law would lose significance in municipal law, international lawyers should not confine comparative legal research to private law only, they should rather extend it to public law.[14] In contrast, customary international law was said to be "too clumsy" and too "slow to accommodate the evolution of international law in our time", it was said to represent an "unsuitable vehicle for international welfare and cooperative international law", where specific and technical rules were necessary.[15] Friedmann acknowledged that customary international law might form "much easier and faster"[16] and emphasized the "constant interaction between custom-which in contemporary conditions may sometimes be formed with astonishing rapidity-and treaty law."[17] In his view, however, "in the area of the international law of co-operation, it is only by treaty or other international agreements that progress can be achieved".[18] To Friedmann, the formation of customary international law in the law of the sea with respect to the continental shelf or the extension of the territorial sea

14 On general principles of administrative law see also Jenks, *The Proper Law of International Organizations* 59-62.

15 Friedmann, *The Changing Structure of international law* 121-122.

16 Friedmann, 'General Course in Public International Law' 132, with reference to transportation and communication. As he noted, the Brierly treatise (edited by Waldock) stated that the customary rule of sovereignty over air developed rather quickly at the beginning of the 20th century, compare James Leslie Brierly, *The law of nations: an introduction to the international law of peace* (6th, ed. by Humphrey Waldock, Clarendon Press 1963) 62: "The growth of a new custom is always a slow process, and the character of international society makes it particularly slow in the international sphere. The progress of the law therefore has come to be more and more bound up with that of the law-making treaty. But it is possible even today for new customs to develop and to win acceptance as law when the need is sufficiently clear and urgent. A striking recent illustration of this is the rapid development of the principle of sovereignty over the air." See also at 218, stating that the doctrine of territorial air space was adopted in the Paris Convention on Air navigation in 1919 and reaffirmed in the Chicago Convention of 1944. As a consequence of this doctrine, "only by virtue of a treaty could one state enjoy rights in the air space of another [...]".

17 Friedmann, 'General Course in Public International Law' 134.

18 ibid 136: "[...] in the area of the international law of co-operation, it is only by treaty or other international agreements that progress can be achieved. The objectives of international welfare organisation require specific regulation, which cannot be achieved by the slow-moving and some- what imprecise methods of custom. It is not possible to agree on fishery conservation measures, or on the stabilisation of prices of commodities, or on international minimum wage standards, other than by specific agreements, which formulate precise standards and obligations."

only represented "a retrograde development" which consolidated "extensions of national sovereignty at the expense of international freedoms".[19]

The early interest in general principles of law of the scholars depicted in this chapter can be seen against the background of the slow progress of success of the International Law Commission in the progressive development and the codification of customary international law.[20] However, when codification conventions were adopted and the ICJ addressed the question of the relationship between conventions and customary international law, the scholarly interest in sources shifted to customary international law.

II. Different approaches to new norms

The emergence of new norms became another subject-matter which was discussed in the doctrine of sources. Roberto Ago proposed the concept of spontaneous law (1.), Bin Cheng and Karl Zemanek approached the question of the normative value of UNGA resolutions from the perspective of customary international law and general principles of law respectively (2.).

1. Roberto Ago's spontaneous law

Roberto Ago's writings on the emergence of spontaneous norms as object of legal research[21] was primarily concerned with legal theory and a critique of voluntaristic positivism, which is noteworthy given its strong roots in the thinking of Italian international lawyers.[22] Spontaneous norms, he claimed, emerged in the general, as opposed to unanimous, conscience of a legal

19 Wolfgang Friedmann, 'The North Sea Continental Shelf Cases- A Critique' (1970) 64 AJIL 233 (quote), 239-240.

20 Cf. Lauterpacht, 'Codification and Development of International Law' 17, who spoke of "the absence of agreed law"; for a treatment of custom see Kunz, 'The Nature of Customary International Law' 662 ff.

21 In this aspect his work bore a certain similarity with Cheng's focus on the living law, see above, p. 636.

22 For this observation, see Pierre-Marie Dupuy, 'Communauté Internationale et Disparités de Développement Cours général de droit international public' (1979) 165 RdC 29; but see also Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts' 640 (noting that already Anzilotti had emphasized the spontaneous character of customary international law); Anzilotti, *Lehrbuch des Völkerrechts* 60-63; for a contextualization within Italian legal scholarship see

community.[23] Because of their unwritten and spontaneous nature, they could not be controlled or predicted by formal law-ascertainment mechanisms and procedures.[24] Those norms could only be observed by way of inductions of their manifestations in social life which would be the task of legal science.[25] From the perspective of legal methodology, Ago's theory can be read as critique against a legal science which excludes an examination of the empirical reality.[26] According to Ago's account, the relation between formally enacted law and spontaneous law could not be determined in the abstract but only under consideration of the particular historical circumstances and the preference of the respective legal society.[27]

Ago's focus on "law in force" in addition to the law explicitly laid down[28] is exposed to the critique that the existence of a common social conscience is unproven, and that speculation thereof should not replace consideration of procedures through which law originates and by which a norm might legitimately receive its legally binding character.[29] Also, Ago's theory has been criticized for elevating the legal science improperly to the actual source of this spontaneous law and for blurring the line between law and non-law.[30] Furthermore, the objections can be raised that the spontaneous law could be characterized as customary international law which would belong to positive international law and which would be created through elements prescribed by international law, namely a general practice which is accepted as law.[31] Even

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Antonello Tancredi, 'The (Immediate) Post-World War II Period' in Giulio Bartolini (ed), *A History of International Law in Italy* (Oxford University Press 2020) 168 ff.

23 Ago, 'Science juridique et droit international' 932.

24 Ago, 'Positive Law and International Law' 729, 732; Ago, 'Science juridique et droit international' 940, 942, 944.

25 ibid 932; on the inductive method in relation to unwritten law see also Ago, 'Positive Law and International Law' 723, 728-9.

26 Tancredi, 'The (Immediate) Post-World War II Period' 179.

27 Ago, 'Science juridique et droit international' 942-943.

28 See Ago, 'Positive Law and International Law' 698-699, 724 ff., 728-733.

29 Herbert Günther, *Zur Entstehung von Völkergewohnheitsrecht* (Duncker & Humblot 1970) 93-95.

30 Tancredi, 'The (Immediate) Post-World War II Period' 180-1; Josef L Kunz, 'Roberto Ago's Theory of a "Spontaneous" International Law' (1958) 52(1) American Journal of International Law 90-1.

31 In this sense ibid 88-90.

though customary international law may emerge or be made unconsciously[32], the creation of customary international law can also, as described by Mendelson, "emerg[e] as the result of careful calculation on the part of its instigators and is thus far from spontaneous".[33] Moreover, it can be argued that Ago's account juxtaposed enacted law that has been explicitly laid down on the one hand and what Ago characterized as spontaneous law on the other hand. This invites the criticism that it is questionable whether the development of the law is best described by a separate category of spontaneous law rather than by a focus on the interpretation and application of the enacted law.[34]

With other scholars discussed in this study, for instance Roscoe Pound[35], Benjamin Cardozo[36], Josef Esser[37] and Lon Fuller[38], Ago shared the idea that law could not be fully understood by way of reference to formal sources only without taking account of the actual legal practice within a given community.[39] It is certainly true that understanding customary international law only as "spontaneous law" is problematic from the perspective of judicial application. In fact, international legal scholarship and the recently adopted conclusions of the ILC[40] can provide important guidance and contribute to a certain formalization of the evidence of customary international law by highlighting the role of the two elements and explaining which materials may be relied upon in order to ascertain the existence of a general practice accepted as law.[41] Without this guidance, a rationality control of the identification, interpretation and application of customary international law would

32 Cf. for the view of custom as unconscious lawmaking ibid 88; Kelsen, *Principles of International Law (1952)* 308; Danilenko, *Law-Making in the International Community* 78; Cassese, *International Law* 156.

33 Mendelson, 'The subjective Element in Customary International Law' 179.

34 See in this sense also Kunz, 'Roberto Ago's Theory of a "Spontaneous" International Law' 88 ("But the 'whole law in force' consists also of individual concrete norms, created by judicial and administrative decisions [...]").

35 See above, p. 115.

36 See above, p. 117.

37 See above, p. 144.

38 See above, p. 118.

39 Cf. Carlo Focarelli, 'The Concept of International Law: The Italian Perspective' in Peter Hilpold (ed), *European International Law Traditions* (Springer 2021) 105 (highlighting the "social attunement" of Ago's theory).

40 See above, p. 372.

41 On the two elements, see above, p. 75; see also Bos, *A methodology of international law* 224; d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' 25 ("formal programme of evidence").

be difficult and customary international law might not fulfil its legitimizing function. Having said this, one should also, however, avoid the other extreme. A formalization of customary international law will be possible only to a certain extent.[42] In the end, the emergence unwritten law, of customary international law and general principles of law, is similar to a path which emerges as one walks it.[43] Roberto Ago's scholarship is an important reminder of this characteristic of unwritten law.[44]

2. Bin Cheng and Karl Zemanek

The rise of "parliamentary diplomacy"[45], the exchange of views on legal matters within the United Nations and in particular the General Assembly, the proliferation of resolutions gave rise to debates as to the legal value of formally nonbinding General Assembly resolutions and on how and whether the doctrine of sources could take account of these development.[46]

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42 For a positive assessment of Ago's theory see Pierre-Marie Dupuy, 'Théorie des sources et coutume en droit international contemporain' in Manuel Rama-Montaldo (ed), *El derecho internacional en un mundo en transformacion: liber amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga* (Fundación de Cultura Universitaria 1994) vol 1, 63; cf. also on the formal character of custom recently Kolb, 'Legal History as a Source: From Classical to Modern International Law' 290: "The better view is that the customary process is recognized in international law as a formal source, but that the process itself makes direct reference to the manifold social activities of the subjects of the law whose behaviour customary international law seeks to regulate."

43 Wolfke, *Custom in present international law* 62.

44 See also Mendelson, 'The subjective Element in Customary International Law' 179 ("Ago's description does serve to remind us that, in trying to fit wild custom into the formalistic clothing of 'civilized' lawmaking, we may deform its nature.").

45 Philip C Jessup, 'Parliamentary diplomacy: an examination of the legal quality of the rules of procedure of organs of the United Nations' (1956) 89 RdC 181 ff.

46 Eg Obed Y Asamoah, *The Legal Significance of the Declaration of the General Assembly of the United Nations* (Martinus Nijhoff 1966) 46 ff. (resolutions as state practice) and 61-62 on whether they could indicate general principles of law; Taslim Olawe Elias, 'Modern Sources of International Law' in Wolfgang Friedmann, Louis Henkin, and Oliver Lissitzyn (eds), *Transnational law in a changing society: essays in honor of Philip C. Jessup* (Columbia University Press 1972) 34 ff.; Krzysztof Jan Skubiszewski, 'A New Source of the Law of Nations: Resolutions of International Organizations' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Faculté de Droit de l'Univ de Genève 1968) 508 ff.; Christoph Schreuer, 'Recommendations

Commenting on UNGA resolutions on Outer Space Bin Cheng considered the idea of "instant customary international law" which in his view, however, had not emerged in the specific context as states held too diverging views on the content and bindingness of the resolutions 1721A[47] and 1962[48].[49] Cheng argued that a *opinio juris generalis* would be the single constitutive element of custom while practice would be important evidence to identify and interpret the *opinio juris generalis*.[50] He later preferred the term "*general international law* [...] because *consuetudo* is now clearly shown not to be a requisite".[51]

Karl Zemanek adopted a different perspective on the development of the law of outer space in the very same year when Cheng published his article on instant custom. Zemanek did not look at this development through the lenses of customary law, but through the concept of "general principles".[52] In his view, the value of the resolutions would not be adequately captured by way of reference to the resolution's lack of binding force. He suggested that article 38(1)(c) ICJ Statute could be interpreted as referring not only to principles recognized in municipal laws but also to those principles at the international plane.[53] The votes in favour of the resolutions would imply the recognition of the resolutions' underlying principles by the states, which "would appear to make a strong case for suggesting that these principles

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and the Traditional Sources of International Law' (1977) 20 German Yearbook of International Law; Friedmann, 'General Course in Public International Law' 142: "apart from the traditional sources of law-making, custom and treaty, we must look to other sources of international law."; critical Baxter, 'Multilateral Treaties as Evidence of Customary International Law' 71.

47 UNGA Res 1721 (XVI) A (20 December 1961) UN Doc A/RES/1721(XVI)A-E.

48 UNGA Res 1962 (XVIII) (13 December 1963) UN Doc A/RES/1962(XVIII).

49 As Mendelson stated, it is often not remembered when discussing Cheng's article that Cheng concluded that no instant custom had emerged, Maurice H Mendelson, 'The Formation of Customary International Law' (1998) 272 RdC 371.

50 Bin Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?' (1965) 5 Indian Journal of International Law 36-37, 42, 45-48.

51 Cheng, 'Custom: the future of general state practice in a divided world' 548; see also the often quoted remark of Robert Yewdall Jennings, 'What is International Law and How Do We Tell It When We See It ?' (1981) 37 Schweizerisches Jahrbuch für internationales Recht 5: " [...] most of what we perversely persist in calling customary international law is not only not customary law: it does not even faintly resemble a customary law."

52 Karl Zemanek, 'The United Nations and the Law of Outer Space' (1965) 19 The Year Book of World Affairs 207 ff.

53 ibid 208.

should be treated as General Principles of Law Recognised by Civilized Nations."[54] Yet, principles would not replace customary international law (or treaty obligations) but require the latter: "[P]rinciples are not norms directly applicable. They are abstractions, to be implemented by norms of contractual or customary international law, or by a judgment in a given case"; rather than regulating states' behaviour in outer space, principles are said to "trace the lines along which the law of outer space, whether contractual or customary, is to develop. It is here that their real importance is found".[55]

The articles written by Cheng and Zemanek demonstrate that the very same phenomenon can be discussed under different sources concepts. Cheng's discussion of "instant custom" may have become particularly famous, and be it only because it is usually approached with skepticism; while custom can emerge rapidly, part of the legitimizing function of custom rest on the fact that it offers general rules which had been applied before and on the insight that "what is done repeatedly by a large number of States cannot be fundamentally detrimental to anyone's interests."[56] Zemanek's article opened the concept of general principles up to developments at the international plane and stressed principles' guiding function for the development of treaty law and customary international law.

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54 Zemanek, 'The United Nations and the Law of Outer Space' 209.

55 ibid 210 (pointing also out that "the development of a divergent evolution of customary rules "would [...] either indicate a change in the general legal conscience, or be evidence to the effect that such a conscience never existed"). Simma later argued that Zemanek failed to consider general principles of law as basis for international responsibility in the context of environmental protection after Zemanek had rejected the existence of a rule of customary international law, Bruno Simma, 'Die Erzeugung ungeschriebenen Völkerrechts: Allgemeine Verunsicherung- klärende Beiträge Karl Zemaneks' in Konrad Ginther and others (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität: Festschrift für Karl Zemanek zum 65. Geburtstag* (Duncker & Humblot 1994) 112-113, see Karl Zemanek, 'State Responsibility and Liability' in Winfried Lang, Hanspeter Neuhold, and Karl Zemanek (eds), *Environmental Protection and International Law* (Graham & Trotman 1991) 187 ff. It can be argued though that Zemanek's work can be read as suggesting that principles would not directly regulate or apply in the same direct manner in which customary international law and treaty law would apply.

56 Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' 331.

III. Codification studies: the interrelationship between treaties and custom

Against the background of the codification conventions in the 1960s, the discourse on the interrelationship of sources shifted to the relationship between treaties and custom. The question arose whether codification would leave any room for customary international law[57] and whether treaties could be regarded as proper state practice.[58] This section focuses on the work of Richard Baxter, Anthony d'Amato and Hugh Thirlway.

1. Richard Baxter's paradox

Prior to the 1969 *North Sea Continental Shelf* judgment, Baxter commented on the topic of the relationship between treaties and custom. He argued with reference to the judicial practice also of the ICJ that treaties could be evidence of customary international law and even of general principles of law.[59] In his view, treaties could have effects beyond codifying customary international law, they would break "down the barriers of strict State sovereignty", indicating "that the matter is becoming one of international concern and is gradually ceasing to be a question within the domestic jurisdiction of States."[60] Codification conventions could impact the further development of customary international law and arrest the latter's "change and flux".[61] Furthermore, treaties as evidence might have the advantage of "speak[ing] with one voice as of one time", while other evidences of state practice might be "ambiguous and inconsistent" and render reconciliation necessary.[62] Baxter seemed to be also sympathetic to the view that the "adhesion of the great majority of the

57 Tammes, 'Codification of International Law in the International Law Commission' 325-326: conventions "tend to drive out customary international law"; see also Karl, *Vertrag und spätere Praxis im Völkerrecht: zum Einfluß der Praxis auf Inhalt und Bestand völkerrechtlicher Verträge* 362.

58 Cf. Wolfke, *Custom in present international law* 70 (rejecting treaties as practice).

59 Baxter, 'Multilateral Treaties as Evidence of Customary International Law' 298. On the role of bilateral treaties see ibid 275-6; Baxter, 'Treaties and Customs' 75 ff.

60 Baxter, 'Multilateral Treaties as Evidence of Customary International Law' 276.

61 ibid 299 ("The clear formulation of rules in a codification treaty and the assent of a substantial number of States may have the effect of arresting change and flux in the state of customary international law. Although the treaty 'photographs' the state of the law as at the time of its entry into force a to individual States, it continues, so long as States remain parties to it, to speak in terms of the present.").

62 ibid 300.

important States of the world to [humanitarian treaties] [...] may act in such a way as to impose the standards of the treaty on non-parties."[63]

He returned to this subject a few years later under the impression of the *North Sea Continental Shelf* judgment.[64] He maintained that treaty ratification can count as state practice.[65] Based on his interpretation of the *North Sea Continental Shelf* judgment he stated what later would be called the Baxter-paradox:

> "It is only fair to observe that the proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty."[66]

In other words, international treaties constituted "an agreed starting point- an attractive force to which non-party practice will be drawn like iron filings to a magnet"[67], but once the treaty becomes successful and increasingly ratified, customary international law would be difficult to prove. Baxter acknowledged that the substance of widely ratified treaties can become "general international law".[68]

If one evaluates Baxter's statements, one can say in hindsight that the so-called Baxter-paradox did not assert itself in practice[69], the paradox remained

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63 If, he added, one accepts some form of legislation in international law, Baxter, 'Multilateral Treaties as Evidence of Customary International Law' 300, see also at 286, where he argued that such view could be supported by the fact that humanitarian conventions were often build on past conventions. He conceded, however, that the distinction between humanitarian treaties and other treaties was one "which might be made but which is not yet reflected in State practice or in other sources of the positive law."

64 His analysis was informed by the judgment, at the same time he was critical of parts of it, in particular of the requirement of the "fundamental norm-making character", Baxter, 'Treaties and Customs' 62.

65 ibid 55-56: "If 30 States are parties to the treaty, the decision-maker, legal adviser, or scholar must give to the treaty the same weight that would be accorded to 30 simultaneous, contemporary, and identical declarations by those 30 States of their understanding of customary law."

66 ibid 64.

67 ibid 73.

68 ibid 103.

69 Kolb, 'Selected problems in the theory of customary international law' 146.

a theoretical one. States may conclude conventions with the very objective to change customary international law and may act not soley in pursuance of treaty in pursuance of treaty obligation with *opinio juris conventionalis*.[70] The ICJ jurisprudence illustrates that there may be a covergence of sources in the sense that treaty and custom can converge into common principles, for instance the prohibition of the use of force or the right to self-determination.[71] The dynamic relationship between treaties and custom makes it difficult to draw conclusions from the practice of states. In certain instances, it may indeed be argued that "when time passes and States neglect to become parties to a multilateral instrument, that abstention constitutes a silent rejection of the treaty".[72] It is, however, equally possible that states, while supporting the substance of the treaty, disagreed with procedural rules or that states are convinced that the content of the convention has become binding as customary international law.[73]

The so-called Baxter-paradox is important in that it reminds one of the distinctiveness of conventions and customary international law and cautions against an equation of the two without demonstrating a certain level of acceptance of the rule set forth in the convention outside the group of states parties. Moreover, it should be borne in mind that the described paradox was an interpretation of the *North Sea Continental Shelf* judgment and that it, therefore, should be interpreted restrictively, taking the ICJ jurisprudence as a whole into account.

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70 See Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 109: "One possibility [to resolve the Baxter paradox] would be to generate a presumption of *opinio juris* from widespread participation in a treaty, at least in normative terms. Indeed this is effectively what the Eritrea-Ethiopia Claims Commission did as regards the four 1949 Geneva Conventions and its Additional Protocol I."

71 See above, p. 285.

72 Baxter, 'Treaties and Customs' 99, 100.

73 Cf. Greenhill and Strausz, 'Explaining Nonratification of the Genocide Convention: A Nested Analysis' 74-375, 381-382.

2. Anthony d'Amato and the formation of custom by treaties

In Anthony d'Amato's view, treaties and customary international law were not isolated from each other.[74] While binding only parties, treaties could constitute state practice relevant for customary international law.

> "Not only do [treaties] carve out law for the immediate parties, but they also have a profound impact upon general customary international law [...] generalizable provisions in bilateral and multilateral treaties generate customary rules of law binding upon all states. [...] The claim made here is not that treaties bind nonparties, but that generalizable provisions in treaties give rise to rules of customary international law binding on all states."[75]

Parties to a treaty could not control the contribution the treaty might make to customary international law as this would depend on the other treaties concluded by different states and the reactions and expectations of the international community.[76] Customary international law, one might describe his view, emerges from the entirety of acts of states in the system.[77] Illustrative in this regard is his critique of the 1986 *Nicaragua* judgment, where he criticized that the Court misunderstood the interaction of treaties and custom.

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74 D'Amato, *The Concept of Custom in International Law* 149; Anthony D'Amato, 'Treaties As a Source of General Rules of International Law' (1962) 3 Harvard International Law Journal 10-11; Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 AJIL 102 ff. His studies are not primarily concerned with general principles of law which are described as municipal law analogies and associated with "the possibility of systemic dysfunction" when being applied at the international level, Anthony D'Amato, 'Groundwork for International Law' (2014) 108 AJIL 672: "[A] rule that has its origin in the domestic law of many states [...] cannot automatically be lifted up to the plane of international law without risking the possibility of systemic dysfunction." Anthony d'Amato, 'International Law as an Autopoietic System' in Rüdiger Wolfrum and Volker Röben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 393-394 (general principles would play a role in international procedural law).

75 D'Amato, *The Concept of Custom in International Law* 104, 107.

76 ibid 151. Yet, the parties' intent as to whether a provision shall be regarded generalizable should be given weight, at 110.

77 D'Amato, 'Groundwork for International Law' 667-668: "[C]ustomary international law is not a collection of discrete rules or statutes; rather, its norms are generalizations made from observations of state practice and, in particular, from the resolution of conflicting claims within that practice. Because every act of a state is "connected" to every other act—that is, it has ramifications for other state behaviors (Axiom 1)—the network of customary law is an analog (not a digital) network that fills the plenum of international transactions."

In his view, the Court took a "unidimensional approach"[78] to this interplay by simply equating article 2(4) UNC with customary international law without appreciating the entirety of acts, in particular subsequent practice to article 2(4) UNC and contrary practice, all of which led d'Amato to arrive at a conclusion which differed from the Court's outcome.

While one does not have to agree with d'Amato's critique of the judgment, the idea to understand customary international law by reference to states' treaty obligations can explain how the rise of multilateral human rights treaties began to enrich and pervade custom.[79] It also points to the fact that the emergence of customary international law is to some extent unconscious lawmaking. However, to argue that all treaties that contain generalizable provisions contribute to customary international law without making any gradual distinction as to the respective weight or adding any nuance goes too far.[80] Understanding customary international law solely as equilibrium of different practices can risk reducing law to what states do and undervaluing law's normative aspiration and the significance of the legal craft and normative considerations in the identification, interpretation and application of customary international law. Even the observation of what states do requires a perspective, a default position on the basis of which the observation is made.

3. Hugh Thirlway

Hugh Thirlway discussed in his first monograph the future of customary international law in the age of codification conventions. He used to be skeptical of whether the customary process of action and reaction, claim and counterclaim between states could contribute to the emergence of norms which protect the human rights of a state's citizen, and he suggested that the only way to regulate these relationships internationally would consist in the

78 D'Amato, 'Trashing Customary International Law' 105.

79 On this topic see Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1995) 25(1) Georgia journal of international and comparative law 92 ff.

80 See also the critique by Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 268; Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law* 81-84, taking issue with the unqualified manner of d'Amato's propositions according to which the process described would always take place.

conclusion of treaties.[81] Nevertheless, in his view, custom would continue to play a role as source of international law.[82] It might, as an independent source, apply *secundum legem* and govern legal relationship which were not covered by a treaty *ratione personae* or *ratione materiae* or in cases of a treaty's *renvoi* to custom.[83] Custom might fill the gaps and provide for the rules of interpretation, and it might even operate *contra legem* and derogate from the treaty.[84]

Thirlway questioned convincingly the underlying idea of the Baxter's paradox, namely that a state, as Thirlway put it, "which becomes a party to the treaty withdraws itself from the body of States which can contribute, by suitable acts, to the formation of customary law on the matter covered by the treaty".[85] In his view, the practice of parties to a treaty should not be counted twice, namely when states ratify a treaty and when they implement a treaty, since "the content of the rule is fixed" by the treaty.[86] The notion of a "fixed content" points to the fact that states have made deliberate decisions when negotiating and concluding the treaty. However, the dynamic element of interpretative practice and the way in which newly emerged rules of international law can inform the interpretation of the treaty according to the general rules of interpretation should not be disregarded.[87] Any consideration

81 Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law* 7-8, 10, arguing that the Nottebohm judgment would indicate that "the whole trend of customary law is opposed" to a development in which states would invoke the responsibility of other states with respect to the latter's treatment of nationals; he later raised the question of the impact of human rights treaties on customary international law, see Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' 495 ff.

82 Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law* 145.

83 ibid 95.

84 ibid 131-133, applying the teaching of Thomas Aquinas, Thirlway concluded: "Thus, when custom praeter legem begins, as a result of social development, so to encroach on the existing law's domain as to verge on the contra legem, it can nonetheless be regarded, in the light of social development, as still only praeter legem, and as tacit lawmaking so as to effect a repeal."

85 ibid 90, 91; Thirlway, *The Sources of International Law* 131.

86 Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law* 91.

87 The effects which run both way in this interrelationship were depicted in the context of the ECHR, see above, p. 403.

of the treaty as evidence of customary international law should, therefore, not stop at the letter of the treaty and instead include an assessment of states' practice in the application of the treaty, in particular when this practice expresses an agreement as to the interpretation of the treaty according to article 31(3)(b) and article 32 VCLT.

C. The interrelationship in a value-laden legal order

I. The continuing interest in customary international law in light of the *Nicaragua* judgments and skepticism

In his *Habilitation* published in 1985, Mark E. Villiger made a case in favour of the continuing significance of customary international law in a legal community which had been increasingly shaped by treaties. He noted several references in codification conventions to customary international law which would be a testimony to the importance of custom and the support of this source by states.[88] In particular, Villiger stressed that customary international law and treaties may interact in different ways, they could influence each other, nonidentical rules could modify each other, identical rules could "parallel each other and assist in their mutual interpretation and ascertainment"; at the same time, treaties and customary international law would retain their independence and individuality as sources.[89] He predicted that "customary law will continue to serve as a modern source of law".[90]

The *Nicaragua* judgments of the ICJ[91] directed the attention of many scholars to customary international law. New approaches to custom were

88 Villiger, *Customary International Law and Treaties* 290; see also Ignaz Seidl-Hohenveldern, 'Review of Customary International Law and Treaties' (1987) 38 Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht 218 (arguing that the *Nicaragua* decision confirmed Villiger's treatment of the relationship between customary international law and treaties).

89 Villiger, *Customary International Law and Treaties* 295-296.

90 ibid 296-297.

91 *Military and Paramilitary Activities in and against Nicaragua* [1984] ICJ Rep 392, 424-425 para 73, 442 para 113; *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 27 para 34, 93 ff.; also, the Court stressed in the Tehran Hostage case that the obligations under review were not just "contractual [...] but also obligations under general international law", *United States Diplomatic and Consular Staff in Tehran* 31 para 62.

suggested which focused on the interplay and the "sliding scale" between both elements.[92] Scholars discussed the significance of customary international law as general law in a value-laden legal order of an international community.[93] Commenting on the *Nicaragua* case, Theodor Meron expressed doubts on whether article 1 and article 3 of the Geneva Conventions were codifications of existing law.[94] He noted that the Court's method in the *Nicaragua* case "cannot but influence future consideration of customary law in various fields of international law, including the Geneva Conventions."[95] In particular, Meron pointed to the possibility that states may conclude treaties in order to articulate norms and values which differ from the actual practice of states.[96] According to the Baxter-paradox mentioned above, it should be "virtually impossible" to prove the customary character of a widely ratified convention such as the Geneva Conventions.[97] Meron recognized that the *Nicaragua* judgment pointed into a different direction and justified a restrictive reading of the *North Sea Continental Shelf* judgment.[98] Meron argued that customary international law in other fields such as human rights law "may have an impact on the transformation of parallel norms of the Geneva Conventions (those with an identical content) into customary norms."[99] In his view, practice in the observance of a treaty can, when accompanied by *opinio*

92 Kirgis, 'Custom on a Sliding Scale' 146 ff.; Tasioulas, 'In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case' 85 ff.

93 Hilary CM Charlesworth, 'Customary International Law and the Nicaragua Case' (1984) 11 Australian Yearbook of International Law 30-31, concluding that the ICJ attempted to reconcile the consensualist Westphalian system with idealistic communal orders for instance by regarding GA resolutions as evidence for both practice and opinio juris; in her view, the Court did not achieve a satisfactory accommodation as it emphasized verbal, idealistic practice, over real and failed to announce a new concept of custom, rather than paying lip-service to the two-elements-model; see for a communitarian perspective Tasioulas, 'In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case'.

94 Meron, 'The Geneva Conventions as Customary Law' 353, 356-357.

95 ibid 361-362.

96 ibid 363.

97 Baxter, 'Treaties and Customs' 96.

98 Meron, 'The Geneva Conventions as Customary Law' 365-367; the tension between interpretations of both judgments as to the interrelationship of sources was recognized also by other commentators, see for instance Charlesworth, 'Customary International Law and the Nicaragua Case' 27; Thirlway, *The law and procedure of the international court of justice: fifty years of jurisprudence* 134; Mendelson, 'The International Court of Justice and the sources of international law' 77-78.

99 Meron, 'The Geneva Conventions as Customary Law' 368.

juris, facilitate "the gradual metamorphosis of those conventional norms into customary law".[100] In his article, Meron paved the way for the international criminal tribunals and their interpretations of customary international law in light of other norms of international law.[101]

Other scholars had their reservations with respect to customary international law. Commenting partly prior to the *Nicaragua* decisions, Prosper Weil pointed to the risk that the weight given to customary international law in scholarship went at the expense of the technicalities and precision of treaty law.[102] According to Weil, the traditional theory of custom was mainly consensualist and a "subtle interplay between tacit intention and nonopposability", preserving and ensuring the "delicate, indeed precarious, equilibrium between two opposing concerns", namely rendering the participation of each state in custom unnecessary while permitting each state to opt out of the formation of a specific rule.[103] From Weil's perspective, the practice on which rules of customary international law were said to rest became less and less general and increasingly focused on "specially affected states", whereas the normative effects of custom, in particular when called general international law, would increase and tantamount to universality.[104] He considered these developments to be dangerous for the sovereign equality of states in a time when the "international society (has been) rendered more diverse than ever by the emergence of a hundred new states" and where international law, in order to perform its function, would be required to be

100 ibid 368; see later Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' 247; similar Cheng, 'Custom: the future of general state practice in a divided world' 533.

101 Cf. Meron, 'The Geneva Conventions as Customary Law' 356, 361-369. Cf. also Mendelson, 'The Formation of Customary International Law' 322 ff., on the "of its own impact" theory of treaties creating custom.

102 Weil, 'Le droit international en quête de son identité: cours général de droit international public' 186, noting that the customary counterpart to a provision such as article 76 UNCLOS would necessarily contain less institutional and technical rules; Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 439.

103 ibid 433.

104 ibid 436: "[...] the generality of practice has been reduced to a minimum requirement, the generality of the normative effects of customary international law has been undergoing the reverse process of constant expansion."; see also Weil, 'Le droit international en quête de son identité: cours général de droit international public' 186 ff.

"neutral".[105] Weil's scholarship cautioned against an expansive recourse to customary international law.

Writing also against an expansive understanding of customary international law, Bruno Simma and Philip Alston considered general principles as a source in particular for human rights law. The article can be read as critique of modern approaches to customary international law in particular in the context of US-American scholarship, the Third Restatement and the use of customary international law in the Alien Tort Statute litigation.[106] In their view, customary international law was in an identity crisis which would express itself in the decreasing importance of material, hard, inter-state practice, as well as in a merging of practice and *opinio juris*.[107] "[I]nstead of further manipulating the established concept of customary law based on an effective requirement of concrete practice", they suggested to consider the concept of general principles of law to explain the "the legal force of universally recognized human rights".[108] In their view, customary international law traditionally emerged from constant interactions between states, whereas the performance of most human rights obligations "lacks this element of interaction proper".[109] General principles of law, however, could emerge

105 Weil, 'Towards Relative Normativity in International Law' 419, 420, 441; Weil, 'Le droit international en quête de son identité: cours général de droit international public' 189; cf. later in a similar sense Yasuaki, 'A Transcivilized Perspective on International Law Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century' 236-237.

106 See Schachter, 'International Law in Theory and Practice: general course in public international law' 75 ff.; 334 ff.; American Law Institute, *Restatement of the law, The Foreign Relations Law of the United States*; for a response to the critique expressed by Simma and Alston see Richard B Lillich, 'The Growing Importance of Customary International Human Rights Law' (1996) 25(1-2) Georgia Journal of International and Comparative Law 1 ff.; cf. Simma, 'From bilateralism to community interest in international law' 289 footnote 194.

107 Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' 88, 96; cf. for a similar assessment Godefridus Josephus Henricus van Hoof, *Rethinking the sources of international law* (Kluwer Law and Taxation Publ 1983) 107-108; cf. Jonathan I Charney, 'Universal International Law' (1993) 87 AJIL 536-538, 543 ff.

108 Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' 98.

109 ibid 99-100, also arguing that without this element of interaction, *opinio juris* would become the only relevant element in order to distinguish customary rules operating purely domestically and internationally concordant domestic behaviour, which

not only *in foro domestico*, but also in an international setting.[110] Basing general principles of law on international materials such as UN resolutions and declarations would ensure that "the recourse to general principles suggested here remains grounded in a consensualist conception of international law", without equating the materials with State practice.[111] The article was an important contribution to a debate which often excessively focused on customary international law. It advanced a new understanding of general principles in response to what the authors considered to be an expanding understanding of customary international law.

"would overstretch the limits of even the most lenient, or "progressive", theory of customary law."

110 ibid 102 (arguing that the reference to principles *in foro domestico* stressed the importance to validate general principles without excluding such validation based on materials at the international level).

111 ibid 105; the article's critique of custom is in line with Simma's other scholarship on this topic, see on the "identity crisis" of custom Bruno Simma, 'Editorial' (1992) 3 EJIL 215 and Simma, 'Die Erzeugung ungeschriebenen Völkerrechts: Allgemeine Verunsicherung- klärende Beiträge Karl Zemaneks' 98 ff.; but cf. Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' 307-308, 313, where the authors stress the combination of custom and general principles. For skepticism of the Simma/Alston thesis to turn to general principles in cases where there is neither custom nor treaty, see Paulus, 'Zusammenspiel der Rechtsquellen aus völkerrechtlicher Perspektive' 94, 98 (debate). Turning to Philip Alston, Alston had a few years prior to the Australian yearbook article pleaded in favour of a "quality control" with respect to the recognition of rights in fora of the UN, see Philip Alston, 'Conjuring Up New Human Rights: A Proposal For Quality Control' (1984) 87 AJIL 607 ff.. However, he was also critical of reducing detailed written obligations to a set of "principles" in the context of the international labour organization, see with respect to this "turn to principles" Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2003) 15(3) EJIL 457 ff.; Bianchi, 'Human Rights and the Magic of Jus Cogens' 493, arguing that "[a]lthough this approach to the source of human rights law was presented by Alston and Simma as 'grounded in a consensualist conception of international law', their final reference to Henkin's stance on general principles common to legal systems as reflecting 'natural law principles that underlie international law' reintroduces the same ambiguity about the origin of the sources of human rights that the authors had probably set out to dispel." The present author would not concur that this last page undermined the consensualist construction, as Simma and Alston just left the question open, whether human rights (not general principles) really have to depend on a positivist, consensualist construction; cf. on this topic, to whom both authors also referred, Koskenniemi, 'The Pull of the Mainstream' 4 ff.

II. The interrelationship of sources in the international community

The scholarship on the international community demonstrates how the same overarching paradigm can lead to different source preferences and to different evaluations as to whether the traditional three sources set forth in the 1920 PCIJ Statute can operate in an international legal order which has embraced community interests expressed, for instance, in the protection of human rights or the environment.

Christian Tomuschat's Hague courses show how the three classical sources can be reconciled with the idea of the constitution of the international community.[112] Tomuschat distinguished different classes of customary international law: the constitutional foundations which included the principle of the sovereign equality of states and common values of mankind; rules which flow from those constitutional foundations, such as the prohibition of the use of force and basic principles of environment which derive from the fact of coexistence of states, and for instance the humanitarian law of warfare and the protection of human life and physical integrity, freedom from torture and slavery.[113] Also, the concept of *jus cogens* was said to "evolve from the common value fund cherished by all nations" and considered as "proof of the existence of an international community grounded on axiomatic premises other than State sovereignty".[114] The last class of rules consists of so-called contingent rules, which emerged in the practice of states.[115] In this account, customary international law is strongly linked to the idea of a legal community from which a single state could not simply withdraw itself.[116] Furthermore, Tomuschat considered that in emergency situations it might be

112 On Hague lectures on the international community: Mosler, 'The international society as a legal community' 1 ff.; Simma, 'From bilateralism to community interest in international law' 217 ff.; Robert Kolb, 'German Legal Scholarship as reflected in Hague Academy Courses on Public International Law' (2007) 50 German Yearbook of International Law 201 ff., on the "international community-oriented school of thought" (206) and its objective to "ensure a proper survival of mankind and create a more just world oder" (210).

113 Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 291-304 (these basic human rights "need no additional confirmation through practice and *opinio juris* on the one hand, or through treaty, on the other", at 303); see also Koskenniemi, 'The Pull of the Mainstream' 1946-1947.

114 Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 307.

115 ibid 308.

116 ibid; see also Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' 331 ("What is

"legitimate to derive binding rules from the basic principles upheld by the international community".[117]

The other two sources find their place as well in this conception. Tomuschat stressed the potential of general principles of law in particular for human rights law which would be concerned with the relationship between a state and individuals both at the domestic and at the international level.[118] As developments in domestic legal orders could permeate the international legal order through general principles of law, general principles of law would be different from the idea of immutable natural law.[119] General principles of law and customary international law could be distinguished according to their formation: "Whereas custom crystallizes in a bottom-up process, general principles permeate the legal order from top down."[120] General principles would be more abstract and could not be identified purely by empirical methods or as distinct patterns of behaviour.[121] Tomuschat noted the importance of the legal craft and the constructive efforts to be employed in order to recognize general principles in the law; at the same time, he stressed that recourse to general principles should not be used in order to fill any gaps "according to the arbitrary discretion of the lawyer" and should therefore be handled "with great care".[122] Treaties would constitute a means to protect basic interests of the international community and give expression to, refine and articulate already existing broad principles "which on their part are constituent elements of the international legal order."[123] A certain overlap of sources could not be excluded, in particular in the field of human rights: "Customary law, general principles recognized by civilized nations

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done repeatedly by a large number of States cannot be fundamentally detrimental to anyone's interests.").

117 Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 309 (with reference to the Nuremberg and Tokyo trials).

118 ibid 315, 321.

119 ibid 317-318, see also 320, where he argues that general principles of international law such as acquiescence or effectiveness "can be considered abstractions from treaty law and customary law in their entirety [...] [these rules], although not immutable, could only be changed in a slow-going process [...]"; Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' 335-337.

120 Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 322.

121 ibid 322.

122 ibid 322.

123 ibid 269, see also 270-271, see also 273 (on treaties "remain[ing] essentially an instrument of self-commitment"), see also 268.

and general principles of international law form an intricate network of principles and rules the substance of which is identical while their legal validity is derived from different basic concepts."[124]

Other scholars' work on the international community displayed partly a stronger source preference or a focus on the legal personality of the international community and on normative concepts outside the three classical sources set forth in article 38. Bruno Simma followed in his Hague lecture on community interests Wolfgang Friedmann and expressed a preference for treaties and general principles over customary international law. In his view, "law-making by way of custom is hardly capable of accommodating community interest in a genuine sense."[125] Customary law would consist of rules "regulating and limiting a sort of "grab race" [...] as international customary law is a natural companion of bilateralism, the multilateral treaty is an indispensable tool for fostering community interests."[126] The notion of "community interest on a bilateralist grounding" may indicate that the title "From Bilateralism to Community Interests" describes a development without suggesting a complete replacement of the former with the latter.[127]

Andreas Paulus argues in *Die Internationale Gemeinschaft* that the international community to which articles 53 VCLT refers is a community of states, and states are said to still remain the decisive actor in international law, also when it comes to lawmaking.[128] At the same time, the international community has acquired the status of a subject of international law.[129] In particular, the introduction of the concept of *jus cogens* is said to point to the development of a law which authorizes the international community to create substantive norms that protect community values.[130] In order to recognize a norm as peremptory, the international community would not require the

124 Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' 334.

125 Simma, 'From bilateralism to community interest in international law' 324.

126 ibid 324; customary international law would be important in his account for instance when it comes to state succession, at 357. General principles of law and elementary considerations are invoked for elaborating the legal limits of the UNSC resolutions, at 277.

127 See ibid 248; for this point see Paulus, *Die internationale Gemeinschaft im Völkerrecht: eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* 431.

128 ibid 228-229, 248-249, 444.

129 ibid 329 ff., 446.

130 ibid 362, 423.

consent of all states but the consent of a vast majority as well as the absence of the rejection by a group of states.[131] This law can be enforced through international institutions, where international organizations such as the United Nations exist and can act, and through states.[132] The international legal order continues to be characterized by the coexistence of and tension between bilateralist structures and state interests on the one hand and community interests, values and law on the other hand.[133]

Mehrdad Payandeh derives from the legal personality of the international community arguments in favour of the existence of a concept of "international community law" which goes beyond the traditional sources set forth in article 38 and *jus cogens*.[134] In his view, this "international community law" constitutes a source of international law.[135] In particular, he argues that normative developments which he describes as forms of a non-consensual lawmaking[136] cannot be reconciled with the traditional sources if one does not manipulate the consensual character of treaties, the emergence of custom through the practice of states and the subsidiary role of general principles in filling gaps.[137] A norm of "international community law" requires an openness in the sense that all states must have had the opportunity to influence the norm's formation which can be articulated in particular in resolutions of the General Assembly or international treaty conferences and must be adopted by the international community as a whole (*opinio juris communis*, expressed by a representative majority).[138] This community is said to be composed primarily by states and also by international organizations.[139] Furthermore, a norm of "international community law" must be based on a community

131 ibid 348, 360-361, 424 and 444.

132 See ibid 424 on bilateralization as an expression of a weak institutionalization of the international community).

133 ibid 427-431.

134 Payandeh, *Internationales Gemeinschaftsrecht: zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung* 439 ff.

135 ibid 447 ff.

136 ibid 453 and 532-533 (referring to the adoption of treaty drafts by consensus, treaties creating an international regime, the law of state succession into treaties, acquiescence as mere legal fiction weakening the consent element in the doctrine on customary international law, the margin of appreciation when it comes to the application of general principles).

137 ibid 449-453 (also rejecting arguments based on secondary law of international organizations or on *jus cogens*).

138 ibid 454-6.

139 ibid 456-459.

interest, which is to be distinguished from mere states interests, it must also serve values and interests of human beings and come into existence not as some form of natural law but through the recognition by the international community.[140]

Other scholars have offered ways to include the developments of the international legal order into the methodology of specific sources. One example concerns the question of how to identify custom under consideration of the values of the legal order. Anthea Robert's work on customary international law exemplifies an interpretative approach to custom.[141] Combining Dworkin's interpretivism and Rawl's idea of a reflective equilibrium, she suggests that the interpreter would first have to apply a threshold of *fit* to determine whether there were eligible interpretations which would make sense out of the raw material, practice, analyzed. If several interpretations were arguable, the interpreter would have to reflect on each interpretation on the basis of *substance*, which consists of "procedural and substantive normative considerations about whether the content of custom is substantively moral and whether it is derived by a legitimate process".[142] In her view, practice was the dominant part of the fit-stage, whereas *opinio juris* was the dominant part of the substance stage. She positions both stages within a reflective equilibrium and considers each in light of the other.[143] Since she understands under morals "commonly held subjective values about right and wrong that have been adopted by a representative majority of states in treaties and declarations"[144], her approach calls upon the interpreter to

140 Payandeh, *Internationales Gemeinschaftsrecht: zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung* 459-460.

141 See already Stein's comment in Antonio Cassese and Joseph HH Weiler (eds), *Change and Stability in International Law-Making* (de Gruyter 1988) 13, who predicted that "the style of reasoning and argument about general international law is going to change from empirical or inductive to principally *interpretative*. We are going to look at texts and what was said about texts, we are going to be analyzing the rules of general international law in much the same way as we analyzed rules that are binding as a matter of treaty law." Cf. for a critical examination of interpretation Başak Çali, 'On Interpretivism and International Law' (2009) 20(3) EJIL 805 ff.

142 Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' 778.

143 ibid 779.

144 ibid 778; crit. of requiring morality's recognition in treaties or resolutions adopted by states John Tasioulas, 'Custom, Jus Cogens, and Human Rights' in Curtis A Bradley (ed), *Custom's future: international law in a changing world* (Cambridge University Press 2016) 95 ff.

reflect on how an alleged rule of custom would relate to the normative environment and which principle such rule would further. Even though her distinctions between traditional and modern custom, facilitative custom with "no strong substantive considerations"[145] and moral custom appear a little bit too clear-cut[146], her interpretative approach adds valuable nuance to other approaches to customary international law by highlighting the importance of interpretation and establishing a relation between custom and the values and principles expressed in treaties and resolutions. In her view as expressed in a different article, custom's function is said to be about "protecting key structural and substantive norms in order to best serve the interests of the international community."[147]

As illustrated in the last chapters, doctrinal and normative considerations are of great importance when interpreting customary international law and normative judgment calls can be informed by value judgments expressed in the normative environment. The challenge for an interpreter will not only lie in recognizing her own responsibility but also in exercising this responsibility with care and taking account of international practice. As demonstrated in relation to the ECHR, the European Court was careful not to interpret state immunity under customary international law in a way that would not have been reflected in the actual practice of states.[148] In this sense, the reflection on substance, while remaining the individual responsibility of the interpreter, should be an assessment made under consideration of the views of other interpreters and of the balance between competing principles struck in international practice.

Other scholars put a greater emphasis on general principles than on customary international law. These accounts are based on a constitutional understanding that emphasizes human rights, rule of law and separation of power, democracy or other "goals" such as environmental protection.[149] Next to the

145 Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' 789.

146 For a critique of the traditional-modern juxtaposition Talmon, 'Determining Customary International Law: the ICJ's Methodology between Induction, Deduction and Assertion' 429-434; see also above, p. 77.

147 Roberts, 'Who killed Article 38(1)(B)? A Reply to Bradley and Gulati' 174.

148 On the careful use of proportionality analysis see above, p. 425.

149 Cf. generally Stefan Kadelbach and Thomas Kleinlein, 'International Law: a Constitution for Mankind?: an Attempt at a Re-appraisal with an Analysis of Constitutional Principles' (2007) 50 German Yearbook of International Law 303 ff.; Niels Petersen, *Demokratie als teleologisches Prinzip: zur Legitimität von Staatsgewalt*

article written by Simma and Alston, the work of Robert Alexy proved to be a source of inspiration for several approaches three of which shall be briefly described.

Niels Petersen agrees with the thesis advanced by Simma and Alston insofar as it suggests a categorical distinction between custom and general principles. However, whereas the distinction in the article written by Simma and Alston was made according to the kind of practice, inter-state or "intrastate"/international practice, Petersen argues that the distinction is a matter of legal theory and corresponds to the distinction between rules and principles according to Robert Alexy.[150] According to Petersen, principles in the Alexian sense as optimization requirements cannot be conceptualized as custom and are not in need of practice, they rest on article 38(1)(c) of the ICJ Statute.[151]

Thomas Kleinlein distinguishes custom and general principles of international law by the "distinction between situations dominated by factual reciprocity (which justify customary norms) and situations where such fac-

im Völkerrecht (Springer 2009); Thomas Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law' (2012) 81 Nordic Journal of International Law 79 ff.; Anuscheh Farahat, *Progressive Inklusion* (Springer 2014) 280, 337, 340, 341, 344, 347, 350, 355, 363 (reconstruction migration law as competition between the principle of static attribution and the principle of progressive inclusion). Farahat's study demonstrates the critical potential of general principles and their legal-political dimension; cf. also Andreas L Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunhoff and Joel P Trachtman (eds), *Ruling the world?: constitutionalism, international law, and global governance* (Cambridge University Press 2009) 87 ff. on constitutionalization from form to substance through principles; on differences between community perspectives and constitutional perspectives see also Jochen Rauber, 'On Communitarian and Constitutional Approaches to International Law' (2013) 26 Leiden Journal of International Law 212-217.

150 See above, p. 150.

151 Niels Petersen, 'Der Wandel des ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung' (2008) 46(4) Archiv des Völkerrechts 507-508, 520; Petersen, *Demokratie als teleologisches Prinzip: zur Legitimität von Staatsgewalt im Völkerrecht* 92 ff.; Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' 284; for another application of the Alexian model of principles see Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21(4) EJIL 853 ff.

tual reciprocity is absent (which justify general principles)."[152] Examining the constitutionalization in international law, Kleinlein argues that neither the concept of customary international law nor the concept of treaties can satisfactorily explain the emergence of norms that form an objective, universal legal order with norms protecting human rights and global goods and provide for standards of good governance.[153] General principles of law are then proposed as source in the sense of article 38(1)(c) ICJ Statute and as a norm type in the sense of Alexy's theory in order to provide for norms on the exercise of public authority.[154] These emerging norms of unwritten international law are said to bind states without their consent and be capable of emerging both from domestic legal orders and within the international legal order.[155] In particular, these principles on human rights, democracy and rule of law can emerge within a discourse on norms and through states' argumentative self-entrapment, for instance the verbal commitment to human rights, and affect states' identity and self-conception.[156] It is for the legal operator to determine whether the degree of entrapment suffices to give rise to a legal norm and meet Thomas Franck's "but of course"- test of intuitive plausibility[157], and to reconstruct the emerging understandings reflected in political discourses.[158]

Similar to Thomas Kleinlein, Jochen Rauber links the so-called constitutionalization of international law to the concept of general principles, which

152 Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 132; Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* 507 f., 619, 682, 698 f.

153 Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 711-712, see also 403-508 (on the role of reciprocity in relation to customary international law), 496-499 (on the uncertainty that comes when deducing norms from the constitution of the international community), 430-473 (on the lack of a generalizable theory on third-party effects of treaties).

154 ibid 704.

155 ibid 633, 704.

156 Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* 636 ff., 714-715. See also above, first chapter.

157 Franck, 'Non-treaty Law-Making: When, Where and How?' 423.

158 Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* 648-652; see also Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 153-157.

he understands, similar to Niels Petersen, in the sense of Alexian principles.[159] In his view, the development of international law is marked by four trends: contentualisation, in the sense that international law is concerned not only with state interests but also with community interests, hierarchization, in the sense that international law recognizes normative priorities such as *jus cogens* norms or Article 103 UNC, privatisation, in the sense that certain non-state-actors are said to enjoy legal personality, and objectivisation, in the sense that the voluntarist basis of international law is partially challenged, when it comes to *jus cogens* norms or the treatment of reservation to treaties.[160] These deveopments are said to be indicative of a change of the foundational principles of international law to which a principle of humanity, a principle of environmental protection and a principle of legal protection belong.[161] The principles' legal validity is traced to article article 38(1)(c) ICJ Statute, they inform the interpretation of rules of treaty law, they can be drawn on *praeter legem* in cases not covered by specific rules and, in certain circumstances, they can justify a development of the law *contra legem*, overriding a specific rule.[162] Customary international law has only little place in this constitutionalist account.[163] It is said to be not open to interpretation, as only practice and *opinio juris*, but not the customary norm, could be interpreted, with the consequence that there would be no room for legal principles to exert their influence.[164] Certain examples that are commonly associated with customary international law and could indicate that customary international law can be subject to interpretation are divorced from this source. For instance, when commenting on necessity as set forth in article 25 ARSIWA and earlier in draft article 33 in the *Gabčikovo-Nagymaros* case, the Court is said to have treated the necessity defence as if it was a treaty rule.[165] Furthermore, it is argued that the Court's jurisprudence on diplomatic protection in case of human rights violations should be better understood as direct recourse to the

159 Rauber, *Strukturwandel als Prinzipienwandel: theoretische, dogmatische und methodische Bausteine eines Prinzipienmodells des Völkerrechts und seiner Dynamik* 153.
160 ibid 26-113, 862.
161 ibid 361 ff., 861, 864.
162 ibid 207-210, 491-652, 864-865.
163 See ibid 245-249, 275-278, 564-570.
164 ibid 570, 701-702, 865.
165 ibid 658.

principle of legal protection that filled a gap which existed with respect to individual rights.[166]

As result of the diverse composition of the international community, certain traditional concepts of public international law have been challenged.[167] Often, it was not the doctrine of sources as such but specific norms of treaty law, customary international law or general principles of law which have been opposed by so-called newly independent states.[168] However, the criticism as to the genesis of old rules could also relate to specific sources. One example in this regard was the work of Onuma Yasuaki. He argued that many rules of customary international law "were characterized as international law by a small number of Western Great Powers" and were based "on the limited practice and opinio juris of a small number of the Western Great Powers"; as this practice was often formulated by "leading international lawyers of these Western nations", Yasuaki submitted that "[t]he intellectural/ideational power of the Western powers [...] dominated the process of the creation of 'customary' international law".[169] In his view, the reliance on multilateral treaties and UNGA resolutions "is far more transparent" than the reliance on the traditional concept of customary international law.[170] He therefore suggested that the concept of "general international law" should no longer be linked to the concept of customary international law[171] and that "a norm provided in the multinational treaties with an overwhelming majority of State parties enjoys a far higher degree of global legitimacy than an old 'customary' norm".[172] At the same time, Yasuaki acknowledged that the lack of legitimacy of customary international was "not regarded as a serious problem"[173], and one reason for the persistence of the concept of customary international law

166 ibid 701-708.

167 See also above, p. 50.

168 See Yusuf, 'Pan-Africanism and International Law' 243-8.

169 Yasuaki, 'A Transcivilized Perspective on International Law Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century' 169-170.

170 ibid 171.

171 ibid 221.

172 ibid 249. See for a similar focus on resolutions Chimni, 'Customary International Law: A Third World Perspective' 42.

173 Yasuaki, 'A Transcivilized Perspective on International Law Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century' 242.

was suspected to be the apparent lack of universality of treaties which visibly manifested itself in states that are not parties.[174]

In summary, the perspectives laid out here demonstrate that trends towards a value-laden order did not leave sources doctrine unaffected. Scholars drew different consequences from this trend and developed responses to the substantive changes; some scholars reconciled all three sources set forth in article 38 with the new developments, other scholars focused on concepts such as *jus cogens* and the legal personality of the international community or focused on the methodology of a specific source, be it, for instance, a more interpretative approach to customary international law or a re-discovery of general principles of law.

Value-based approaches to the doctrine of sources are not uncontroversial, however. The doctrine of sources is important because it explains which norms are binding on states. In order for states to accept the bindingness, some form of consent, which can exist at different levels of specificity in relation to the three sources, is important. A doctrine that is deeply embedded in a specific narrative, a specific interpretation of the developments of the international legal order or specific legal-theoretical assumptions and premises may encounter difficulties in finding broad acceptance and remaining capable of accommodating a wide variety of views, interests and counter-trends.[175]

While this study adopts a different approach in comparison to the perspectives described here which does not rely on the persuasiveness of a certain narrative, these perspectives can still be valuable for reading and interpreting practice and the development of law. It remains to be seen whether the developments of the international community will give rise to new source preferences and recalibrations in the relative importance of each source. As of today, it seems that the doctrine of sources provides for enough flexibility and room to accommodate diverse interests and perspectives.

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174 Yasuaki, 'A Transcivilized Perspective on International Law Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century' 242-3.

175 See also Heike Krieger, 'Verfassung im Völkerrecht - Konstitutionelle Elemente jenseits des Staates?' in *Verfassung als Ordnungskonzept. Referate und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Speyer vom 7. bis zum 10. Oktober 2015* (de Gruyter 2016) vol 75 449 (pointing to counter-trends such as a greater emphasis of state sovereignty, the rise of unilateral actions and tendencies of counter-trend to the legalization of international affairs), 470.

D. Recent legal positivist perspectives

At the end, this section will zero in on selected recent legal positivist perspectives. In particular, it will comment on and engage with the critique in the works of Jörg Kammerhofer and Jean d'Aspremont. This section's approach is, it must be stressed, selective, it is confined to specific points both authors have made in relation to the sources, their interrelationship and the unwritten international law.

I. Jörg Kammerhofer

From Kammerhofer's neo-Kelsenian perspective, norms cannot relate with each other unless by way of authorization and derogation.[176] As far as the "inter-source relationship" is concerned, he does not endorse a *Stufenbau* on the top of which customary international law would provide the authorization to conclude treaties, since customary international law, as understood by Kammerhofer, could "only have such content that can be classified as accumulated factual behaviour [...] A content that refers to other norms cannot be reflected as factual pattern."[177] Consequently, norms which authorize the creation of other norms or which derogate from norms could not be created by way of customary international law.[178] In his view, the sources are not normatively connected,[179] and each treaty is said to be "its own normative

176 "Norms can relate to other norms only if they take the functions of 'authorisation' and 'derogation'. [...] There cannot be a breach of a norm by a norm. A norm, for example, claims to derogate from another norm. Where that is validly possible, the other norm simply disappears, loses its validity ('existence'). [...] If a claim to derogate is not valid – as would manifestly be the case between two different and unconnected normative orders- nothing would happen to the purportedly derogated norm. It would still be valid. [...] There cannot be a divergence between claim and observance in the case of derogation since the ideal is confronted by another ideal.", Kammerhofer, *Uncertainty in international law: a Kelsenian perspective* 143.

177 ibid 73.

178 ibid 74, 156; Jörg Kammerhofer, 'The Pure Theory's Structural Analysis of the Law' in Samantha Besson and Jean d'Aspremont (eds), *Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 356.

179 See Kammerhofer, *Uncertainty in international law: a Kelsenian perspective* 156 ("The 'default solution" is that the two sources [treaty and customary international law, M.L.] are not normatively connected"); cf. on the ideas that either each source has its own *Grundnorm* or that all sources have a common *Grundnorm* Kammer-

island".[180] With respect to general principles of law, Kammerhofer has expressed "grave theoretical doubts as to the very possibility of this source as positive international law", since it would be unclear how "scientific abstractions from diverse legal systems in any shape be willed as part of international law".[181]

From Kammerhofer's legal-theoretical perspective, a normative connection between a treaty and customary international law and general principles of law cannot be based on the interpretative means enshrined in article 31(3)(c) VCLT which, according to the prevailing view, requires the interpreter to take into account a treaty's normative environment. According to Kammerhofer, however, the rules of interpretation appear to have a different effect than commonly assumed. He distinguishes interpretation as a hermeneutic process from the concretization of law through its application.[182] Relying on Kelsen, he emphasizes that "[n]orms do not necessarily have *one right meaning* and interpretation is the cognition of the frame, rather than of the 'correct meaning' [...] In short: the norm is the frame, not one of the pos-

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hofer, 'The Pure Theory's Structural Analysis of the Law' 358-60, concluding (at 360): "However, it is still the better argument that neither stratagem can work to unite international law absent a positive legal connection [...] the presumption of a *Grundnorm* cannot create a connection where positive norms do not."

180 Kammerhofer, *Uncertainty in international law: a Kelsenian perspective* 156.

181 ibid 157; on whether the requirement of recognition relates to the recognition in domestic legal orders or whether it could be construed as act of will that a principle applies in the international legal order see Jörg Kammerhofer, 'The Pure Theory of Law and Its "Modern" Positivism: International Legal Uses for Scholarship' (2012) 106 Proceedings of the American Society of International Law at Its Annual Meeting 367; see in more detail Jörg Kammerhofer, 'Die Reine Rechtslehre und die allgemeinen Rechtsprinzipien des Völkerrechts' in Nikitas Aliprantis and Thomas Olechowski (eds), *Hans Kelsen: die Aktualität eines großen Rechtswissenschafters und Soziologen des 20. Jahrhunderts: Ergebnisse einer internationalen Tagung an der Akademie von Athen am 12. April 2013 aus Anlass von Kelsens 40. Todestag* (Manzsche Verlags- und Universitätsbuchhandlung 2014) 33, arguing that recognition in the end may relate to the domestic legal orders; see Giorgio Gaja, 'The Protection of General Interests in the International Community' (2012) 364 RdC 35, arguing that the "category of "general principles of law" also includes principles of international law that have been "recognized" by States, although they may not be regarded as customary principles."

182 Jörg Kammerhofer, 'Systemic Integration, Legal Theory and the International Law Commission' (2010) 19 Finnish Yearbook of International Law 2008 165, 167; Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' 129 ff.

sible meanings."[183] Legal scholars can only identify the frame, whereas it is for the body which is authorized by the general norm, for instance a court, to create an individual norm.[184] Against the background of this legal-theoretical understanding, the general rules of treaty interpretation are not about "interpretation properly speaking"; rather, they modify the norm's frame as filter of the cognition and, therefore, unlike interpretation in a hermeneutic sense, modify the norm which is to be interpreted.[185] Such a modification could not take place if the VCLT did not apply to the interpretation of a treaty. Customary international law, as understood by Kammerhofer, could not provide for a rule such as article 31(3)(c) VCLT: Being based on behavioural regularities, customary international law could not relate to other norms and the incorporation of other norms.[186] If article 31(3)(c) VCLT applied to a treaty, though, it would not establish a normative connection between the treaty and a rule of customary international law:[187] the incorporation of a rule

183 Kammerhofer, 'Systemic Integration, Legal Theory and the International Law Commission' 166.

184 ibid 166-167.

185 ibid 172-173 (arguing that such modification would be theoretically possible even though it could not be based on the intention of the drafters of the VCLT); Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' 142 ff.; Kammerhofer, *International investment law and legal theory: expropriation and the fragmentation of sources* 79 ff.

186 Kammerhofer, 'Systemic Integration, Legal Theory and the International Law Commission' 163-165, 174. Kammerhofer, *Uncertainty in international law: a Kelsenian perspective* 155: "It is doubtful that customary law is capable of 'referring' to other norms at all [...] Because customary law is based on behavioural regularities (customs), customary law can only have such content which can be reflected as behavioural pattern; these patterns are required to form state practice. This 'real world' behaviour, e.g. the passage of a ship through straits, or the signing of a piece of paper cannot refer to the ideal or normative content of such action. The specific ideal significance is not part of the behavioural pattern, hence is not part of state practice and thus cannot form part of the content of a customary norm." Kammerhofer, 'Taking the Rules of Interpretation Seriously, but Not Literally? A Theoretical Reconstruction of Orthodox Dogma' 128-129; Kammerhofer, *International investment law and legal theory: expropriation and the fragmentation of sources* 72 ff., 77 ("Customary law does not 'exist' as words, as language. On that view, the customary rules of interpretation by definition cannot be identical to Articles 31-3 VCLT because they cannot have a content that is made up of words. Customary international law is wordless; only our (scholarly or judicial) *reconstruction* of its content is, can be and has to be.").

187 Kammerhofer, 'Systemic Integration, Legal Theory and the International Law Commission' 172: "By incorporating norms 'X' to 'Z', norm 'A' creates a number of

of customary international law by a treaty would lead to treaty norm with an identical content. Alternatively, if a treaty term is assumed to have the same content as a norm of customary international law, "the treaty norm does not incorporate the customary norm as norm; only the attributed meanings are duplicated."[188] Therefore, the "*renvoi* [...] is to meanings, not norms";[189] in his view, tribunals only claimed to be inspired by other treaties and customary international law in order "to observe legal strictures while in fact constructing meaning not from law but from the opinions of professional jurists."[190] The doctrine of systemic integration is said to be "a scholarly attempt to create *unity* in international law where none exists, to alleviate conflict where positive law provides no remedy"[191], and, as this doctrine is not about interpretation properly speaking, the cognition of existing legal norms, it is said to be "yet another - methodologically unsound - tool appropriating law-making status" to scholars.[192] Kammerhofer's scholarship can be understood as a

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substantially identical norms. Contrary to popular opinion, X to Z are now not normatively linked to A, because they cannot be. This is because the incorporated norms may very well belong to a different legal order [...] In legal terms: A now contains copies of X, Y and Z and the original X to Z are not impinged, even though A only says so in linguistic short form." See also Kammerhofer, *International investment law and legal theory: expropriation and the fragmentation of sources* 182 ("Norm-structurally, incorporation is the taking on board by the target treaty of the normative content of customary law. Incorporation clauses are a shorthand form of law-creation; in this manner, norms with the same content as the customary norm are created in the referring treaty.").

188 ibid 130.

189 ibid 132 ("On the interpreter's perspective, systemic integration is not an incorporation of customary *norms* into the treaty but a method of reasoning by the interpreter which provides a concretization of content/meaning [...] In orthodox parlance, when interpreters are 'taking other rules into account', they are importing not target *norms* but *meanings*. The *renvoi*, such as it is, is to meanings, not norms, norm-content or norm-texts.").

190 ibid 134.

191 Kammerhofer, 'Systemic Integration, Legal Theory and the International Law Commission' 178; see recently Kammerhofer, *International investment law and legal theory: expropriation and the fragmentation of sources* 141 f.

192 Jörg Kammerhofer, 'Law-making by Scholarship? The Dark Side of 21st Century International Legal Methodology' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law, Volume 3, 2010* (Hart 2012) 124: "In this sense, this strain of scholarship takes away the competence of the organs to decide and turns 'political' decisions over to scholarship on the basis of the erroneous view that scholarship is somehow better equipped to make this

plea for a self-restrained understanding of scholarship that resists the "pull to engage in effort at (interstitial and subconscious) lawmaking" and focuses more on the cognition of the frame of possible meanings of a norm.[193]

Kammerhofer's account adds an important critical perspective on the interrelationship of sources and its construction by scholars and can facilitate legal-political critique.[194] The focus on positive norms can remind one that certain doctrines and a certain jurisprudence which have been developed in relation to positive norms are not by themselves law but doctrinal constructions which can be questioned.[195] Not every factual convergence does imply a normative convergence in the sense that this convergence has become binding law.[196]

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choice than those whom the law authorises to make them." See also at 118, referring to Jan Wouters and Cedric Ryngaert, 'Impact on the Process of the Formation of Customary International Law' in Menno Tjeerd Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 127: "Clearly, doctrinal rigour is not of the utmost importance [...] treaty practice, custom and general principles are liberally combined so as to achieve the desired result: increased promotion and protection of human rights."; Jörg Kammerhofer, 'Lawmaking by Scholars' in Catherine Brölmann and Yannick Radi (eds), *Research handbook on the theory and practice of international lawmaking* (Edward Elgar Publishing 2016) 305 ff. See also Jörg Kammerhofer, 'Scratching an itch is not a treatment. Instrumentalist non-theory contra normativist Konsequenz and the Problem of systemic integration' in Georg Nolte and Peter Hilpold (eds), *Auslandsinvestitionen-Entwicklung großer Kodifikationen -Fragmentierung des Völkerrechts-Status des Kosovo Beiträge zum 31. Österreichischen Völkerrechtstag 2006 in München* (Peter Lang 2008) 166 ff.. Cf. on the positive law status of argumentative devices such as lex specialis, lex posterior, lex superior Kammerhofer, *Uncertainty in international law: a Kelsenian perspective* 146-194.

193 Kammerhofer, *International investment law and legal theory: expropriation and the fragmentation of sources* at 8, 10.

194 For an application to the debate on an expansive reading of self-defence under customary international law see for instance Jörg Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence' in Marc Weller (ed), *The Oxford handbook of the use of force in international law* (Oxford University Press 2015) 627.

195 Cf. more generally Kammerhofer, *Uncertainty in international law: a Kelsenian perspective* 261 on questioning existing dogmas and one's responsibility to chose one's dogmas.

196 See recently Kammerhofer, *International investment law and legal theory: expropriation and the fragmentation of sources* 142 ("Coherent interpretative outcomes may exist [...] Yet a factual coherence of behaviour is at the basis of such outcomes, not legal norms of great specificity [...] It is submitted that interpretation achieves less than is commonly assumed [...] It can be *factually* important [...]").

Yet, the positions of Kammerhofer need not be adopted uncritically. One can argue, for instance, that customary international law in its entirety is not best captured by the description of behavioural regularities since it consists of norms of different levels of generality. If the customary law process continues to be accepted it cannot be excluded that, at a certain point, factual convergence may create expectations that can favour the emergence of normative convergence. Article 31(3)(c) VCLT may be said to establish a normative connection to other principles and rules of international law. If one does not endorse the view that courts make or create law, it may also matter that courts refer not just to mere "meanings" but to meanings of law.[197] Customary international law and general principles of law may perform an important legitimizing function in this regard.

Kammerhofer's critique invites one to consider the question of how much international law exists. If one follows Kammerhofer's approach and accepts his understanding of customary international law, namely as mere behavioural regularities on which architectural rules such as the rules of interpretation cannot be based, then the scope of application of customary international law may be significantly reduced. The question will then arise how a general international law remains possible. Given his deviation from Kelsen's organization of the sources within one *Stufenbau*, the community aspect appears to assume a more important role in Kelsen's system than in Kammerhofer's, since it was arguably this *Stufenbau* which explained in Kelsen's account the objective character of treaties as a product of a legal community.[198] Depending on one's viewpoint this restraint can be criticized or welcomed, as it either prevents international law from fulfilling an integrative function in the international community or it refrains from attributing to international law a function which it may be able to fulfil only to a limited extent.

II. Jean d'Aspremont

The objective of d'Aspremont's monograph *Formalism* is said to "make the case for the preservation of formalism in the theory of the sources of international law for the sake of the ascertainment of international legal rules

197 Cf. on different understandings of the normative framework of the normative process between Lauterpacht and Kelsen above, p. 210.

198 Cf. von Bernstorff, *The public international law theory of Hans Kelsen: believing in universal law* 173-176.

and the necessity to draw a line between law and non-law."[199] His scholarship can be read as response to tendencies of deformalization in legal scholarship which seek to pursue a strategy of expansion of international law or the field of international legal research.[200] In the following, this section will highlight a few general features of his scholarship which are relevant to the interrelationship of sources.

One important aspect is the understanding of sources as "communitarian constraints". It is proposed to understand sources not as "rules" or "rules on rules" but as communitarian constraints which are a product of the social practice of a legal community, the actors of which include, but are not necessarily limited to, states.[201] This social account of sources is said to be "dynamic as its rules of recognition fluctuate and change along with the practice of law-ascertainment by international law-applying authorities".[202] It can therefore explain changes within a legal community as to the community's recognized sources. It divorces the doctrine of sources from article 38 of the ICJ Statute[203] as "formal repository"[204] and enables "disagreement, conflict and dissent about the criteria of law-identification"[205].

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199 d'Aspremont, *Formalism and the Sources of International Law* 5; cf. for a longer assessment of his work Matthias Lippold, 'Reflections on Custom Critique and on Functional Equivalents in the Work of Jean d'Aspremont' (2019) 21(3-4) International Community Law Review 257 ff.

200 d'Aspremont, *Formalism and the Sources of International Law* 133-134 and Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19(5) EJIL 1075 ff.; d'Aspremont, *Formalism and the Sources of International Law* 119 ff.; see also in more detail d'Aspremont, 'The Politics of Deformalization in International Law' 503 ff.; Jean d'Aspremont, 'Expansionism and the Sources of International Human Rights Law' (2016) 46 Israel Yearbook on Human rights 223 ff.

201 d'Aspremont, 'The Idea of 'Rules' in the Sources of International Law' 104 ff., 113-115.

202 ibid 116.

203 d'Aspremont, *Formalism and the Sources of International Law* 149: "providing a model for law-ascertainment has never been the function of article 38 [...] article 38 of the ICJ Statute has been misguidedly elevated into the overarching paradigm of all sources doctrines in international law".

204 According to d'Aspremont, international lawyers tend to associate doctrines to a source as formal repository of this doctrine, Jean d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2018) 39 ff.

205 d'Aspremont, 'The Idea of 'Rules' in the Sources of International Law' 124, 130; Jean d'Aspremont, *Epistemic forces in international law: foundational doctrines and*

One implication of questioning the ruleness is that certain doctrines no longer need to be understood as "rules" and as part of customary international law. Background assumptions, definitions and so-called rules on rules would not constitute proper rules as they do not set forth a clear prohibition or permission.[206] Like Kammerhofer, d'Aspremont doubts whether the so-called rules on interpretation can be based on an orthodox understanding of customary international law, if custom is understood as a process of behavioral generation of legal normativity.[207]

One central aspect of d'Aspremont's analysis is a strongly advocated distinction between ascertainment and content-determination.[208] Whereas law-ascertainment leads to a binary result, i.e. law or non-law, content-determination aims at meaning and at a standard of conduct.[209] This distinction can be regarded as an expression of scholarly self-restraint since "formalism is not envisaged here as a means to describe and delineate the whole phenomenon of law, and in particular, to determine the content of international legal rules."[210] This distinction has several consequences in d'Aspremont's scholarship. For instance, different processes of interpretation with different

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techniques of international legal argumentation (Edward Elgar Publishing 2015) 220.

206 Cf. d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' 1030 footnote 7, where he refers to an interpretation of the *North Sea Continental Shelf* judgment which in his view embodied an "elementary 'Continental Shelf' test whereby any potential standard is required to be of a 'fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law' to ever generate customary law." d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' 19; d'Aspremont, 'International Customary Investment Law: Story of a Paradox' 33-34.

207 d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' 1030 footnote 7; Jean d'Aspremont, 'Sources in Legal-Formalist Theories: The Poor Vehicle of Legal Forms' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 376.

208 d'Aspremont, *Formalism and the Sources of International Law* 157 ff.

209 d'Aspremont, *Epistemic forces in international law: foundational doctrines and techniques of international legal argumentation* 213.

210 d'Aspremont, *Formalism and the Sources of International Law* 14, 161, 218; d'Aspremont, 'Reductionist legal positivism in international law' 368: "[...] positivism should be stripped of all the straw men that are commonly attached to it: voluntarism, state-centrism, rigid and static theories of sources, theories of interpretation and techniques of content determination, etc.".

constraints apply to ascertainment and to content-determination[211], and actors, such as scholars, courts and activist, enjoy different relative authority in relation to ascertainment and content-determination.[212] He acknowledges that such a distinction cannot be maintained with respect to customary international law and general principles of law as rigidly as it can be maintained with respect to written law, which is "why legal positivism should emancipate itself from the current theory of sources."[213] His scholarship is a reminder for that "customary international law, general principles of law, oral treaties, and oral promises as a source of international legal rules should stem from a conscious choice, i.e. a choice for non- formal law-ascertainment informed by an awareness of its costs, especially in terms of the normative character of the rules produced thereby."[214] His scholarship invites one to reflect on and evaluate those choices of a legal community as to its sources of law and to approach the topic not solely at an abstract level but also in different contexts or fields of international law in which a different understanding of sources might have emerged.[215]

D'Aspremont is transparent about his choices: he does not regard general principles of law to be a valid source of law but only a means for the interpretation of international law.[216] Also, he calls into question the normative character of broadly framed, general rules of customary international law at the level of primary obligations. Customary international law standards such as the international minimum standard are said to be "dangerously indeterminate, at least as long as they have not been certified by a law-applying

211 d'Aspremont, *Epistemic forces in international law: foundational doctrines and techniques of international legal argumentation* 201.

212 ibid 213.

213 d'Aspremont, 'Reductionist legal positivism in international law' 369-370; see also d'Aspremont, *Formalism and the Sources of International Law* 173-174 (arguing that for customary international law, general principles of law, or other "rules in international law which are ascertained short of any written instrument [...] the law-ascertainment criteria are practice, *opinio juris*, convergence of domestic traditions, or orally expressed intent. None of them is a formal identification criterion."

214 ibid 174.

215 d'Aspremont, 'Théorie des sources' 98 ff. (on whether sector-specific secondary rules have emerged in international humanitarian law); d'Aspremont, 'The Two Cultures of International Criminal Law' 400 ff. (on a change from a culture of law-ascertainment of customary international law to a culture of interpretation of the Rome Statute).

216 d'Aspremont, 'What was not meant to be: General principles of law as a source of international law' 163 ff.

authority"[217], and they "do not provide for clear standards of behavior and suffer from strong normative weakness."[218] Customary rules are said to "fall short of generating any change in the behaviour of its addressees"[219] and to impair the legitimacy of adjudicatory powers of courts and tribunals.[220]

His critique can, of course, be subjected to criticism as well.[221] Whilst it is not argued here that one should not distinguish between ascertainment and content-determination at all, it is submitted here that, if one is to evaluate the present system of sources, one should not stop at ascertainment. If one excludes content-determination, one will not take into account that similar problems which d'Aspremont discussed in relation to customary international law may exist in the context of content-determination of treaty obligations. Whereas a treaty rule usually comes with a higher certainty as to its validity than custom, the problems of vagueness can occur nevertheless at the level of content-determination, as a broad treaty standard such as the obligation to accord "fair and equitable treatment" illustrates.[222] Moreover, by excluding content-determination, the analysis does not evaluate to what extent the uncertainties that undoubtedly exist with respect to customary international law are mitigated by the administration of the law by law-applying authorities.

It is submitted here that the idea of customary international law as a common law of a legal community beyond specific regimes which ensures, in the words of d'Aspremont, "a minimum content of law" and "a minimal relevance of law"[223], should not be lightly discarded. Whereas a certain institutionalization of customary international law by way of judicial application is helpful,[224] it is arguably also the case that customary international law exercises an important compensatory function precisely with respect to the

217 d'Aspremont, *Formalism and the Sources of International Law* 164.
218 d'Aspremont, 'International Customary Investment Law: Story of a Paradox' 33-34.
219 ibid 36.
220 ibid 40.
221 Lippold, 'Reflections on Custom Critique and on Functional Equivalents in the Work of Jean d'Aspremont' 269-270.
222 Alvarez, 'The Public International Law Regime Governing International Investment' 354 ff.
223 d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' 20, 29.
224 Cf. d'Aspremont, *Formalism and the Sources of International Law* 170, arguing that such institutionalization is necessary for the preservation of the normative character of custom.

decentralized structure of the international legal order.[225] It is the general law in a legal community and states can, based, for instance, on past concretizations of customary international law by courts and based on the ILC conclusions on the identification of customary international law, evaluate how their future behaviour will be judged. At the same time, courts do not have to carry the burden of a lawmaker for their particular case. It is submitted here that the criteria on the identification of customary international law constrain legal operators' reasoning and allow for a rationality control of the decisions.[226] Still, d'Aspremont's perspectives are challenging and thought-provoking; in particular the questioning of the character of sources and certain doctrines as rules might become one of the focal points of the debates to come on how much unwritten international law will be needed and will continue to exist.

E. Concluding Observations

This chapter identified stages in scholarly discussions on the interrelationship of sources. It illustrated shifting research interests in specific sources[227], described different perspectives on the interrelationship of sources in a value-laden international legal order[228] and addressed recent skepticism as to unwritten international law[229].

Furthermore, this chapter contextualized the selected scholarly approaches by relating these to the decisions or developments to which these scholars responded. It is possible to see the early interest in general principles of law[230] against the background of the slow progress of success of the International Law Commission in the codification of customary international law and the submission of drafts for codification conventions. However, with the rise of such conventions and the ICJ commenting on the relationship between

225 Lippold, 'Reflections on Custom Critique and on Functional Equivalents in the Work of Jean d'Aspremont' 280.

226 See also Andreas Føllesdal, 'The Significance of State Consent for the Legitimate Authority of Customary International Law' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 128-31 (on the importance of limits to judicial discretion in the identification of customary international law).

227 See above, p. 635.

228 See above, p. 651.

229 See above, p. 667.

230 See above, p. 635.

treaty law and customary international law, doctrinal research concerning the relationship of sources focused mainly on this aspect.[231] This chapter demonstrated that the questions of the interrelationship of sources and of the relative place accorded to each source in a legal community can be indicative of the respective legal culture's preferences for formalist or informal, conscious or unconscious lawmaking. Even though the ILC's recent conclusions[232] help to rationalize the identification of customary international law, rationalization can take place only to a certain degree. In the end, the emergence of customary international law is similar to a path which emerges as one walks it.

Finally, this chapter's selectivity has to be acknowledged; many other scholars could have been mentioned as well. The scholars discussed in this chapter were selected partly because their work illustrated different stages in engagement with the interrelationship of sources, and partly because they illustrated different emphases and perspectives against the background of which one can evaluate the future developments of the international community.

231 See above, p. 645.
232 See above, p. 372.