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Discourses on Methods in International Law

An Anthology

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Discourses on Methods in International Law: An Anthology

Foreword

Methodology has always been an important part of the legal discourse. Law is, by nature, an imprecise science, since it commonly tends to admit a plurality of views about the same problem. Therefore, more than the solution, it is the correctness of the methodology employed which bestows authoritativeness to the solution arrived at.

This truism sounds even more true with regard to international law. Possibly with a view to establishing the philosophical foundations of this relatively new branch of legal science, methodology has been, for decades, a constant source of inspiration for scholarly analyses. The contemporary debate is rather focusing on the methods to be employed to determine how the law sprouts from its classical and new sources. In this dimension, the debate on methodology deeply permeated the recent editions of the Morelli Lectures. The three last editions devoted a special attention to methodology and the very last one was entirely devoted to that topic.

The written versions of some of the courses are collected in this anthology. In spite of their apparent heterogeneity, the various pieces are bound together by a thin but very visible thread: they all are discourses on method; and discourses on method are part and parcel of the mission assigned to the Morelli Lectures. It is our hope that the subsequent editions of the Lectures will continue to follow this thread in the years to come.

E.C.

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Gaetano Morelli Lectures Series (Vol. 3 – 2020)

Discourses on Methods in International Law: An Anthology

Methodological Choices and Debates Concerning the Non-Use of Force

Olivier Corten*

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Abstract: This *Chapter* provides an overview of the debates in relation to the non-use of force. Its objective is to understand that, beyond debate on the substance of the matter, there are invariably divergences as to the approach taken, which relate to international custom and to the principles of interpretation of international law. The divide between the extensive and restrictive approaches to *jus contra bellum* has not disappeared and is not about to disappear either.

Keywords: non-use of force – UN Charter – methodology – theory of international law – customary law – interpretation.

I. Introduction

Season 2 of the French TV series *Baron noir* broadcast in 2018 features a particularly interesting discussion between the President of the Republic, Amélie Dorendeu, and her special advisor. The two are looking for a way to neutralize a terrorist threat facing France and specifically by contemplating the military option in Syria.
President: "Option C. I need you to tell me more about it".
Advisor: "Technically, the position is unchanged. The operation is still feasible".
President: "Legally, what authorizes us to execute a Daesh soldier in Syria?".

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Advisor: "In Syria, it's a little complicated. Because we rely on an extensive approach to international law and the United Nations Charter. Unlike Russia, which is acting on an appeal for help from Assad, France is compelled to claim it is acting in either collective or individual self-defence. In the case in point, Iraq has asked for help from France. We consider that to be a mandate to act against Islamic State in Syria".
President: "Our operations in Syria are a direct extension of our operations in Iraq".
Advisor: "Exactly. The point has never been challenged at the UN".
President: "And the second possibility?".
Advisor: "Individual self-defence. Being attacked in France by Islamic State fighters gives us the right to kill Islamic State fighters in Syria. But, be careful. Each operation must be thoroughly documented so we can prove the action out there is directly linked to an imminent threat back here".
President: "I'm afraid Jacques. I'm afraid of not having done everything I could. I'm afraid it will start over. Slaughter. Children. It gets harder every time. The country breaks further apart each time".[1]

What is depicted is what is referred to explicitly as an "extensive approach" to the prohibition of the use of force.[2] "Unlike Russia, which is acting on an appeal for help from Assad", France "is compelled to", as the advisor puts it, use an extensive interpretation of self-defence. More specifically, the terrorist threat supposedly justifies strikes on Syrian territory – with all the material and human loss which that implies – without having to prove that that state was responsible. This view of things, which the advisor concedes is "a little complicated" can supposedly be justified only by reference, not to legal texts or case law, but to a sort of military necessity combined with humanitarian considerations: the purpose is to protect France and more specifically its citizens. What the President has to say is significant. Under certain circumstances, legal form must give way to the requirements of action: "I'm afraid of not having done everything I could".

Such a contrast between an extensive approach and another more restrictive one is to be found, too, this time in the very real statements of several heads of state. Statements by the last three presidents of the United States to hold office are significant:

1) "[T]hose who plan, authorize, commit or aid terrorist attacks against the United States and its interests – including those who harbor terrorists – threaten the national security of the United States. It is, therefore, necessary and appropriate that the United States exercise its right to defend itself and protect United States citizens both at home and abroad".[3]

[1] E. Benzekri, J.-B. Delafon, *Baron Noir*, Canal +, Season 2, Episode 4, 2018 (our translation).

[2] See in general O. Corten, *The UN Charter in Action Movies*, in O. Corten, F. Dubuisson (eds.), *Melland Schill Guidebooks on International Law: Cinematic Perspectives on International Law*, Manchester: Manchester University Press, forthcoming.

[3] G.W. Bush, *President Signs Authorization for Use of Military Force Bill*, The White House, Washington, 18 September 2001, georgewbush-whitehouse.archives.gov.

2) "I have made it clear that we will hunt down terrorists who threaten our country, wherever they are [...]. This is a core principle of my presidency: If you threaten America, you will find no safe haven".[4]

3) "I will quickly and decisively bomb the hell out of ISIS, will rebuild our military and make it so strong no one – and I mean, no one – will mess with us".[5]

The legitimacy of the use of force is asserted manifestly in an extensive manner, with barely any reference to the formal legal constraints deduced from the UN Charter or from other sources of public international law. The contrast with this declaration by 120 UN Member States in April 2018 is striking: "The Movement stressed that the UN Charter contains sufficient provisions regarding the use of force to maintain and preserve international peace and security [...]. In addition, and consistent with the practice of the UN and international law, as pronounced by the ICJ, Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted".[6]

All of these states insist on strict observance of the Charter terms and consideration of the precedents of the International Court of Justice (ICJ). However, no mention is made of criteria such as the necessity to defend oneself or the "reasonableness" of any military intervention.[7]

The same contrast can be found in scholarship on the subjects, as the two excerpts below show:

1) "A state (the 'victim state') suffers an armed attack from a nonstate group operating outside its territory and concludes that it is necessary to use force in self-defense to respond to the continuing threat that the group poses [...]. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the nonstate group poses".[8]

2) "Concentrating on the notion of 'attribution' of non-state actor conduct to states this article evidences that all approaches put forward in favor of grounding attribution on 'unwillingness' or 'inability' of states to suppress terrorist activities have not reached the level of *lex lata*. The systematics of the Charter allocate the responsibility to deal

[4] B. Obama, *Statement by the President on ISIL*, The White House, Washington, 10 September 2014, obamawhitehouse.archives.gov.

[5] D. Trump, (quoted in J. Johnson), *Donald Trump promises to 'bomb the hell out of ISIS' in new radio ad* , in*The Washington Post*, 18 November 2015, www.washingtonpost.com.

[6] Non-Aligned Movement, 18th Mid-Term Ministerial Meeting of the Non-Aligned Movement, Baku, 3-6 April 2018, para. 27.2. See also, among other similar statements, 17th Summit of Heads of State and Government of the Non-Aligned Movement, Venezuela, 16-18 September 2016, para. 25.2, www.dirco.gov.za.

[7] See O. Corten, *Necessity as a Justification for the Use of Force?*, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford: Oxford University Press, 2014, p. 861 *et seq*.

[8] A. Deeks, *'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense*, in *Virginia Journal of International Law,* 2012, p. 487 *et seq*.

with 'unwilling or unable' states to the Security Council. Even if the Security Council is paralyzed and fails to act, 'armed enforcement actions' by states against non-state actors are as of current law not legal".[9]

The first author reiterates fairly flexible criteria such as necessity or proportionality, which alone should guide interpretations as to the lawfulness of the use of force. The second prescribes a more stringent method; in order to act in self-defence within the territory of a state harbouring a non-state actor, it should first be ascertained that the latter's acts can indeed be attributed to that state. The mere fact that the state concerned is "unwilling or unable" to take action is not sufficient to make any action in self-defence against it legitimate. In such an instance, the matter should be taken to the Security Council, pursuant to the UN Charter.

In short, in all discussions about the use of force we have a clash that can be considered on several levels.

1) Substantively, between a position underscoring the stringency of the prohibition and another position based on a more flexible and more extensive approach, tending to justify military action.[10]

2) More theoretically or even philosophically, between a peace-making ideal of international law, that is sometimes characterized as utopian, and realism referring to the necessity to take account of states' vital interests at the risk of incidentally vindicating them.[11]

3) Methodologically, between the references to classical sources of positive international law, such as the UN Charter, and the call for value-laden concepts such as "necessity" or "reasonableness".

As shall be explained below, positions need not necessarily match on all three levels. Although it is not frequent in practice, it is theoretically possible to defend an extensive position substantively and to use a rather restrictive method,[12] and vice-versa.[13] In the remainder of this exposition, the focus shall fall on the methodological aspects of

[9] P. Starski, *Right to self-defense, attribution and the non-State Actor – Birth of the "unable or unwilling" standard?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2015, p. 455 *et seq*.

[10] See the topical examples of C. Gray, *International Law and the Use of Force*, Oxford: Oxford University Press, 2018, and Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press, 2012.

[11] O. Corten, F. Dubuisson, V. Koutroulis, A. Lagerwall, *A Critical Introduction to International Law*, Bruxelles: Les éditions de l'Université de Bruxelles, 2019, p. 401 *et seq*.

[12] An illustration of the first possibility can be found in R. Van Steenberghe, *La légitime défense en droit international*, in *Annuaire Français de Droit International*, 2012.

[13] Some studies by M.E. O'Connell can, to some extent, be considered as an illustration of this second possibility, see e.g. M.E. O'Connell, *Self-Defense against non-State Actors*, Cambridge: Cambridge University Press, 2019.

the contrast between restrictive and extensive approaches to the non-use of force, although full account will be taken of the connections with substantive positions.[14]

It is from this perspective that I reasoned in a paper published in 2005[15] and then more fully some years later in chapter 1 of *Le droit contre la guerre*.[16] Since then other publications have addressed this methodological two-way split, even if other terms are employed: Matthew Waxman draws a distinction between "balancers" and "bright-liners",[17] Tom Farer opposes "purists" and "eclectics",[18] and others speak of "expansionists" and "restrictivists".[19] On reading these contributions, two caveats should be given from the outset.

First it would be pointless to establish any scientific rank order between these two approaches.[20] The choice between them is primarily a philosophical, even a political one, and it may also be explained by cultural factors (the extensive approach in particular seems to reflect more a US culture whereas the restrictive approach is traditionally associated more closely with European legal culture).[21] It cannot be claimed, for instance, that the restrictive approach is superior because it is more characteristic than the extensive approach of the case law of the ICJ,[22] since that would imply that this case law is scientifically superior, which is just one of many choices.[23] As shall be seen, one might conversely, from an extensive viewpoint, give precedence to state practice over more classical sources of positive law, which again is a matter of choice that cannot be

[14] See G. KAJTAR, *Self-Defence Against Non-State Actors – Methodological Challenges*, in *Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica*, 2013, p. 309.

[15] O. CORTEN, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, in *European Journal of International Law*, p. 803 *et seq*.

[16] English version in O. CORTEN*, The Law Against War,* Oxford: Hart Pub., 2010, p. 4 *et seq*.

[17] M.C. WAXMAN*, Regulating resort to force: Form and substance of the UN Charter regime*, in *European Journal of International Law*, 2013, p. 151 *et seq.*

[18] T. FARER, *Can the United States Violently Punish the Assad Regime? Competing Visions (including that of Anthony d'Amato) of the Applicable International Law*, in *American Journal of International Law*, 2014, pp. 702-704.

[19] J. KAMMERHOFER, *Introduction: The Future of Restrictivist Scholarship on the Use of Force*, in *Leiden Journal of International Law*, 2016, p. 13.

[20] D. KLEIMANN, *Positivism, the New Haven School and the Use of Force in International Law*, in *BSIS Journal of International Studies*, p. 27 *et seq.;* see generally about the impossibility of 'proving' the superiority of one method or approach of international law O. CORTEN, *Méthodologie du droit international public*, Bruxelles: Editions de l'Université de Bruxelles, 2017, p. 41.

[21] W.C. BANKS, E.J. CRIDDLE, *Customary Constraints on the Use of Force: Article 51 with an American Accent*, in *Leiden Journal of International Law*, 2016, p. 67 *et seq.*; J. KAMMERHOFER, *Introduction*, cit., pp. 15-16; see also, focusing on the policy-makers, I.H. DAALDER, *The Use of Force in a Changing World–US and European Perspectives*, in *Leiden Journal of International Law*, 2003, p. 171 *et seq*.

[22] G. PALMISANO, *Determining the Law on the Use of Force: The ICJ and Customary Rules on the Use of Force*, in E. CANNIZZARO, P. PALCHETTI (eds), *Customary International Law on the Use of Force: a Methodological Approach*, Leiden: Brill, 2005, p. 197 *et seq.*

[23] O. CORTEN, *Le positivisme juridique aujourd'hui: science ou science fiction?*, in *Revue québécoise de droit international*, 2016, pp. 39-40. See R. VAN STEENBERGHE, *The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side*, in *Leiden Journal of International Law*, 2016, p. 48.

readily made objective. Besides, it would be sticking one's neck out to claim that either approach prevails because it is supposedly best able to ensure peace and security, which are the essential purposes of the UN Charter. The restrictive approach is often legitimized in this way, by underscoring the bellicose tendencies that seem to go along with overly flexible interpretations. By contrast, the extensive approach sets itself up as being the more able to effectively counter the risks of destabilization of international relations generated by certain states or groups that directly or indirectly challenge international security. Only a broader conception of self-defence is purportedly suitable for achieving the peace-making objectives of international law.[24] Here again, one may be more or less convinced by one or other of these approaches but, scientifically, it would be an intricate matter, not to say an impossible task to prove the validity of the arguments made by either side. It remains for commentators to specify the approach that is given precedence, so as to relativize their arguments. For my own part, and as I have explained elsewhere,[25] the reading of my works leaves no doubt about my categorization; one author has even labelled me as a "restrictivist *pur sang*".[26]

Next, it is generally accepted that the point in studying this divide is primarily to ensure a better understanding of the debates about the non-use of force.[27] One cannot fully understand – and therefore respond to – a study of *jus contra bellum* without taking into account the specific features of the legal and methodological approach it reveals. Reference to the wording of Art. 51 of the Charter or to ICJ case law will not have the same scope when addressing a "restrictivist", who will probably respond by interpreting those sources in turn, or an "extensionist", who will tend more to set them aside and prefer instead considerations relating to the spirit of the law or more openly politi-

[24] Thus, according to J.N. Moore, "Of particular importance, for *jus ad bellum* as a normative principle to inhibit aggression, as is the very purpose of the norm, it must differentially impose costs on the aggression it seeks to deter. If, to the contrary, it treats aggression and defense equally, by failing to effectively differentiate between them, or even worse, it effectively favors aggression by ignoring an aggressive attack while condemning a defensive response, then it will have turned this central normative principle into a cipher. Like an autoimmune disease, it will have turned the international order's own immune system against itself, thus encouraging aggression. Moreover, international institutions effectively ignoring aggression while condemning defense – thus supporting an inverse of the critically important principle banning use of force as a modality of change – will themselves inevitably be harmed as they, in turn, undermine the rule of law"; J.N. Moore, *Jus ad Bellum before the International Court of Justice*, in *Virginia Journal of International Law*, 2011, pp. 904-905.

[25] O. Corten, *The Law Against War*, cit., pp. 1-2; O. Corten, *Regulating Resort to Force. A Reply to Matthew C. Waxman from a 'Bright-Liner'*, in *European Journal of International Law*, 2013, p. 191 *et seq*.

[26] A. De Hoogh, *Restrictivist reasoning on the ratione personae dimension of armed attacks in the post 9/11 world*, in *Leiden Journal of International Law*, 2016, p. 41.

[27] Thus, as enunciated by A. Bianchi, "the current difficulties in determining the exact contours of the international legal regulation of the use of force would greatly benefit from a reflexive consideration, by all relevant actors, of some methodological aspects underlying the legal discourse on the use of force"; A. Bianchi, *The international regulation of the use of force: The politics of interpretative method*, in *Leiden Journal of International Law*, 2009, p. 284.

cal arguments or moral values.[28] It should be noted incidentally that it would be pointless to claim to escape from any considerations of this sort in the name of a form of pragmatism that is refractory to any theoretical thinking: "Practitioners, even when not conscious of it, always presuppose 'a theory' or 'a method'. It is against the backdrop of theory and method, whatever they may be, that they provide their choices with the necessary level of credibility and persuasiveness required by the players of the game".[29]

In other words, it is certainly not by denying it that we shall be able to settle the problem. In this sense, the objective of this contribution is to understand that, beyond debate on the substance of the matter, there are invariably divergences as to the approach taken, which relate to international custom and to the principles of interpretation of international law (section II). After evoking both these facets of the methodological debate, we shall briefly illustrate the latter by taking up the two particularly controversial substantive issues of self-defence and of the right of humanitarian intervention (section III). We shall continue by reading and interpreting a few excerpts from scholarship that show it is sometimes difficult to categorize an author or even a single study within one or other of the approaches in question (section IV). Lastly, we shall question, from a dynamic and prospective perspective, whether these recent years have seen significant or even radical change in the extensive approach (section V).

As stated, I have already dealt with this issue in earlier writings, which were based mostly on material covering the scholarship of the first half of the 2000s. At that time, which was marked by 9/11 and the beginnings of the "War on Terror" in Afghanistan and then by the war conducted in Iraq without specific authorization from the Security Council, particularly sharp controversy developed about the meaning or even the continued existence of the rules prohibiting the use of force.[30] The remainder of this contribution shall draw on publications from the 2010s, in the context of conflicts like those in Iraq, Syria, or Ukraine. Again, the stringency of the rules prohibiting the use of force has been called into question in the name of considerations relating both to security and to observance of human rights and humanitarian law. As shall be seen, the divide between the extensive and restrictive approaches to *jus contra bellum* has again been apparent, whether with respect to considerations of customary law or the question of the interpretation of treaties.

[28] Compare P. STARSKI, *Right to self-defense*, cit., and A. DEEKS, *'Unwilling or Unable'*, cit.

[29] A. BIANCHI, *The international regulation of the use of force*, cit., p. 285.

[30] See M.J. GLENNON, *The Fog of Law: Pragmatism, Security, and International Law*, Palo Alto: Stanford University Press, 2010.

II. The extensive v. restrictive approach: customary law and the interpretation of treaties

The *jus contra bellum* is a regime that ultimately relies on just a few treaty-based rules in the Charter: Art. 2, para. 4, lays down a general principle of prohibition while Art. 51 and Chapter VII provide for "exceptions" (a term that shall be given precedence from a restrictive perspective) or certain rights to use force (to use a more extensive terminology, aimed at presenting self-defence as a sovereign right rather than an exceptional situation). It is therefore a matter of a body of rules that is little developed in treaties and that can only be supplemented by limited case law.[31] These particularities set it apart from other areas of international law in which there are a great many instruments and precedents, such as WTO law or human rights. In this context, most of the methodological reflections relating to the non-use of force bear traditionally on the scope of precedent,[32] whether with respect to custom, which has a central position, or to the interpretation of treaties, which also includes essential consideration of practice.

Before developing the analysis, we must first emphasize a fundamental distinction between the two approaches.

1) From an extensive perspective, there will be a tendency to associate legitimacy and legality and to move away from a positivist or formalistic perspective. So there is nothing to exclude referring to "natural law",[33] that should be associated with the central criterion of necessity: "Necessity as a general proposition in *jus ad bellum* is best understood as a prohibition against use of force except in protection of major values".[34] Finally, it is all about applying "most comprehensive and fundamental test of all law, reasonableness in a particular context".[35]

2) A restrictive perspective relies by contrast on a positivist underpinning.[36] In this sense, "the methodological option underlain by this approach is to consider that legality

[31] International Court of Justice: *Military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), judgment of 27 June 1986; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgment of 19 December 2005; and to a lesser extent *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996; *Oil Platforms* (Islamic Republic of Iran v. United States of America), judgment of 6 November 2003; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004; *Accordance with International Law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010.

[32] T. Ruys, O. Corten, A. Hofer, *Introduction: The Jus Contra bellum and the Power of Precedent*, in T. Ruys, O. Corten, A. Hofer (eds), *The use of force in international law: a case-based approach*, Oxford: Oxford University Press, 2018, p. 1 *et seq.*; R. Van Steenberghe, *The Law of Self-Defence*, cit., p. 58.

[33] J.D. Ohlin, *The Doctrine of Legitimate Defense*, in *International Law Studies*, 2015, p. 120.

[34] J.N. Moore, *Jus ad Bellum before the International Court of Justice*, cit., p. 915.

[35] *Ibid.*, p. 916.

[36] A. Orakhelashvili, *Changing jus cogens through State practice? The case of the prohibition of the use of force and its exceptions*, in M. Weller (ed.), *The Oxford Handbook on the Use of Force*, Oxford: Oxford University Press, 2012, pp. 174-175.

and legitimacy pertain to two analytical registers which, although not formally watertight, remain irreducibly separate by nature".[37] The conclusions of this type of study claim therefore to be valid only if "one keeps to positive law, as expressed through that "mouthpiece" of international law, the International Court of Justice".[38]

This divergence of views must be clearly understood in order to address the question of custom as well as the question of interpretation.

II.1. Non-use of force and customary law: which method?

The distinction between the two main ways of dealing with custom when contemplating a question of the use of force may be illustrated by the table below.[39] It is designed to set out the differences between approaches and it goes without saying that most of positions actually taken fall between the two and cannot necessarily be immediately and categorically classified.[40] Even so, as I see it, such a schema can provide a better understanding of the debates about the customary regime of the prohibition of the use of force.

	Extensive approach	**Restrictive approach**
Legal status of custom	Main Source	Treaty Law & Customary Law on the same level
	Policy-oriented perspective	Formalist perspective
Constitutive elements	Practice (main element)	*Opinio Juris* (main element)
	Rapid evolution	Progressive evolution
	Role of "custom pioneers" (like USA or other Western States)	Equality Between States

Table 1.

The distinction between the two approaches is marked therefore both with respect to the status of custom and to the way its constitutive elements are viewed.

First, with respect to the *status of custom*, the differences in approach are radical.

An extensive approach will tend to see custom as the main source of law against which the lawfulness of any use of force should be gauged. The wording of the Charter should therefore take a back seat behind the way it has been implemented in actual

[37] N. Hajjami, *De la légalité de l'engagement militaire de la France en Syrie*, in *Revue du Droit Public*, 2017, p. 152 (our translation).

[38] F. Latty, *Le brouillage des repères du jus contra bellum. A propos de l'usage de la force par la France contre Daech*, in *Revue générale de droit international public*, 2016, p. 21 (our translation).

[39] See also O. Corten, *The Law Against War*, cit., p. 6.

[40] See *infra*, section IV.

practice.[41] Custom would make it possible to adapt the rules on the use of force, initially designed in 1945, to the new necessities arising from the continuing development of international relations: "the credibility of the law depends ultimately upon its ability to address effectively the realities of contemporary threats".[42] Allowance should therefore be made for political or even ethical requirements rather than hanging on regardless to overly formal reasoning that is detached from reality.[43]

A restrictive approach views custom as one source among others but a source that can certainly not be thought of as superior to treaty law. When it comes to the use of force, allowance for the wording of the Charter must be made to fit with customary practices that have developed since the Charter came into force. The required standard is purportedly very high insofar as prohibition of the use of force is a matter of mandatory law.[44] Any change to the rule would not be excluded, provided it could be grounded on varied and repeated precedents as well as sound legal sources and not just on political or moral considerations.[45] This sets aside "the 'what is reasonable' school, or the 'something-must-be-done' school".[46]

By the same logic, the two approaches ought therefore to be carefully told apart with respect to the *constitutive elements of custom*.

The extensive approach will emphasize practices and the real situation on the ground: "Particularly in this area of law, it is important that principle should be sensitive to the practical realities of the circumstances that it addresses".[47] Obviously this does not mean that the justificatory discourse of states (especially intervening states) is ignored but that it will always come in support of practice (or even as a constituent component of it).[48] The point that military interventions have actually and regularly occurred would in any event be the sign of a softening of the prohibition of the use of force, which might come about quite quickly: "Usually, customary international law changes slowly over many decades. But sometimes, world events are such that customary international law develops quite rapidly".[49] This swift change might be achieved via the Security Council which, without authorizing military interventions, can legitimize

[41] M.P. SCHARF, *How the war against ISIS changed international law*, in *Case Western Reserve Journal of International Law*, 2016, p. 36 *et seq.*

[42] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense against an imminent or actual armed attack by nonstate actors*, in *American Journal of International Law*, 2012, p. 4.

[43] See R. VAN STEENBERGHE, *The Law of Self-Defence*, cit., pp. 54-55.

[44] A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., pp.157-175.

[45] *Ibid.,* p. 174; N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 152.

[46] C. GRAY, *The Limits of Force*, in *Collected Courses of the Hague Academy of International Law*, Leiden: Brill, 2016, p. 109.

[47] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense,* cit., p. 4.

[48] See R. VAN STEENBERGHE, *The Law of Self-Defence,* cit., pp. 56-57.

[49] M.P. SCHARF, *How the war against ISIS changed international law*, cit., pp. 4 and 11.

them.[50] In this context, the preponderant status of some states, referred to as "custom pioneers",[51] that is, primarily the United States and its allies, should be accepted and acknowledged. Those states play a leading part in the formation of custom since they are the states best placed to ensure actual compliance with international law (their power being an asset and not a failing) and to embody a degree of democratic legitimacy. By comparison, states like Russia, China, or most Third World states, are supposedly too weak or have too little legitimacy to deserve being granted equivalent standing.

A restrictive approach will tend instead to give precedence to legal discourse over facts and to see this as the only way to maintain the integrity of international law. In this way, when a state resorts to the use of force contrary to the Charter but invokes an exception contained in the Charter, this strengthens rather than weakens the legal regime of the Charter.[52] Practice would be meaningless unless associated with the expression of a new *opinio juris*: "'state practice' is not self-fulfilling or self-explanatory", "*opinio juris* is crucial".[53] As the ICJ stated, for the rule to change, the intervening powers would have to rely on some new justification that was originally excluded by the Charter and this new justification be accepted by all the other UN member states.[54] On the side of the intervening states, the claim should be expressed in clear legal terms: "[t]he changing allusion to multiple justification casts doubt on the validity of all related claims".[55] As for third states, it is not enough to point to their remaining silent and inferring general acceptance from that: "toleration of practice is not the same as acceptance of its legality".[56] The principle of equal sovereignty would rule out favouring one or other category of state and thereby consecrating the primacy of power over law.[57] Law could therefore only evolve gradually and by means of "unambiguous and widespread acceptance and recognition".[58] In view of the mandatory status of *jus contra bellum*, an agreement of the "international community of states as a whole" would indeed have to be secured.[59] From this perspective, although Security Council resolutions may obviously have legal effects in a specific instance, they could not as such suffice to conclude that custom had evolved.

[50] G. H. Fox, *Invitations to intervene after the Cold War: Toward a new collective model*, in A. Peters, C. Marxsen (eds.), *Intervention by Invitation*, Cambridge: Cambridge University Press, forthcoming.

[51] M.P. Scharf, *How the war against ISIS changed international law*, cit., p. 11.

[52] O. Corten, *The Russian Intervention in the Ukrainian Crisis: was jus contra bellum 'confirmed rather than weakened'?*, in *Journal on the Use of Force and International Law*, 2015, p. 17 *et seq.*

[53] A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., pp. 159 and 158.

[54] O. Corten, *Breach and evolution of the international customary law on the use of force*, in E. Cannizzaro, P. Palchetti (eds), *Customary International Law on the Use of Force*, cit., p. 119 *et seq*.

[55] A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., pp.169.

[56] *Ibid.*, p. 171.

[57] C. Gray, *The Limits of Force*, cit., p. 103.

[58] C. Henderson, *The Use of Force and International Law*, Cambridge: Cambridge University Press, 2018, p. 26.

[59] *Ibid.*, p. 25; A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., p. 158.

As can be seen, there are many differences reflecting radically different legal – and beyond that theoretical and philosophical – approaches. In this way, beyond the substantive positions that are defended, the methodology used to establish a customary rule seems to open the way to various possibilities, some of them extensive and others more restrictive. The International Law Commission's development of principles for the establishment of customary law is not of a nature to limit those possibilities inasmuch as the principles themselves are broad enough to leave considerable leeway for whoever interprets them.[60] And in this respect, broader reference may be made to the principles of treaty interpretation which also open up the path to different and potentially opposing approaches.

II.2. Non-use of force and treaty interpretation: which method?

In addition to its Art. 32 on supplementary means of interpretation such as preparatory work, and Art. 33, which refers to issues of translation assuming several official languages are used, Art. 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) sets out various means that must be fitted together to reflect a "general rule of interpretation":

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose [...].
> 3. There shall be taken into account, together with the context:
> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (*c*) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended".

Other than the specificities of these various means, in essence, three approaches to interpretation are be found.[61] The first is literal; it involves beginning with the "ordinary meaning" or "special meaning" of the relevant articles based on the text and therefore on the vocabulary used as well as the usual rules of grammar. The second is teleological; consideration of the "object and purpose" of the rule being interpreted must enable the rule to be adapted to the changes in the political context and the changing spirit of international law. The third is pragmatic: it is centred on the way in which the rule has actually been interpreted by the various states parties to the treaty so as to come to an

[60] International Law Commission, Identification of Customary International Law. Draft Conclusions annexed to General Assembly Resolution 73/203, 20 December 2018, UN Doc. A/RES/73/203.

[61] O. Corten, F. Dubuisson, V. Koutroulis, A. Lagerwall, *A Critical Introduction to International Law*, cit., pp. 49-50.

"agreement of the parties regarding its interpretation". This third element of interpretation seems to relate to the concept of custom because it contains both the factor of practice and the decisive factor of the agreement of the parties.[62]

Let us return now to the opposition between extensive and restrictive approaches to interpretation to relate them with these principles, which are themselves applicable on a customary basis.[63] Logically, the extensive approach will tend to favour the teleological approach over the wording of the text and the mere existence of the practice over the "agreement of the parties" that such practice should reveal. This teleological approach will even be construed very broadly without citing or evoking Art. 31.[64] Conversely, the restrictive approach will give precedence to the literal meaning of the text, at least to establish a presumed meaning, although that meaning might be overturned if it can be shown there is agreement among all the parties to do so. As for the object and purpose of the rule, the argument is used to emphasize its peace-making and stabilizing character.[65] And the authors concerned will tend to refer to principles of interpretation set out in the Vienna Convention, which is a fairly logical approach from a more formalistic or restrictive perspective.

As can be seen, the establishment of a customary rule and the interpretation of a conventional rule are two intellectual operations that largely overlap or even merge. This is especially so when practice is taken into account as an essential means of interpreting a text.

It has, however, been emphasized that a distinction should be made between debates about "modification" and debates about the "interpretation" of treaties.[66] The first instance arguably requires a more stringent standard than the second:

> "As a result, the modification of that law through state practice should imply, first, that the weight of this practice is high in the sense that it must be able to reveal the *opinio juris* of states in the least ambiguous manner; second, that, in case of international reactions to a specific practice, those reactions be as abundant as possible and consist of explicit – rather than only implicit – approbations when assessing the generality of such practice; and, third, that the repetitions of the relevant practice over time be numerous and its uniformity well established".[67]

[62] R. Van Steenberghe, *The Law of Self-Defence*, cit., pp. 60-62.

[63] A. De Hoogh, *Restrictivist reasoning on the ratione personae dimension of armed attacks in the post 9/11 world*, cit., p. 23.

[64] See R. Van Steenberghe, *The Law of Self-Defence*, cit., p. 55.

[65] C. Gray, *The Limits of Force*, cit., pp. 109-110.

[66] R. Van Steenberghe, *State practice and the evolution of the law of self-defence: clarifying the methodological debate*, in *Journal on the Use of Force and International Law*, 2015, p. 92 *et seq*.

[67] *Ibid.*, p. 93.

This argument is made in support of an extensive approach, because it would then suffice to assert that a rule was only being interpreted in order to reduce the degree of methodological stringency required.[68]

Such an argument is confounding, especially if a restrictive outlook is given precedent.

First because it is difficult to understand in concrete terms what is at issue, since Art. 31, para. 3, VCLT expressly requires an "agreement between the parties" to establish a simple interpretation by means of subsequent practice; this seems a particularly difficult target to reach since it concerns "virtually, every state".[69] The afore-cited author adds that, if it is a question of modification, the *opinio juris* will have to be established "in the least ambiguous manner" or that "as abundant as possible" a reaction will have to be established, or again that the precedents referred to in support of it will have to be "numerous" and their uniformity "well established". True enough. But it seems that these criteria are in any event excellent guidelines for analysing practice, whether with regard to customary law or to the interpretation of treaties and whether such interpretation is changing or not. In other words, I fail to see in what way the criteria mentioned should be distinguished from – even less opposed to – the criterion of agreement between the parties within the meaning of Art. 31, para. 3, VCLT. It seems they should be contemplated instead in a supplementary way, as part of a method to be used in an integrated manner.

Next, it is hard to see how it would be possible to make an objective distinction between authentic "interpretation" of the rule and "modification" of the rule, in each particular case. While admitting this difficulty as a point of principle, the afore-cited author argues that it would easily be overcome in the area of the non-use of force, where it would suffice to define the modification as "the situation where the new rule cannot fit in any of the plausible meanings that could be given to the treaty text".[70] Simply reading this criterion gives a glimpse of all the difficulties likely to arise in implementing it. Can an entire theory really be based on so subjective a concept as a "plausible meaning"?

Lastly and more fundamentally, this argument rests on a theory that has largely been called into question, that there could be an interpretation that, if only marginally, would not entail at the very least some adaptation or adjustment – that is, ultimately a modification however minimal – of the rule.[71] In this context, the distinction between interpretation and modification appears to be fictitious. True, it is often asserted formally, as confirmed by the work on interpretative practice especially in the International

[68] *Ibid.*, pp. 93-95

[69] C. HENDERSON, *The Use of Force and International Law*, cit., p. 25; see also A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., pp. 158.

[70] R. VAN STEENBERGHE, *State practice and the evolution of the law of self-defence*, cit., p. 93 (citing T. Ruys).

[71] See e.g. D. ALLAND, *L'interprétation du droit international public*, in *Collected Courses of the Hague Academy of International Law*, Leiden: Brill, 2013, p. 41*et seq.*.

Law Commission.[72] But that is a purely rhetorical argument because in practice and even if it is often used to reduce the scope of the changes in meaning that may effectively be generated informally, the distinction between interpretation, evolution, or modification of the rule is quite simply impossible to show.

What is relevant, however, is to ask what the content of the initial agreement between the parties was. This generally leads an author taking a restrictive approach to begin with the text of the Charter and with the meaning attributed to it when it was first drafted. The stakes are very clear this time: once the initial meaning has been established, any new interpretation, evolution, or modification (no matter what the terms) of that meaning will have to be based on a general agreement among the parties. The task is not impossible, as illustrated by the examples of the abstention of a permanent member state (accepted in practice as being consistent with the letter of Art. 27, para. 3, of the UN Charter although formally contrary to it) or the possibility for the Security Council to authorize states to use force (a move that is envisioned nowhere in the Charter, which provides only for Security Council action with forces placed under UN command).[73] But the task is an intricate one because, in many instances (just think of the two examples that shall be evoked below: self-defence and humanitarian intervention), practice points instead more to *disagreement* among states. Under this last assumption, and regardless of whether a "modification" or an "interpretation" of the rule is invoked, it will have to be concluded that its initial meaning is maintained: "Overall there is a strong presumption against any extension of the right to use force".[74] Obviously enough, whatever anyone's position may be, it will always be in their interests to claim to be merely interpreting a meaning that was globally favourable to them from the outset.

Finally relations between customary law and the law of treaties appear themselves to be an issue in the debate among authors arguing for extensive or restrictive approaches. Whatever the sources mobilized, the jurists' margin of appreciation will enable them to implement radically different approaches to determine the scope of the prohibition of the use of force within the meaning of Art. 2, para. 4, of the UN Charter.[75] A first approach is to extend the possibilities of military intervention by giving precedence to considerations of opportuneness while a second, more restrictive approach aims to defend the stringency of prohibition both in the name of the provisions of the Charter, their peace-making objective, and the refusal of member states to make its

[72] International Law Commission, Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (Special Rapporteur: G. Nolte), 28 February 2018, UN Doc. A/CN.4/715.

[73] O. Corten, *The Law Against War*, cit., chapter 6, section 1.

[74] C. Gray, *The Limits of Force*, cit., p. 194.

[75] See generally O. Corten, *Les techniques reproduites aux articles 31 à 33 des Conventions de Vienne: approche objectiviste ou approche volontariste de l'interprétation?*, in *Revue generale de droit international public*, 2011, p. 351 *et seq.*

terms more flexible. The observation may be illustrated by a brief glimpse of current debates relative to the content of the rules governing the non-use of force.

III. The extensive v. restrictive approach: self-defence and humanitarian intervention

The events of 11 September 2001 revived both the political and the scholarly debate on self-defence. In parallel and this time further to the War in Kosovo in 1999, more thought has been put into the legitimacy and the legality of humanitarian intervention (often associated with the new expression, "responsibility to protect"). These two substantive questions can be taken up briefly to illustrate the methodological differences characterizing the restrictive and extensive approaches to the non-use of force.

III.1. The extensive v. restrictive approach: self-defence

Current debates over self-defence are many and concern two aspects mostly. The first, concerning timing, relates to the question: can self-defence be validly invoked in the event of a simple threat (or an "imminent" threat) or is it essential to establish that an "armed attack" has already actually begun? The second debate concerns not the timing but the attacker's identity: need it be demonstrated that it is a state, against which a valid riposte may be made, or is it enough to observe that a non-state group has used force in order for it to be targeted and pursued wherever it may be? In practice, in the context of the war against terrorism, these two debates are often connected. They shall therefore be contemplated jointly here by showing how the choice of an extensive or restrictive approach will influence matters.

To understand this debate we must obviously begin with Art. 51 of the UN Charter, whereby: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security".

From an extensive standpoint, it shall be observed that Art. 51 clarifies from the outset that it shall under no circumstances "impair the inherent right of individual or collective self-defence", thereby emphasizing a sovereign right that should be largely construed and that originates in history.[76] Accordingly, "self-defence was a mainstay of discussions about law and peace, in both natural law and *jus gentium* traditions, even before the 'state' had become the normative authority in international affairs".[77] Here

[76] M.C. Alder, *The Inherent Right of Self-Defence in International Law*, New York: Springer, 2013.

[77] C. Espaliú Berdud, *The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law*, in *Spanish Yearbook of International Law*, 2017, p. 185.

we find again a certain fuzziness between considerations of positive law and of "droit naturel", to use the French translation for "inherent right" in the English version:

> "The effect of this incorporation was to preserve and protect, as a carve-out from the prohibition against force codified in Article 2 of the Charter, the rights of defensive force that applied in natural law (and so continue to be protected by Article 51). This is the doctrine of legitimate defense [...]. Both "inherent right" and "*droit naturel*" suggest an explicit reference to natural law as defining the proper scope of self-defense".[78]

This right has therefore always been around which is why the Charter did not purport to challenge it: "customary international law, in which resides the inherent right of self-defense, including anticipatory self-defense, usually traced back to the Webster-Ashburton correspondence of 1842 concerning the *Caroline* incident".[79] To define the outline of this right, we should therefore go back to the "Webster formula" made by the U.S. Secretary of State in 1841 in the case of the *Caroline*: "the *necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation*. [T]he act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it".[80] From this perspective, if circumstances so warrant, there is nothing to prohibit a state from acting even before a threat, especially if imminent, is materialized. Likewise, this riposte may be aimed at acts of a state but also of a non-state group. Again Art. 51 is drafted in terms broad enough to cover both assumptions.[81] To contemplate the lawfulness of the riposte, appeal is made not so much to formal criteria as to "reasonable" judgment, that must act as a guide, with the essential thing being to establish "a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack".[82] In any case, all the criteria that can be established theoretically "are without prejudice to the application of any circumstance precluding wrongfulness or any principle of mitigation that may be relevant".[83] This tendency to recognize an extended right of self-defence was supposedly enshrined in resolution 1368, adopted by the Security Council on 12 September 2001, and which acknowledges in its preamble a right of self-defence.[84] And that right must logically be able to cover certain preventive actions, always by application of an "inherent right" to self-preservation. It might even be asserted that: "Under natural law, self-defense was conceptualized in terms of self-preservation, not only as a right but also as a duty. [...] Self-preservation in its

[78] J.D. OHLIN, *The Doctrine of Legitimate Defense*, cit., pp. 120 and 125.

[79] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense*, cit., p. 4.

[80] Italics added; Letter from Daniel Webster, US Secretary of State, to Mr. Fox, 24 April 1841; see M.P. SCHARF, *How the war against ISIS changed international law*, cit., p. 11.

[81] C. ESPALIÚ BERDUD, *The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law*, cit., p. 190.

[82] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense*, cit., p. 7.

[83] *Ibid.*, p. 8.

[84] *Ibid*., 5; M.P. SCHARF, *How the war against ISIS changed international law,* cit., p. 31.

broadest sense included not just repelling an outside attack, but also pro-actively intervening externally in foreign States whose behavior was inconsistent with basic principles of natural law. [...] This provided for the right of intervention against States acting contrary to international legal norms".[85]

Preventing a state from taking appropriate and necessary measures to defend itself on the pretext that the attack has not yet begun or that the attack could not be attributed to a state would be meaningless. In short, "self-defense is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day".[86] Abundant practice could be cited along these lines for that matter. To take just one example, a good number of states have recently intervened to put an end to the threat from the so-called Islamic State of Iraq and the Levant (ISIL) in Syria by invoking the right of self-defence.[87] This right was supposedly enshrined implicitly by the Security Council when, in its resolution 2249 (2015), it "*Calls upon* Member States that have the capacity to do so to take all necessary measures, [...] to eradicate the safe haven they have established over significant parts of Iraq and Syria". [88] Accordingly, the rules on the non-use of force are "capable of developing incrementally to meet modern threats".[89]

A restrictive reading of Art. 51 will view the question quite differently.[90] It will be noticed that the text of this provision makes self-defence explicitly conditional on the prior existence of an armed attack ("if an armed attack occurs"). Significantly, no "threat", whether imminent or not, is mentioned, whereas it features prominently in other provisions: Art. 2(4) prohibits the "threat" of the use of force and Art. 39 empowers the Security Council to take coercive measures in the event of any "threat to the peace".[91] The text of the Charter makes a clear distinction between the triggering of an "armed attack", which entitles a state to riposte without waiting for the Security Council to make a statement, and the existence of a mere "threat", which must lead the Security Council to take the necessary measures, including military measures. These features are again confirmed by the texts subsequently adopted by the states parties to the Charter, like

[85] J.D. OHLIN, *The Doctrine of Legitimate Defense*, cit., pp. 130 and 133.

[86] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense*, cit., p. 3

[87] C. ESPALIÚ BERDUD, *The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law*, cit., pp.199-200.

[88] Security Council, Resolution 2249 of 20 November 2015, UN Doc., S/RES/2249 (2015), para. 5; see P. HILPOLD, *The evolving right of counter-terrorism: An Analysis of SC Resolution 2249 (2015) in view of some basic contributions in International Law literature*, in *Questions of International Law*, 2016, pp. 15-34; M.P. SCHARF, *How the war against ISIS changed international law*, cit., pp. 51-53 and M. WOOD, *The Use of force in 2015 with Particular Reference to Syria*, in *Hebrew University of Jerusalem Legal Research Paper*, no.16-05, 2016, p. 5 *et seq.*

[89] M. WOOD, *The Use of force in 2015*, cit., p. 3.

[90] See A. DE HOOGH, *Restrictivist reasoning on the ratione personae dimension of armed attacks in the post 9/11 world*, cit., 19-42.

[91] N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 159.

the definition of aggression appended to resolution 3314 (XIX) adopted by the General Assembly in 1974. This resolution limits aggression, and so armed attack within the meaning of Art. 51, to the "use" of force (threat not being mentioned), and also specifies that such use means use by one state against another.[92] Accordingly, the fact that Art. 51 does not specify that the perpetrator of the attack must be a state should not be of any consequence: it is clear that the whole of the regime of the prohibition of the use of force (*jus contra bellum*) is conceived of from an interstate perspective.[93] This does not mean that terrorist groups cannot be targeted, but within a cooperative framework, not by multiplying armed actions in the territory of third states without their consent, and always assuming Security Council authorization has not been obtained. Whether in its resolution 1368 (2001) referred to above or in others, the Security Council has never recognized an extended right of self-defence.[94] To accept that such a practice becomes law would besides undermine the very foundations of the peace-making objectives that underpin the drafting of the UN Charter.[95] This explains why the precedents in which self-defence has been extensively invoked have never given rise to a new *opinio juris* shared by the international community of states as a whole.[96] On the contrary, many states have constantly made manifest their reluctance or even their opposition.[97] Characteristic of this is the declaration referred to in the introduction made public by the Non-Aligned Movement that "Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted".[98] Such particularly vigorous language echoes many other declarations.[99] Thus, in view of the restrictive positions that are regularly repeated by the Non-Aligned Movement, it is clear that the Syrian precedent is not sufficient to conclude there has been any change to international law. Against this conclusion it is possible to hold up the wording of resolution 2249 (2015), which does not mention self-defence but on the contrary reiterates that any action taken should be "in compliance with international law, in particular with the United Nations Charter".[100] Conversely, the

[92] *Ibid*., p. 161.

[93] F. LATTY, *Le brouillage des repères du jus contra bellum*, cit., pp. 21-22.

[94] A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., pp. 172-173; G. KAJTAR, *Self-Defence Against Non-State Actors*, cit., pp. 318-324.

[95] F. LATTY, *Le brouillage des repères du jus contra bellum*, cit., pp. 30-38.

[96] *Ibid.*, pp. 27-28; G. KAJTAR, *Self-Defence Against Non-State Actors*, cit.; C. HENDERSON, *The Use of Force and International Law*, cit., pp. 332-333.

[97] C. GRAY, *The Limits of Force*, cit., p. 139.

[98] 17th Summit of Heads of State and Government of the Non-Aligned Movement, Venezuela, 16-18 September 2016, para. 25.2; see *supra*, footnote 6.

[99] See e.g. Comments of the Non-Aligned Movement on the Observations and Recommandations contained in the Report of the High-Level Panel on Threats, Challenges and Change (A/59/565 and A/59/565CORR.1), New York, 28 February 2005, www.un.int, par. 23-24.

[100] N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., pp. 171-174; P. HILPOLD, cit., p. 18; J.-C. MARTIN, *Les frappes de la France contre l'EIIL en Syrie, à la lumière de la résolution 2249 du Conseil de sécurité*, in *Questions of International Law*, 2016, pp. 11-14.

case law of the ICJ, in the cases concerning the *Wall* or *Armed activities on the territory of the Congo*, seemingly confirm this restrictive reading.[101] And it would be pointless trying to neutralize or underestimate the scope of statements by the Court because it "was straightforwardly and consistently clear on the principles it upheld, and there is no international authority postulating the law of self-defence in a different manner".[102]

Finally, it can be understood that one and the same provision may open the way to very different approaches on which the textual, teleological, and pragmatic dimensions of the interpretation all hinge. Beyond these two substantive positions, there are two opposing approaches, one tending to refer to flexible criteria, the other preferring a perspective centred more on positive law. Such a distinction is also to be found in parallel, as shall now be seen, in the debates on the question of the law of humanitarian intervention.

III.2. The extensive v. restrictive approach: humanitarian intervention and responsibility to protect

The bone of contention refers first to a question of interpretation not this time of Art. 51 but of Art. 2, para. 4, of the Charter, which provides: "All Members shall refrain in their international relations from the threat or use of force *against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*".[103]

This provision has been construed in two radically different ways.

From an extensive perspective, it has been claimed that the object of the provision was to prohibit uses of force contrary to the purposes of the United Nations, which was not the case of a humanitarian intervention.[104] An intervention of this type is supposedly not designed to call into question a state's territorial integrity or even necessarily to overthrow its government and so impede its political independence. In support of this teleological interpretation, mention has been made of the practice that allegedly enshrines the possibility, under exceptional circumstances, of conducting military actions designed to protect human rights. From this perspective, allowance for moral considerations is said to become decisive: "natural law protects nations and peoples in addition to formal states";[105] and the right of humanitarian intervention might even be related to a form of self-defence: "[T]he doctrine of legitimate defense provides a foundation for humanitarian intervention because it carves out from the Article 2 prohibition on the

[101] N. Hajjami, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 164; F. Latty, *Le brouillage des repères du jus contra bellum*, cit., pp. 51-52.

[102] A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., p. 172.

[103] Italics added.

[104] J.N. Moore, *Jus ad Bellum before the International Court of Justice*, cit., p. 914.

[105] J.D. Ohlin, *The Doctrine of Legitimate Defense*, cit., pp. 120-121.

use of force not only self-defense, but also defense of others, which also falls under the rubric of legitimate defense".[106]

From a restrictive perspective, emphasis has been placed on the contrary on the stringency of the text, which prohibits any use of force by a state against the political independence of another, which excludes the exercise of extraterritorial executive competencies without the consent of the state concerned.[107] The reference of the necessity to observe the other purposes of the United Nations seems to be, as is confirmed by the consideration of preparatory work, of a nature to reinforce and not chip away at prohibition.[108] The agreements entered into subsequently by the parties on the subject of interpretation of this text confirm as much, in particular Resolution 60/1 adopted by the General Assembly in 2005.[109] This Resolution opens up the path to intervention only under the Security Council's authority, which merely codifies customary law:

> "*The international community, through the United Nations, also has the responsibility* to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, *we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate,* should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[110]

Lastly and as to recent practice, the vindicatory discourse of states has been classical indeed: in most precedents, the intervening states have relied on Security Council resolutions.[111] The only exception is the War in Kosovo in which a few rare states (especially the United Kingdom) did indeed take on a broader right of humanitarian intervention. But such reference has either been presented as a *sui generis* case and unable to create a precedent or strongly condemned as incompatible with existing international law.[112] It is for that reason that, when the new concept of responsibility to protect was evoked, the

[106] *Ibid.*, p. 140; see also J.N. MOORE, *Jus ad Bellum before the International Court of Justice*, cit., p. 914, fn. 33.

[107] International Law Association, *Final report on Aggression and the Use of Force*, 2018, www.ila-hq.org, pp. 4-5.

[108] C. HENDERSON, *The Use of Force and International Law*, cit., pp. 21-22.

[109] C. GRAY, *The Limits of Force*, cit., p. 153.

[110] Italics added; UN General Assembly Resolution 60/1 of 24 October 2005, UN Doc. A/RES/60/1, paras 138-139. See C. GRAY, *The Limits of Force*, cit., p. 183; N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 155.

[111] Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, Vol. II, September 2009, www.mpil.de, p. 284.

[112] A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., p. 174.

very great majority of states insisted that no unilateral actions should be accepted, and that such responsibility should only be exercised by the UN Security Council.[113]

At this stage, we have tried to clearly distinguish the features of the two approaches characterizing scholarship on the use of force. From this perspective we have deliberately emphasized the differences and contrasts, minimizing the nuances and ambiguities that may sometimes characterize particular writings. In what follows, we shall look at a few examples of such ambiguities in order to add nuance to the contrasts highlighted so far.

IV. The extensive v. restrictive interpretation: Some persistent ambiguities

Although many studies can be easily attributed to an extensive or a restrictive approach, some lend themselves less readily to categorization. The two excerpts below on humanitarian intervention in the War in Syria can be compared to this end.

> "There are at least two distinct though intersecting strands of legal argument that could support a sustainable conclusion that the use of force in circumstances of dire humanitarian need would be lawful under international law notwithstanding the absence of an authorising Chapter VII resolution of the UN Security Council or other Charter-based justification (such as collective self-defence). *The first strand is purpose-driven, focused on the insufficiency of a narrow, traditionalist view of the law on such matters and the consequential imperative to translate from the existing law to address circumstances of dire humanitarian need.* This approach contends for the rapid crystallisation of a norm of customary international law in favour of a principle of humanitarian intervention [...]. The second strand is *more rooted in the detail of the law, pulling together threads of practice that in isolation may appear fragile and unreliable but which, when knitted together, are more robust and compelling*".[114]
>
> "The inability of the international community to effectively respond to the Syria crisis through the humanitarian intervention responsibility to protect doctrine (RtoP) and the geopolitics between the United States (US), Russia and China mean that a dangerous stalemate remains in the Syria crisis*. This study argues that for the RtoP to silence its critics, world leaders need to agree on a common ground for the protection of civilians through a strict monitoring and evaluation of the intervention process and the actors involved, enforcing an arms embargo, and committing to support local cease fires*".[115]

[113] V. Lowe, A. Tzanakopoulos, *Humanitarian Intervention*, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2012, p. 55; C. Gray, *The Limits of Force*, cit., pp. 191-192.

[114] Italics added; D. Bethlehem, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, in *EJIL: Talk!*, 12 September 2013, www.ejiltalk.org.

[115] Italics added; N.I. Erameh, *Humanitarian intervention, Syria and the politics of human rights protection*, in *The International Journal of Human Rights*, 2017, p. 517.

The first of these two excerpts is by Daniel Bethlehem and clearly aims to mark off a distance with a restrictive conception that is characterized as a "narrow traditionalist view". However, contrary to what can be found in some studies with extensive overtones, it is not a question of setting aside the classical legal methods of establishing custom; it is a question rather of interpreting them more flexibly. The determining factor in this is supposedly the objective of the Charter, which is meant also and perhaps primarily to protect human rights. In this context, it might more rapidly be concluded there is a customary practice of intervention that should be contemplated overall as a general and progressive trend. How, now, should the excerpt from Nicholas Idris Erameh be taken? One the one hand, the terminology is characteristic of an extensive approach: the "international community" is denounced for being passive and the need to ensure effective compliance with international humanitarian law is reasserted. On the other hand, the author does not seem for all that to assert there is any right for states to conduct military action without Security Council authorization. Perhaps he is calling for a change to existing law, but that implies that however unsatisfactory it may be it does not yet recognize any right of humanitarian intervention. In this sense, and even if the excerpt contains no development implementing the criteria for establishing custom or interpreting the Charter, it has overtones at this point of a rather restrictive approach. In both cases, though, it is understood that there is no straight or orthodox version of one or other approach.

These two examples therefore show the difficulty sometimes found in classifying writings in terms of the criteria set out above. This is particularly so when articulating considerations concerning existing law and others on the developments to be made to that law. But we also sometimes find philosophical reflections surrounding the rules on the non-use of force, which may further reinforce the difficulty. These two short but dense excerpts are evidence of this.

"Kelsen's insistence on the strict autonomy of the law [...] constitute[s] an attempt to save the law from destruction through its instrumentalization for political purposes".[116]

"[T]here [is] no international law governing use of force, and in the absence of governing law, it [is] impossible to act unlawfully".[117]

Vera Gowland-Debbas does not set about analysing positive law here by implementing the constituent components of custom or the principles of interpretation enshrined in the 1969 Vienna Convention on the Law of Treaties. At the same time, she openly makes a profession of positivist and formalist faith, going so far as to cite the classical reference in this field embodied by Hans Kelsen. She claims that making the

[116] V. Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of United Nations Peace Maintenance*, in *European Journal of International Law*, 2000, p. 381.

[117] M.J. Glennon, *The UN Security Council in a Unipolar World*, in *Virginia Journal of International Law*, 2003, p. 100.

distinction between what is legal and what is moral is the only way to save law from power relations. Because, if we let each state rely on its own conceptions of justice to justify the triggering of military action, it is all of international law that is under threat. Here we find a few traces, in scholarship, of the fears manifested by the states of the Non-Aligned Movement that acceptance of new doctrines tending to make the prohibition of the use of force more flexible – and specifically to circumvent the central position of the Security Council – would not be a step forward but a step backward for international law. International law would be dragged back to what were thought to be bygone times, such as the time when the conception of "just war" prevailed and crusades and imperial actions followed on one from the other. In this sense, Vera Gowland-Debbas lays bare the normative and philosophical underpinnings of the restrictive approach. She reminds us that this approach cannot be reduced to a defence of law for law's sake but embodies a political project in which observance of forms and procedures is the only guarantee for maintaining the peace and besides for maintaining a degree of pluralism in conceptions of what is fair and just.

Michael Glennon's formulation is also particularly arresting. His position is clearly opposed to that of Vera Gowlland-Debbas. First because the idea is not to promote or for that matter to criticize legal formalism. The statement is more of an observation of fact. Like it or not, then, there are no longer (the paper was published in the aftermath of the War against Iraq, which revealed deep disagreements among states) or never have been (because it may even be considered that the repeated military interventions since the Charter was adopted have shown it has no normative power) any rules effectively prohibiting the use of force.[118] Next, and in substance, Michael Glennon does seem to legitimise military interventions. Because, if there is no prohibition, those rules cannot by definition be used to challenge the lawfulness of the interventions in question. At this point, we have the impression of standing clearly apart from a restrictive approach, which would consist in stating a view on the scope of the rule with respect to the texts, practice, and *opinio juris*. On the other hand, the argument about the absence of any rule prohibiting the use of force seems to be based on an examination of practice: practice would seem to point to the *absence* of any customary rule, because states' behaviour seemingly attests rather to their belief they are free to act sovereignly to uphold what they consider to be their rights. But, even if the conclusion may appear astonishing or even provocative, things remain within the domain of the establishment of custom which, strictly, it would simply have been impossible to demonstrate. So there is no ruling out interpreting Michael Glennon's assertion as being linked to a restrictive approach for the simple reason that, fundamentally, it enshrines the sovereign right of states to use force.

[118] T.M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, in *American Journal of International Law*, 1970 p. 809 *et seq*.

When one comes to think about it, claiming that interventionist practice has resulted in the disappearance (or even the non-emergence) of a legal rule prohibiting war does not seem to arise from either a restrictive or an extensive approach in the sense in which we have described them above. Michael Glennon illustrates rather a strictly realistic approach to international relations whereby law is quite simply powerless to regulate power-based phenomena. Therefore it is not a matter of interpreting law restrictively, since there is no such law. But for the same reason, we are no longer dealing with an extensive interpretation of a rule, that rule being purely and simply absent. The value of this realist stance is to show us that, beyond their divergences, the restrictive and extensive approaches share a common frame of reference. To claim that Art. 2, para. 4, or Art. 51 of the UN Charter prohibits, or does not prohibit, military action presupposes that the two provisions exist and have binding legal effects on states. As will also have been observed, a consensus also seems to emerge over certain criteria that should be used to establish a customary rule or interpret a treaty. Those criteria have been set out by the ICJ, by the International Law Commission, or by states themselves in instruments like the VCLT. They are all sources that make up a common legal landscape in which interpreters are at loggerheads, some preferring a restrictive, others an extensive reading. Accordingly, debates about the non-use of force may reveal both divergences and common ground, which should be taken into account when undertaking an examination of the subject.

V. Towards the success of the extensive approach?

That being specified, might it not be considered that the restrictive approach is tending to weaken within scholarship to the point of being threatened with extinction? Several authors seem to have answered in the affirmative. Pointing out what they considered to be a spectacular advance by the extensive approach, they consider, somewhat bombastically, that "restrictivism [...] has simply rolled over and died in the face of relentless onslaught. The few hold-outs [...] are increasingly isolated – irrespective of the force of their legal arguments ",[119] or that "the orthodoxy on the law on the use of force has dramatically switched from a restrictivist to an expansionist perspective [...]. The legal scholarship on the use of force has clearly moved towards a broader conception of the law of self-defence [...]. Expansionists have recently succeeded in imposing their views upon the restrictivist camp with respect to important issues of this law".[120]

The tipping point is supposedly the events of 11 September 2001 and the resulting shift to the age of the "War on Terror".

[119] J. Kammerhofer, *Introduction*, cit., p. 15.

[120] R. Van Steenberghe, *The Law of Self-Defence*, cit., pp. 43 and 44. And further on: "Legal scholarship on the use of force has undeniably moved towards a broader interpretation of the law of self-defence" (*ibid.*, p. 64).

But can it really be shown that such a change occurred? It has been claimed on the basis of individual writings on the use of force, and we shall begin by looking at the arguments made in this respect. Then we shall step back to evoke the collective standpoints involving a large number of international law scholars to ask whether it can really be deduced there has been a radical shift towards an extensive approach.

V.1. *Jus contra bellum* individual studies: is the restrictive approach really "increasingly isolated"?

It is hard to deny that numerous papers and books have been published recently to defend an extensive approach, as attested especially by the work of Michael Wood,[121] Christian Tams,[122] or Daniel Bethlehem.[123] But how far does this trend extend? This is the question Jörg Kammerhofer asks, presenting himself as a supporter of a restrictive approach. While conceding that it is particularly difficult to measure, he bases his impression on an analysis of a "random sample"[124] of 61 articles. These are in English or German and published between 2001 and 2012 and include 38 US authors. In looking more specifically at the question of the "possibility, degree and shape of a "delinkage" of armed attacks from the "host state", Jörg Kammerhofer concludes that "39 authors in the sample support a wide reading, 13 do not and one is too close to call".[125] He goes on, "(particularly continental European) non-US writings have changed to a significant degree because of the impact of the events on and following 11 September 2001 on society, including scholars. Even writers in countries where restrictive readings used to be prevalent, for example Germany, have now moved to an expansionist position".[126]

This analysis enables him to conclude that "the orthodoxy, seems to have shifted markedly in favour of a wider reading of the right in the last 13 years".[127]

The paper does not list the 61 articles examined, but one thing is sure: since 2001 in particular, countless studies have discussed self-defence in the event of a terrorist attack and they have often tended to support a broad interpretation of the Charter.[128] It

[121] See, for example, M. Wood, *Terrorism and the International Law on the Use of Force*, in *Indian Journal of International Law*, 2013, p. 195 *et seq*.

[122] C.J. Tams, *The Use of Force against Terrorists*, in *European Journal of International Law*, 2009, p. 359 *et seq*.

[123] D. Bethlehem, *Principles relevant to the scope of a State's right to self-defense*, cit., pp. 1-8.

[124] J. Kammerhofer, *The Resilience of the Restrictive Rules on Self-Defence*, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford: Oxford University Press, 2015, p. 633.

[125] *Ibid*.

[126] *Ibid.*, p. 634.

[127] *Ibid.*, p. 635.

[128] See, for example, N. Ronzitti, *The Expanding Law of Self-Defence*, in *Journal of Conflict and Security Law*, 2006, pp. 344 and 348; K.N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, in *International & Comparative Law Quarterly*, 2007, p. 156; R. Van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A*

is true that the simple choice of selecting, analysing, and commenting on recent practice in this domain probably prompts the authors concerned to identify innovative or even revolutionary features rather than conclude unexcitingly that positive law has gone unchanged. Moreover, can we see in this teeming literature on the extensive trend a snowball effect, as these studies tend to some degree to cite each other to strengthen their position, which, by dent of repetition, tends to pass for the norm. Can we, for all that, draw such sharp conclusions like the one Jörg Kammerhofer puts forward? The straightforward exposition of his method shows its limitations, which he readily admits.[129] The following four points can be emphasized in particular.

First, the number of studies analysed is quantitatively small compared with the volume of output in the discipline. Even if we confine ourselves to books and journals in English, we very quickly get beyond the five or six studies per year that is the average for the selected sample. It will be recalled in this respect that there are at least two specialized journals in this area: the *Journal of Conflict & Security Law*, founded in 1996, and the *Journal on the Use of Force in International Law*, the first issue of which dates from 2014. Even if we confine ourselves to these two publications, we will already have a score of studies per year on the non-use of force. Although it is difficult to identify them all, it seems obvious that recent years have seen a spate of multi-authored books including the *Oxford Handbook of the Use of Force in International Law* (57 chapters)[130] published in 2015 and *The Use of Force in International Law. A Case-based Approach* (66 chapters) published in 2018.[131] To gain some idea of the approximate number of relevant studies, a search was conducted on the *Heinonline* database, with the keywords "self-defence/terrorism/international law", with the year 2000 as the start date: 4930 studies were listed. Even if some of them did not refer directly to the subject of interpretation of Art. 51 of the Charter, the number does in any event far exceed 61, particularly as the search engine can select only articles in English, which leads us to a further remark.

This purely quantitative aspect apart, we can obviously question the limitations with the lack of diversity of the studies selected. They are exclusively papers in English or German, which omits a substantial number of publications, whether in languages traditionally used by international law scholars such as French, Spanish or Italian, or other languages such as Arabic or Russian to take just two examples. Yet, as Jörg Kammerfofer himself remarks, "the debates in international legal scholarship are to a surprising-

Step Forward?, in *Leiden Journal of International Law*, p. 183 *et seq.*; N. Tsagourias, *Non-state actors in international peace and security, Non-state actors and the use of force*, in J. D'Aspremont (ed.), *Participants in the International Legal System Multiple Perspectives on Non-State Actors in International Law*, London: Routledge, 2011, p. 326 *et seq*.

[129] In his own words, "in contrast to jurisprudence, scholarly literature in international is far more difficult to survey"; J. Kammerhofer, *The Resilience of the Restrictive Rules on Self-Defence*, cit., p. 632.

[130] M. Weller (ed.), *The Oxford Handbook on the Use of Force*, cit.

[131] T. Ruys, O. Corten, A. Hofer (eds), *The use of force in international law: a case-based approach*, cit.

ly large extent still confined within national or linguistic boundaries".[132] It can therefore be seriously doubted whether the sample of 61 studies from a random sample (which, remember, includes some 60 per cent of US authors) is representative. And it can also be doubted whether this reductionism is without any effect on the results insofar as it is known that US authors are generally purveyors of more extensive conceptions.[133] In any event, the choice to use just English (and German) as the relevant language excludes studies in other languages by renowned authors from various nationalities who, for their part, have supported more restrictive conceptions such as Maurice Kamto,[134] Slim Laghmani,[135] Théodore Christakis,[136] or Pierre Klein, who gave a course at The Hague Academy on the subject.[137]

A third bias with the method used in the paper under discussion is that it is limited to a particular theme (the "possibility, degree and shape of a "delinkage" of armed attacks from the "host state"), which besides is not very clearly defined. Why not, for example, have looked at the right of humanitarian intervention, which also gives rise to a traditional opposition between extensive and restrictive approaches? It is not sure, in that case, that the author would have reached the same conclusion. The conclusion therefore seems to hold for a highly specific question and it would be difficult to infer from it a weakening, let alone the gradual disappearance, of the restrictive approach generally in the domain of *jus contra bellum*. To really make a ruling on the matter, we would have to broaden the perspective not just to all studies of the topic but to others such as international law textbooks or the general courses of The Hague Academy of International Law, with the test of the victory of a new conception relating to its inclusion in these books designed to teach international law. At the very least we could look at textbooks on the non-use of force and there again it is far from obvious that we should obtain similar figures to those reached on the basis of the 61 articles selected by Jörg Kammerhofer. To take just publications after 2001, it could be hypothesized that a certain balance would arise with Thomas Franck,[138] Yoram Dinstein,[139] and Tarcisio

[132] J. KAMMERHOFER, *The Resilience of the Restrictive Rules on Self-Defence*, cit., p. 632.

[133] See V. CHAPAUX*, Pour une relativisation de la rupture entre approches étasuniennes et françaises du droit international*, in R. BACHAND (ed.), *Théories critiques et droit international*, Bruxelles: Larcier, 2013, p. 93 *et seq*.

[134] M. KAMTO, *L'agression en droit international*, Paris: Pedone, 2010.

[135] S. LAGHMANI, *La doctrine américaine de la "preemptive self-defense"*, in R.B. ACHOUR, S. LAGHMANI (eds), *Le droit international à la croisée des chemins*, Paris: Pedone, 2004, p. 137 *et seq.*

[136] T. CHRISTAKIS, *Existe-t-il un droit de légitime défense en cas de simple "menace"? Une réponse au "groupe de personnalités de haut niveau" de l'ONU*, in Société française pour le droit international (ed.), *Les métamorphoses de la sécurité collective - Droit, pratique et enjeux stratégiques*, Paris: Pedone, 2005, p. 197 *et seq*.

[137] P. KLEIN, *Le droit international à l'épreuve du terrorisme*, Leiden: Brill, 2008, p. 368 *et seq.*

[138] T.M. FRANCK, *Recourse to Force. State Action against Threats and Armed Attacks*, Cambridge: Cambridge University Press, 2009.

[139] Y. DINSTEIN, *War, Aggression and Self-Defence*, cit.

Gazzini[140] representing an extensive approach and Christine Gray,[141] Robert Kolb,[142] and Christian Henderson[143] or myself[144] embodying a more restrictive position.

Some points of the classification just made might be challenged. Yoram Dinstein and Thomas Franck, for example, have been characterized as Bright-Liners,[145] which plainly corresponds to what has been referred to as a restrictive approach. Conversely, Robert Kolb, given his emancipation from the letter of the UN Charter and his approach that takes its liberties more generally with legal positivism,[146] might in some respects reflect a method with extensive tendencies. In this we touch upon the last but not the least of limitations in any attempt for any tendency to claim victory over another: that of the difficulty, in many instances, of associating a study with one and only one such tendency. In the article referred to, Jörg Kammerhofer fails to say how he set about his categorization,[147] and so we have no way of validating his procedure.

In the light of all these factors, it seems difficult to say the least to claim that the extensive approach has developed in such a spectacular way as to now threaten the survival of a more restrictive position. Patently in view of the various individual writings just mentioned, the restrictive approach has not disappeared. To consolidate this impression, we can evoke certain collective rather than individual stances, as shall be seen in what follows.

V.2. *Jus contra bellum* collective positions: is the restrictive approach really "increasingly isolated"?

Several stances reflecting an extensive approach were made public in the period following 11 September 2001. In this respect we might cite the *Principles of International Law on the Use of Force by States in Self-Defence* established by Chatham House of the Royal Institute of International Affairs in London, in 2005,[148] the *Leiden Policy Recommenda-*

[140] T. Gazzini, *The Changing Rules on the Use of Force in International Law*, Manchester: Manchester University Press, 2006.

[141] C. Gray, *International Law and the Use of Force*, cit.

[142] R. Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum*, Cheltenham: Edward Elgar, 2018.

[143] C. Henderson, *The Use of Force and International Law*, cit., p. 58.

[144] O. Corten, *The Law Against War*, cit.

[145] M.C. Waxman, *Regulating resort to force*, in *European Journal of International Law*, 2013, p. 151 *et seq.*

[146] R. Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum*, cit., pp. xi-xii.

[147] In his study he comes up with the figure of 39 authors (out of 61) having defended and extensive view of self-defence but fails to explain how he reached this figure (with the exception of Albrecht Randelzhofer); J. Kammerhofer, *The Resilience of the Restrictive Rules on Self-Defence*, cit., pp. 634-635.

[148] See E. Wilmshurst, *Principles of International Law on the Use of Force by States In Self-Defence*, Chatam House, 1 October 2005, www.chathamhouse.org.

tions on Counter-Terrorism and International Law, made public in 2010,[149] or the *Tallinn Manual* (2013), and *Tallinn Manual 2.0* (2017), on "International Law applicable to Cyber Operations".[150]

But, apart from having been drafted at the instigation of or with support from states (the United Kingdom in the first case, the Netherlands in the second) or international organizations (NATO in the third) that are developing an interventionist practice more in line with an extensive conception, these texts are the output of a comparatively limited number of specialists, and mostly from Western countries.

If we broaden the outlook, it can rapidly be seen that many other texts, signed by numerous international law scholars outside of any state initiative, may be evoked. These texts were first drawn up in the context of the 2003 War on Iraq,[151] but more recent ones can be identified. Particularly emblematic in this regard is the "Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism".[152] This text was initiated in May 2016 by the *Centre de droit international* at the *Université libre de Bruxelles* (ULB) and in conjunction with several colleagues.[153] It was published in French, English, Dutch, Spanish, Portuguese, Italian, and Arabic and quickly met with remarkable success: 306 signatures (205 men and 101 women), including 243 full or associate professors (and even an international judge) as well as 63 teaching assistants, researchers, and PhD students. The nationalities represented were very varied and included the following countries: Argentina, Australia, Austria, Bahrain, Belgium, Brazil, Burundi, Cameroon, Canada, Chile, China, Columbia, Costa Rica, Cyprus, the Democratic Republic of Congo, Finland, France, Germany, Greece, Iran, Israel, Italy, Japan, Kazakhstan, Kuwait, Luxembourg, Mauritania, Netherlands, Portugal, Romania, South Africa, Spain, Switzerland, the UK, Uruguay, and the US. The highly sensitive context was the aftermath of the Paris attacks of 13 November 2015 and the commitment of several European states in the war against ISIL in Syria. It was at this time too that the extensive conceptions of self-defence were developing based on the "unwilling or unable" standard already referred to. The Plea Against the Abusive Conception of Self-Defence was therefore from the outset a reaction against an extensive approach to the use of force:

[149] See the document explaining and exposing the Recommendations: N. SCHRIJVER, L. VAN DEN HERIK, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 1 April 2010, www.openaccess.leidenuniv.nl.

[150] M. SCHMITT, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge: Cambridge University Press, 2017.

[151] See *Appel de juristes de droit international concernant le recours à la force contre l'Irak*, in *Revue belge de droit international*, 2003, p. 266 *et seq.*

[152] *Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism*; Text and list of signatories in *Revue belge de droit international*, 2016, p. 7 *et seq*.

[153] O. CORTEN, *A Plea Against an Abusive conception of Self-Defense as a Response to Terrorism,* in *EJIL:Talk!,* 14 July 2016, www.ejiltalk.org.

> "[N]umerous military interventions have been conducted in the name of self-defence, including against Al Qaeda, ISIS or affiliated groups. While some have downplayed these precedents on account of their exceptional nature, there is a serious risk of self-defence becoming an alibi, used systematically to justify the unilateral launching of military operations around the world. Without opposing the use of force against terrorist groups as a matter of principle – particularly in the current context of the fight against ISIS – we, international law professors and scholars, consider this invocation of self-defence to be problematic".[154]

The text then covers more strictly legal considerations including the following:

> "[I]t is only if – and as long as – the Security Council has not adopted the measures necessary for maintaining international peace and security that self-defence may be invoked to justify a military intervention against a terrorist group. *In accordance with article 51 of the Charter, the use of force in self-defence on the territory of another State is only lawful if that State bears responsibility for a violation of international law tantamount to an "armed attack". This may occur either where acts of war perpetrated by a terrorist group can be attributed to the State, or by virtue of a substantial involvement of that State in the actions of such groups*. In certain circumstances, such involvement may result from the existence of a direct link between the relevant State and the group. *However, the mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State's territory without its consent. Such an argument finds no support either in existing legal instruments or in the case law of the International Court of Justice*. Accepting this argument entails a risk of grave abuse in that military action may henceforth be conducted against the will of a great number of States under the sole pretext that, in the intervening State's view, they were not sufficiently effective in fighting terrorism".[155]

The plea therefore manifestly enshrines a restrictive conception both in terms of substance and in a more narrowly methodological way, with a reference to the UN Charter, to "legal instruments" which, given the language used, contains the definition of aggression annexed to Resolution 3314 (XXIX) of the General Assembly and the case law of the ICJ.

In light of this evidence, it seems to be overstating matters to claim that the restrictive conception is "increasingly isolated". The signatories of the last text include specialists who have written studies in the area of *jus contra bellum*.[156] One could obviously

[154] *Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism*, cit., p. 11.

[155] *Ibid.* (italics added).

[156] Karine Bannelier, Michael Bothe, Michael Byers, Enzo Cannizzaro, Théodore Christakis, Luigi Congorelli, Christine Gray, James Green, Christian Henderson, Mary Ellen O'Connell, Jörg Kammerhofer, Maurice Kamto, Robert Kolb, Anne Orford, Tom Ruys, Christian Walter, Myra Williamson, and others. See also other major figures of international legal scholarship like Georges Abi-Saab, Denis Alland, Philip Alston, Tony Anghie, Jean d'Aspremont, Hilary Charlesworth, Monique Chemillier-Gendreau, Olivier de Schutter, Yann Kerbrat, Martti Koskenniemi, Nico Krisch, Frédéric Mégret, Dhamchid Momtaz, Marco Sassoli, Emmanuelle Tourme-Jouannet, and others.

debate the interpretation of the different texts mentioned, and again the reasons why they were sometimes signed. The essential point, though, is to demonstrate that it is difficult if not impossible to measure the scope and respective shifts in the extensive and restrictive approaches within scholarship. What is for sure, though, is that the restrictive approach is still very much present, not just among many figures from many different countries, but also in the Institute of International Law, which adopted several resolutions in 2007 and 2011 which are far from enshrining an extensive approach to the use of force, and the International Law Association, which published a report leading to the same conclusions in 2018. Lastly, it is difficult not to remind readers that the ICJ for its part has held to a particularly narrow and restrictive line. Finally, the only conclusion to be drawn is that the debate has not disappeared and even that, more than likely than not, it is not about to disappear either.

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Discourses on Methods in International Law: An Anthology

Origins and Challenges of a Positivist Approach to International Law

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Abstract: Positivism as a method to identify and interpret International law is nowadays often criticized. In order to better understand and evaluate the criticisms, it is helpful to trace back the origins of such an approach and reflect on its core tenets. It is maintained that, while there are issues which may not be understood through a strict positivist lens, this methodology remains today the closest to the reality of international law-making.

Keywords: International law theory – positivism – custom – States – Permanent Court of International Justice – Nuremberg trial.

I. Foreword

It is for me a great, but at the same time arduous honor to take part in the Gaetano Morelli Lectures series. I was introduced to the *Nozioni di Diritto Internazionale*[1] as a first-year law student, and it was not an easy opening encounter with international law. Nonetheless, the reasoning and categories of that handbook – once grasped – were intriguing and compelling, and had a great part in the relationship I developed with the subject. In my subsequent studies, faced with the disharmonies, conflicts, inconsistencies, developments of international relations and international law, I have often found a reassuring respite in Gaetano Morelli's approach and systemic organization.

At the world level, Morelli may be best known for his role as a judge at the International Court of Justice, and for the precision by which he identified the concept of inter-

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[1] A French translation has been published by R. Kolb, *Notions de droit international public*, Paris: Pedone, 2013.

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national dispute, as well as the distinctions between procedural and substantive issues. There is, however, much more to his work. He is, in fact, one of the most convinced and convincing supporters of positivism, as applied to international law during the 20th century.

The present lecture, therefore, is twice as challenging for the author. My – limited – goal here is to try to understand[2] to what extent positivism has been applied to international law and whether, in the 21st century, it may still be a viable tool in finding, studying and applying this body of law.

II. Positivism as a methodology applied to law

Positivism is, first of all, a philosophical approach. Developed in the mid-19th century, it aspires to be as progressive as the industrial revolution to which it is strictly associated. By emphasizing the need to look first at facts and then to link them together by identifying common patterns (laws), positivism brings a *scientific*, *objective* methodology to a highly speculative discipline. The study of cause and effect is central and induction, rather than deduction, is the fundamental process to follow. Positivists do not devote time to what they consider purely theoretical speculations about the metaphysical reasons behind those patterns; they aim to offer a *rational* picture of the world, with man at its center.[3]

In the field of law, this approach intersects the radical changes brought about by the 18th century and its political revolutions. In the 19th century, law-making is no more a sovereign, absolute and discretionary entitlement of the monarch, who receives it from higher entities. Rather, the crown – where still in some control – now shares those powers with the people/parliaments, however defined. The making of law becomes a regulated process, where various actors have a distinct role: it is clearly recognizable and a matter of *objective* study. For Austin, in this context positive law is characterized by command given by a political superior (person or body); consequent duty imposed on the subjects; and sanction following the breach of duty.[4]

The new approach involves a radical shift: there is no more room for natural law, which had thus far played a key role. A body of rules handed down through the centuries, *ius naturale* had a Roman law root and its content determined mostly by experts, according to whatever meaning they gave to *nature*, be it divinity, morality or reason,

[2] In the sense expounded by H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press, 2012, Preface.

[3] A. Comte, *Discours sur l'esprit positif*, Paris: Carilian-Goeury et Dalmont, 1844. He is widely regarded as the founder of sociology. John Stuart Mill, Herbert Spencer, Roberto Ardigò are among those deemed most influenced by his theory. Philosophers like John Locke or Jeremy Bentham, and more generally Utilitarians, are to some extent considered forerunners of positivists. Others maintain that positivism has a much more ancient genealogy in Western philosophical history.

[4] J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, London: Murray, 1832, hereinafter quoted in the 5th edition, revised and edited by R. Campbell, London: Murray, 1885.

and identified through a deductive process. While recourse to natural law may have provided a limitation to the absolute discretion of monarchs in past ages, positivists point out the arbitrariness of this approach to make/find the applicable law, as well as its uncertainty. This is true not only for the continental tradition, which is by now based on codes and parliamentary laws, but also for common law countries.[5]

It is worth recalling here a few features of positivism as a method of identifying law, which were generally acknowledged between the 19th and 20th centuries. The following are broad statements, which do not pay their due to the complexity of an articulated debate among positivists themselves.[6] As the subject of this lecture is not a study of positivism across the board, but its application to international law, it is here necessary but also sufficient to bring to the reader's attention a few points.

The expression positivism may have different roots; in the legal discourse, *positum* is mostly understood as created by man. *Ius positum* is thus juxtaposed to natural law, which is instead thought to be immanent. In this sense, the notion of positive law is not a novelty of the 19th century; it may be traced back at least to the Middle Ages.[7]

What is new, is that by this time the State has the monopoly of *ius ponere*, of making law. Positivism then equates with State law; and because the political regimes, at this time and in the regions of the world where positivism blooms, tend towards a liberal democracy pattern, the people, through parliaments, have the power to make the law. The will of the legislators is supreme. There is theoretically no more room for a law, which is not made by the people for the people. Positivism then has the very first goal to delegitimize any discretionary rule-making outside the established, constitutional procedures, such as also leaving to a few, unelected experts the task of declaring what the applicable norm is, often – it is maintained – by way of hazy arguments. Like natural

[5] J. AUSTIN, *Lectures*, cit., p. 251, seems to air a certain diffidence towards "that measureless system of judge-made rules of law, or rules of law made in the judicial manner, which has been established covertly by those subordinate [to the king] tribunals as directly exercising their judicial functions". However, he traces these rules back to the legislative power by noting that "when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature [...] The state [...] permits its minister to enforce them" (*ibid.*, p. 102; emphasis in the original). H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *Harvard Law Review*, 1957-58, p. 593 *et seq.*, reprinted in H.L.A. HART, *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press, 1983, also available at Oxford Scholarship Online, states that "after it was propounded to the world by Austin [positivism] dominated English jurisprudence" (p. 55), as well as US jurisprudence. See, for example, O.W. HOLMES, *The Path of the Law*, originally published in *Harvard Law Review*, 1897, p. 457 *et seq.*, reprinted in *Boston University Law Review*, 1998, p. 78 *et seq.*

[6] A thorough introduction to legal positivism is provided by the collected essays of N. BOBBIO, *Giusnaturalismo e positivismo giuridico*, Roma, Bari: Laterza, 2011.

[7] R. AGO, *Positive Law and International Law*, in *American Journal of International Law*, 1957, p. 691 *et seq.*

law, in the European continental countries other unwritten law, such as usages, almost completely disappears from municipal legal orders.[8]

One major tenet is that one can neatly distinguish between the social, political, economic motives, which make up the reasons for having a certain rule, and the actual, legal procedure by which the rule becomes binding.[9] The two spheres are separate, or separable. The law as it is, is the area of legal studies; the law as it ought to be, is the area of political studies. Against this background, legal arguments are technical, not based on subjective, moral values. It is not the task of the jurist to express value-judgments: this is the realm of politics. Lawyers are scientists, who apply an objective method to the reading of law, as formulated by the political bodies. Also, as State-made law is written, rules are worded in such a way, as to make their scope clear. Thus, their application is predictable, and the role of judges is simply to apply the law in the specific case.[10] There is only limited room for interpretation, which consists in analyzing the text, context and premises of the law.[11] However, already Austin, for one, acknowledges that judges may have a quasi-creative role.[12]

The concept of sources of law is central. A rule becomes binding only if it is enacted according to the procedures established by the legal system, and not by itself because it is just. The direct consequence is that one may not invalidate nor discard a rule because it is biased, according to a moral judgment, but only because it conflicts with higher norms of the legal system.

The self-standing character of the juridical order is best developed in Kelsen, who may be considered, for the purposes of this lecture, an advanced positivist. According

[8] J. AUSTIN, *Lectures*, cit., p. 101 *et seq.*, considers custom as law established "by the state directly or circuitously" (p. 103), where "customs are turned into legal rules by decisions of subject judges" … the State "signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed" (p. 102). See also *supra*, footnote 4.

[9] This is the well-known distinction between *fonte materiale* and *fonte formale* in the Italian legal theory, as developed also by international scholars. E.g., see D. ANZILOTTI, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Firenze: F. Lumachi, 1902, p. 30; D. ANZILOTTI, *Corso di diritto internazionale*, Roma: Athenaeum, 1923, pp. 13 e 39. H.L.A. HART, *The Concept of Law*, cit., refers to the *fonti formali* through the notion of "rules of recognition".

[10] On predictability from the point of view of common law, see O.W. HOLMES, *The Path of the Law*, cit.

[11] According to H.L.A. HART, *Positivism and the Separation of Law and Morals*, cit., p. 66, the clear-cut idea that judges only find and never make law is maintained only by those legal theorists, most concerned with the separation of powers, like Montesquieu or Blackstone. Kelsen maintains that "the creation of an inferior norm is at the same time the application of the superior norm determining the creation of the inferior norm [...] Creation and application of law are only relatively, not absolutely, opposed to each other. In regulating its own creation, law regulates also its own application", H. KELSEN, *Principles of International Law*, New York: Rinehart & Company, 1952, p. 304.

[12] J. AUSTIN, *Lectures on Jurisprudence*, cit., p. 35 *et seq.*, examines among the sources two modes of making law: a "*properly* legislative mode (or in the way of *direct* legislation), or in the *improperly* legislative mode (or in the way of *judicial* legislation)" (p. 35, emphasis in the original). Austin is of course speaking about the common law tradition.

to Kelsen, every legal system finds its legitimacy in a *Grundnorm*, which is simply – from the point of view of the lawyer – assumed, presupposed. The term normativism, often employed to describe Kelsen's approach, indicates both that the value-judgment, which is involved in deciding about the making of the norm, is not taken into consideration, once the rule has become a norm according to the established legal procedures; and – here mostly lies its difference with other forms of positivism – that the method employed in the study and application of the law is neither empirical, nor inductive. Any resort to methodologies of natural sciences, which relate to facts, is unacceptable in the social science, which is the study of law. The "purely legal" method is the one which distinguishes between what it is (the reality) and what it ought to be (what the law says), and only studies the second one: "which legal condition is linked with legal consequence".[13] Kelsen's aim is "to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude".[14] Such objectivity leads to the conclusion that interpretation of a positive norm in a material case is but an act of will, and that legal certainty is just an illusion.[15]

Because of its detachment from a critical appreciation of the content of law,[16] legal positivism is sometimes, in a not-so-much disguised derogative sense, described as formalism,[17] or analytical jurisprudence.[18]

III. Is positivism different in international and municipal law?

The notion that only the State makes law has an immediate appeal in international law. States were and are the leading personalities both in international relations and in international law. The central role of the will of States in law-making is unquestionable.

At the same time, international law is the expression of a society very different from municipal polities. It is a society of entities *superiorem non recognoscentes*, which lacks features considered essential by Austin, like a sovereign authority and an effective sanc-

[13] H. Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (1934), translated by B.L. Paulson, S. Paulson, Oxford: Clarendon, 1997, p. 58. Kelsen critique of empirical-positivism centers on seeing the law as part of the world of fact.

[14] *Ibid.*, p. 1.

[15] *Ibid.*, p. 83 *et seq.* The conclusion is not too far, although completely differently argued, from the one reached by Austin and quote, see *supra*, footnote 12.

[16] But, in turn, for a criticism of this common appreciation, see M. García-Salmones Rovira, *The Project of Positivism in International Law*, Oxford: Oxford University Press, 2013, Ch. 4.

[17] N. Bobbio, *Giusnaturalismo e positivismo giuridico*, cit., p. 12 *et seq*.

[18] The expression, originally employed by Austin, acquired a non-complimentary nuance especially in the US realist school of the 1930s. J.L. Kunz, *The "Vienna School" and International Law*, in *New York University Law Quarterly Review*, 1933-1934, p. 376 *et seq.*

tioning system.[19] The very notion of the State is different in municipal and international law.[20]

Such a society expresses law-making processes quite different from the enactment of laws. First of all, members of the international society themselves proceed directly to create legal norms: they self-impose rules. Also, international law continues to rely upon customary rules, and not to a limited extent. Unwritten international rules had been based for centuries both on natural law and on *jus gentium*, or on one of them, or on the result of their merging, according to various authors. This recourse to Roman, private law concepts was due to the need to find general and universal rules, which might apply in the peculiar society, which had developed in Europe at least since the 16th century.[21] The concept of *jus gentium* later evolved into a customary body of rules, made up of practices followed by the different (European) States in their relationships. By the 19th century, States do not appear to be willing to give up recourse to unwritten rules in their relations. The various Foreign Affairs ministries regularly kept invoking customary rules.[22]

[19] According to J. AUSTIN, *Lectures*, cit., pp. 225-226, "[s]ociety formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another. And hence inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected". Following Austin, the qualification of international rules as law continues up to this day to be a matter of debate in the English-speaking international relations community of scholars.

[20] G. ARANGIO-RUIZ, *L'Etat dans le sens du droit des gens et la notion du droit international*, in *Österreichische Zeitschrift für Öffentliches Recht*, 1975, p. 3 *et seq.*, p. 265 *et seq.*, available at www.gaetanoarangioruiz.it.

[21] This was true even before Grotius: see M. GIULIANO, *La comunità internazionale e il diritto*, Padova: CEDAM, 1950, ch. 1; R. AGO, *The First International Communities in the Mediterranean World*, in *The British Yearbook of International Law*, 1982, p. 213 *et seq.* On the topic, see now R. LESAFFER, *Roman Law and the Intellectual History of International Law*, in *Oxford Handbook of the Theory of International Law*, Oxford: Oxford University Press, 2016, p. 38 *et seq.*; W.G. GREWE, *The Epochs of International Law*, Berlin, New York: Walter de Gruyter, 2000, Part One. The quotation that "[t]he Law of Nations is but private law 'writ large'" is from T.E. HOLLAND, *Studies in International Law*, Oxford: Clarendon Press, 1898, p. 152, now available at www.archive.org. The quotation is reproduced as a dedication, at the opening page, in H. LAUTERPACHT, *Private Law Sources and Analogies in International Law*, London: Longmans, Green and Co., 1927, latest reprint, Clark, N.J.: The Lawbook Exchange, 2013.

[22] As it is evident from even a quick perusal of the various collections of diplomatic practice, like F. WHARTON, *A Digest of International Law of the United States*, Washington: Government Printing Office, 1887, p. 3 *et seq.*; J.B. MOORE, *A Digest of International Law*, Washington: Government Printing Office, 1906, p. 8 *et seq.*; the various volumes of *British and Foreign State Papers*; Società italiana per l'organizzazione internazionale (SIOI), *La Prassi italiana di diritto internazionale*, *Prima Serie*, Dobbs Ferry, New York: Oceana, 1970.

Treaty-law is also peculiar, if confronted with statutes. It has traditionally been assimilated to contracts, to indicate that they are concluded among parties on the same formal level. Besides, States enjoy complete freedom about not only the procedure to follow, but also the content of their agreements.

These difficulties did not discourage international scholars from embracing positivism. The fact that they are, at least in the beginning, mostly German might be connected to the influence upon them of Hegel, rather than Austin.[23] A first approach connected the binding nature of international law, or of treaties, to that same will, which the State exercises by making law in its municipal order. International law is thus the result of the combination of unilateral acts of will of the State, a sort of external public law. Such combination does not result in something similar to a contract; in fact, each State is at the same time the right holder and the obligation holder. As a consequence, it may always unilaterally withdraw its previous acceptance of obligations.[24]

A different approach is developed by Triepel, followed by Anzilotti. These Authors move away from the notion that international law is but external public law; rather, they view it as an original system of law, separate and independent from the various municipal orders.[25] They point out the likelihood of conflict among the different systems. In this context, the fathers of the dualist approach to the relation between international and municipal laws considered not only that international law had its proper sanctions, such as the

[23] On this aspect, see C. FOCARELLI, *Introduzione storica al diritto internazionale*, Milano: Giuffrè, 2012, p. 307 *et seq.* J. VON BERNSTORFF, *German intellectual historical origins of international legal positivism*, in J. D'ASPREMONT, J. KAMMERHOFER (eds.), *International Legal Positivism in a Post-Modern World*, Cambridge: Cambridge University Press, 2014, p. 50 *et seq.*, draws a rich picture of the German contribution to international positivism in the 19th century and before. Hegel had no issues in considering international law as law, although in the sense later developed by Jellinek: see G.W.F. HEGEL, *Grundlinien der Philosophie des Rechts*, Berlin: in der Nicolaischen Buchhandlung, 1821, English translation A.W. WOOD, *Elements of the Philosophy of Right*, Cambridge: Cambridge University Press, 8th ed., 2003, p. 366 *et seq.*

[24] C. BERGBOHM, *Staatsverträge und Gesetze als Quellen des Völkerrechts*, Dorpat: C. Mattiesen, 1877, p. 43; G. JELLINEK, *Die rechtliche Natur der Staatenverträge*, Wien: Holder, 1880, now available at www.archive.org. For ample references to the German debate of the time, see J. VON BERNSTORFF, *German intellectual historical origins*, cit., p. 54 *et seq.*

[25] H. TRIEPEL, *Völkerrecht und Landesrecht*, Leipzig: J.C.B. Mohr, 1899. While there is apparently no translation in English, the Italian translation, *Diritto internazionale e diritto interno*, dates back to 1913 (Torino: Unione Tipografico Editrice Torinese). A French translation appeared in 1920 (*Droit international et Droit interne*, Paris: Pédone; Oxford: Impr. de l'Université, 1920) and has been later republished. Triepel delivered a course at the very opening of the Hague Academy of International Law, *Les rapports entre le droit interne et le droit international, Recueil des Cours*, 1923, vol. 1, p. 73 *et seq.* Anzilotti was first a positivist philosopher, and only later an international law scholar; his first two works were in fact D. ANZILOTTI, *La scuola del diritto naturale nella filosofia giuridica contemporanea*, Firenze: Tip. Dei Succ. Le Monnier, 1892 and D. ANZILOTTI, *La filosofia del diritto e la sociologia*, Firenze: Tip. Dei Succ. Le Monnier, 1892, now reprinted in D. ANZILOTTI, *Opere di Dionisio Anzilotti,* IV, Padova: CEDAM, 1963, respectively p. 673 *et seq.* and p. 495 *et seq.* See G. GAJA, *Positivism and Dualism in Dionisio Anzilotti*, in *European Journal of International Law*, 1992, p. 123 *et seq.*

use of force in the way of reprisals or self-defence;[26] they also challenged the very idea that only the right enforceable through sanction properly qualified as right.[27] In claiming this, they separated the "principal right" from the "secondary right", where the latter consists in the right to enforce the first one.[28] Also, the dualist perspective forced them to identify sources of law, different from the municipal ones.[29]

Triepel and Anzilotti fully adhere to the notion of sources of law. For them, agreement is the typical source of international law. It is the expression, the product of the will of States. Unlike Jellinek, however, they refuse to regard the unilateral will of the single State as internationally binding. It is only the common will of some or many States about the establishment of a certain relationship, which becomes the source of international law, which produces "objective law".[30] Such common will, once expressed in the forms provided for (*Vereinbarung*), does not belong to the single State anymore.[31] According to Triepel, there is no juridical explanation for the binding nature of treaties. "The 'foundation' of the validity of law lies outside the law", for international as well as for municipal law.[32] It is worth highlighting that this remark antedates Kelsen's theory.

As for custom, Triepel denies that plain usages can be a source of law, because they are devoid of any will. He sees in the approaches which consider custom binding in international law merely a bequest of natural law doctrines.[33] Confronted with the fact that States do indeed invoke unwritten rules in their relations, Triepel conceives them as a tacit

[26] H. TRIEPEL, *Droit international et Droit interne*, cit., p. 104. At the time of writing (1899), limitations to recourse to the use of force were only beginning to be discussed by States.

[27] *Ibid* , p. 105 *et seq.*; D. ANZILOTTI, *Corso di diritto internazionale*, cit., pp. 27-29.

[28] H. TRIEPEL, *Droit international et Droit interne*, cit., p. 106. Anzilotti, as it is well-known, developed his approach to State responsibility for wrongful acts upon the distinction between a primary and a secondary rule: D. ANZILOTTI, *Teoria generale della responsabilità*, cit., p. 96 *et seq.* Such an approach arrived at the International Law Commission through the work of Roberto Ago, and remains an essential feature of the 2001 codification.

[29] H. TRIEPEL, *Droit international et Droit interne*, cit., pp. 9-10, 16, 19, 126 *et seq.*

[30] *Ibid.*, p. 31 *et seq.*; D. ANZILOTTI, *Teoria generale della responsabilità*, cit., p. 30 *et seq.* Anzilotti later accepted, following Kelsen, that indeed the binding force of treaties laid, itself, on the *pacta sunt servanda* rule: D. ANZILOTTI, *Corso di diritto internazionale*, cit., p. 27.

[31] It is not relevant here to dwell into the distinction between a contract-treaty (*Vertrag*), which according to Triepel cannot create law but only a reciprocal relationship, where the parties exchange something, and a normative-treaty (*Vereinbarung*), which instead is to be considered the only proper source of objective law. The difference consists mostly in the attitude of the second kind of agreements to establish a certain regime, producing rights and obligations, which is susceptible of being applied in an undetermined series of cases. According to Triepel, in the first case, States are subjects of law, while in the second, they are makers of law (p. 46). The distinction, which was already present in C. BERGBOHM, *Staatsverträge und Gesetze als Quellen des Völkerrechts*, cit., p. 79 *et seq.* and in the subsequent German doctrine, was accepted by D. ANZILOTTI, *Teoria generale della responsabilità*, cit., p. 41 *et seq.*

[32] H. TRIEPEL, *Droit international et Droit interne*, cit., pp. 80-81.

[33] *Ibid.*, cit., pp. 30-31; as does D. ANZILOTTI, *Corso di diritto internazionale*, cit., p. 39.

Vereinbarung. Only when it is possible to trace in the usage followed by different States a tacit declaration of will, that custom as *Vereinbarung* may produce law.[34]

Lassa Oppenheim arrived at similar results. His *International Law*, first published in 1905,[35] has remained for over a century the textbook of reference for any English-speaking international lawyer/scholar, being subsequently updated – or should one say changed[36] – by the most eminent English international scholars.[37] One of the reasons his treatise was so successful, is his capacity to give a clear exposition of the subject, while building a system of international law. Oppenheim's extensive and varied German education[38] has him fully embracing positivism.[39] He maintains that, like any other system of law, international law also is based on common consent, in this case of States as sovereign communities.[40] However, his notion of source of law is not without ambiguities. Like other positivists, he also cautions against mixing sources and causes of law; but then maintains that "rules of law [...] rise from facts in the historical development of a community".[41] Oppenheim states categorically that both custom and treaties are sources of international law; the basis for the binding force of treaties lies in a customary rule that so provides.[42] He also maintains that such a rule is clearly existent, because it is "produced" by various causes: religion, morals, interest of States.[43]

This is not the place to dwell on the problems of tracing custom to a tacit agreement; the question was vastly discussed soon after the theory was presented.[44] It

[34] H. TRIEPEL, *Droit international et Droit interne*, cit., p. 89 *et seq.*; D. ANZILOTTI, *Corso di diritto internazionale*, cit. p. 39 *et seq.*

[35] L.F.L. OPPENHEIM, *International Law. A treatise*, I, *Peace*, London: Longmans, Green, and co., 1905, now available at www.gutenberg.org.

[36] W.M. REISMAN, *Lassa Oppenheim's Nine Lives*, in *Yale Journal of International Law*, 1994, p. 255 *et seq*.

[37] The 9th edition was published in 1994, and edited by R. Jennings and A. Watts. In 2017, a new part was added concerning the United Nations, under the editorship of Dame Rosalyn Higgins.

[38] M. SCHMOECKEL, *The Internationalist as a Scientist and Herald: Lassa Oppenheim*, in *European Journal of International Law*, 2000, p. 699 *et seq*.

[39] L.F.L. OPPENHEIM, *International Law*, cit., pp. 90-93. On the influence of earlier German authors, not only international law scholars, see M. SCHMOECKEL, *The Internationalist as a Scientist and Herald*, cit., p. 705 *et seq.*

[40] L.F.L. OPPENHEIM, *International Law*, cit., p. 16 *et seq.*

[41] *Ibid.*, p. 21.

[42] *Ibid.*, p. 21 *et seq.* More generally, he maintains that even in municipal law there is always some customary law, and that to consider that it becomes law through an indirect recognition by the State (as Austin does), is "nothing else than a fiction". *Ibid.*, p. 5.

[43] *Ibid.*, pp. 3 and 12 and L.F.L. OPPENHEIM, *Lectures on Diplomacy as Part of International Law*, unpublished manuscript, as quoted by M. SCHMOECKEL, *The Internationalist as a Scientist*, cit., p. 701, from which the expression in the text is taken.

[44] Practice throughout the 20th century has shown that new States have, sooner or later, come to terms with custom and have proceeded to influence its change and further development, without contesting anymore its way of working. The idea that custom might be conceived as a tacit agreement was never debated during the recent works of codification on the topic of customary law carried out, with the approval of States members of the United Nations, by the International Law Commission.

should only be noticed here that the tacit agreement approach was quickly adopted by new States/regimes, which make their entrance into the society of States in the 20th century – the Soviet Union first of all.[45] For them, it is a way to affirm their sovereignty, as well as their new ideology, in their relations to pre-existing States. At the same time, though, Soviet international scholars reject the understanding of the international legal system as based on a basic norm.[46]

Some of the above-mentioned international continental positivists, like Triepel and Anzilotti, at the turning of the 19th and 20th century did not dwell too much on the identity or content of the original norm to be assumed as the basis of the international legal system. They rather insisted on agreements as the only source of international law. Others, like Oppenheim, very early found the origin of the whole system in the *consuetudo est servanda*. It is, however, due to Kelsen, that the fundamental rule and its nature become central in the theoretical debate.[47] In Italy, Perassi is the first to refer to the *pacta sunt servanda* as the basic rule in international law, within a larger theoretical construction which is on the whole, but not completely, derived from Kelsen.[48] Anzilotti finds such a solution consistent with his approach.[49] Kelsen, on the other hand, within the hierarchical system of sources, which is typical of his doctrine, lays the rule *consuetudo est servanda* as the basic norm of international law.[50] He then proceeds to link the binding power of treaties to the customary rule *pacta sunt servanda* and the binding power of other acts, like judgments, to the treaty providing for those procedures or, if this is the case, for an international court.[51] Kel-

[45] G.I. TUNKIN, *Coexistence and International Law*, in *Recueil des cours de l'Académie de Droit International de la Haye*, 1958, p. 9 *et seq.*; G.I. TUNKIN, *Remarks on the Judicial Nature of Customary Norms of International Law*, in *California Law Review*, 1961, p. 419 *et seq.*; R.J. ERICKSON, *Soviet Theory of the Legal Nature of Customary International Law*, in *Case Western Reserve Journal of International Law*, 1975, p. 148 *et seq.*, available at www.scholarlycommons.law.case.edu. See also, in Italian, M. GIULIANO, *La concezione marxista del diritto*, in *Rinascita*, 1948, pp. 68-74, where the Author notes at p. 69 that "[l]a concezione marxista del fenomeno giuridico è, pertanto, innegabilmente una concezione *positivistica*" (emphasis in the original).

[46] G.I. TUNKIN, *Coexistence and International Law*, cit., pp. 38-39.

[47] Kelsen could rely on a number of previous notations on the topic: see J. VON BERNSTORFF, *German intellectual historical origins*, cit., *passim*.

[48] T. PERASSI, *Teoria dommatica delle fonti di norme giuridiche in diritto internazionale*, in *Rivista di diritto internazionale*, 1917, p. 195 *et seq*. The work by Kelsen Perassi referred to was H. KELSEN, *Hauptprobleme der Staatsrechtslehre*, Tübingen: Mohr, 1911. He also took into consideration A. VERDROSS, *Zur Konstruktion des Völkerrechts*, in *Zeitschrift für Völkerrecht*, 1914, p. 355. See F. SALERNO, *L'affermazione del positivismo nella scuola internazionalista italiana: il ruolo di Anzilotti e Perassi,* in *Rivista di diritto internazionale*, 2012, p. 29 *et seq.*, esp. p. 50 *et seq.*

[49] D. ANZILOTTI, *Corso di diritto internazionale,* cit., pp. 27, 39 and 42.

[50] Kelsen may first have identified the basic norm of the international legal system in the *pacta sunt servanda*: H. KELSEN, *Das Problem der Souveränität und die Theorie des Völkerrecht*, Tubingen: J.C.B. Mohr, 1920, 2nd reprint of the 2nd edition, Aalen: Scientia, 1981, pp. 136-137. For the later view, see H. KELSEN, *Principles of International Law*, cit., pp. 314, 319.

[51] H. KELSEN, *Introduction to the Problems of Legal Theory*, cit., p. 107 *et seq.* The question of the monistic or dualistic construction on the relationship between international and municipal laws, which accord-

sen denies that custom may be seen as a tacit agreement, because custom, as a law-creating procedure, must be provided for by another, higher norm.[52] *Consuetudo est servanda* as the basic norm of the international legal system is later accepted by many positivists, Gaetano Morelli among them.[53] He carries over the normativist approach of Kelsen about the sources of international law, while maintaining Anzilotti's basic tenets concerning separation of the municipal and international legal orders, or the content of State responsibility for wrongful acts. The positivist focus on the legal construction becomes in Morelli the search for a flawless logical system, which can accommodate all the possible variables of reality. It is a fitting task for the author, due both to his scientific profile, and the political background in Italy at the time he first writes.[54] In that task he succeeds, with an incomparable clarity and precision of language.

To sum up, there is accordance among the various views, that the basic rule is assumed and no inquiry is devoted to its nature. Some did and do not fail to notice that this appears an oxymoron, from a positivist standpoint.[55]

ing to Kelsen should be necessarily resolved in the first sense if one accepts his theory of the *Grundnorm* (p. 113 *et seq.*), will not be discussed here.

[52] Which cannot be a State norm, as the tacit agreement theory would, in his opinion, maintain, by stressing the will of each State. For Kelsen, "this so-called 'will' of the state is simply the anthropomorphic expression for the 'ought' of norms" (H. KELSEN, *Introduction to the Problems of Legal Theory*, cit., p. 118; see especially p. 122 *et seq.*).

[53] G. MORELLI, *Nozioni di diritto internazionale*, Padova: CEDAM, 1943, p. 10.

[54] G. GAJA, *Necrologio – Gaetano Morelli*, in *Rivista di diritto internazionale*, 1990, p. 114 *et seq.* G. BARTOLINI, *The Impact of Fascism on the Italian Doctrine of International Law*, in *Journal of the History of International Law*, 2012, p. 237 *et seq.*, draws a detailed picture of the standing of international law professors during Fascism in Italy. To some extent, he disagrees with what Sereni had maintained in his 1943 book *The Italian Conception of International Law* (New York: Columbia University Press), that is, that Fascism had no influence whatsoever on Italian international law doctrine. In any case, there is no evidence of any involvement of Morelli with legal theories favored by, or favoring, the dictatorship. As for Anzilotti, his dissent from some political moves by Fascism, such as the ones leading to the Corfu dispute with Greece, is well retold in O. FERRAJOLO (a cura di), *Il caso Tellini. Dall'eccidio di Janina all'occupazione di Corfù*, Milan: Giuffrè, 2005, p. 154. See also F. SALERNO, *L'affermazione del positivismo nella scuola internazionalista italiana*, cit., p. 37, and J.M. RUDA, *The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice*, in *European Journal of International Law*, 1992, p. 122.

[55] Among others, S. ROMANO, *Corso di diritto internazionale*, Padova: CEDAM, 1933, p. 25; G. SALVIOLI, *Principi generali di diritto internazionale (A proposito del* Corso di diritto internazionale *di D.Anzilotti)*, in *Rivista di diritto internazionale*, 1928, p. 571 *et seq.* A thorough and critical analysis of this aspect is one of the main points made by M. GARCÍA-SALMONES ROVIRA, *The Project of Positivism in International Law*, cit. But see T. PERASSI, *Teoria dommatica delle fonti*, cit., p. 205: "[u]na teoria dommatica delle fonti di norme giuridiche è, per definizione, una teoria incapace di scovrire l'origine del diritto, ossia, più precisamente, di spiegare come un processo qualsiasi sia per sè idoneo a produrre la giuridicità di una norma indipendentemente da una norma giuridica preesistente, a cui attenga tale idoneità: essa ha per limite tale incapacità".

IV. A methodology for international law

The remarks so far sketchily carried out are necessary to understand the bases, upon which a positivist methodology lays. As should be apparent, the label positivism covers a variety of approaches; a closer look into the actual method employed by self-defined international positivists around the turn of the 19th and 20th centuries is therefore necessary.

The central role of the will of States should make it necessary to analyze international relations to ascertain whether such a will has been expressed, by which States and with what content. Such an inquiry, if not always easy, is at least clear concerning treaties; it may become much more difficult in the identification and evaluation of custom, even if understood as a tacit agreement.

In their works, continental scholars do not usually dwell upon the exposition of the practice of States; but they know it well and they assume that readers mostly do too.[56] It is interesting to remember here what Anzilotti was writing in 1902, in his book on State responsibility for wrongful acts:

> "[a]ll [...] these international disputes, whether they were the object of scholarly debate or they remained confined to the diplomatic correspondence of the various States, are very helpful in discovering the different aspects of the complex subject; so much so, that he who intends to discuss it must keep them constantly in mind, because the value of any legal theory is, ultimately, its ability to understand and explain the actual relationships".[57]

After having considered the will of States as the key element to qualify a system of rules as juridical, Anzilotti remarked in the first edition of his lectures: "[i]t is for us sufficient to note that rules produced by the common will of States with the aim to regulate their conducts without any doubt exist, in order to maintain that it is a legitimate, if not necessary, task of our subject to ascertain and study them for what they are, putting them together in a logical system".[58]

The approach advocated is, thus, inductive. Object of the research is to ascertain "whether there are rules governing the relations among States which are not mere morals or usages".[59] It is starting from the behaviors of States expressing their will, that one may conclude whether or not there is a certain rule: "[t]he essential moment for

[56] H. Triepel, *Droit international et Droit interne*, cit., p. 11 *et seq.* The book by D. Anzilotti, *Teoria generale della responsabilità dello Stato*, cit., for example, is replete with cases, which are not examined *per se*, but discussed together with the proposed theoretical approach.

[57] D. Anzilotti, *Teoria generale della responsabilità dello Stato*, cit., pp. 22-23. Translation by the present Author.

[58] D. Anzilotti, *Corso di diritto internazionale*, cit., p. 29, translation by the present author. In the 3rd edition of the *Corso*, reissued by SIOI, Padova: CEDAM, 1955, I, p. 75, Anzilotti wrote: "[è] facile comprendere come la determinazione dell'esistenza e della portata di una norma risultante dal modo di comportarsi degli Stati presenti grandi difficoltà. I dati di fatto di questa determinazione sono forniti dalla storia, specialmente dalla storia delle relazioni internazionali".

[59] D. Anzilotti, *Teoria generale della responsabilità*, cit., p. 26 (translation by the present author).

[determining] the existence of a juridical rule, is that it is the expression of a will capable to impose itself upon the single wills towards which it is directed".[60] Therefore, only acts carried out on the international level and directed to other States are relevant for discerning tacit agreements. Municipal laws, case-law and administrative acts may only be used as further proof of a tacit agreement.[61]

Perhaps the most outspoken on methodology,[62] Oppenheim's approach may also be qualified as inductive. He describes the object of study not just by reference to the will of States. It is, more generally, the practice of States, the history of the relationships among States, over the background of that common consent "which is the basis of the Law of Nations".[63] The social intercourse of States is the material to be carefully analyzed and upon which rules are based.[64] Oppenheim strongly cautions against mixing the results of the historical inquiry – the *lege lata* – and the writer's opinions or wishes *de lege ferenda*.[65] He himself offers political and moral views as well as hopes for the development of international law, but stresses that all of this is not the current law. Oppenheim gives detailed indications about the way the positivist method should be applied, not limiting himself to recommend in general terms strict adherence to the data offered by State practice, but clearly stating how to appreciate municipal case-law, arbitral awards, international legal literature, and treaties.[66] Oppenheim explicitly considered the method of natural law incompatible with the positivist one.[67]

With regard to Kelsen, the issue of methodology is central in all his work, and not limited to international law.[68] His approach does not involve, however, providing indications on how to ascertain the existence and content of international rules, whether customary or conventional, in a material case. Kelsen concentrates on the general theory

[60] D. ANZILOTTI, *Teoria generale della responsabilità*, cit., p. 27. See also D. ANZILOTTI, *Corso di diritto internazionale,* cit., p. 43.

[61] D. ANZILOTTI, *Corso di diritto internazionale,* cit., p. 46.

[62] But see the criticisms of M. GARCÍA-SALMONES ROVIRA, *The Project of Positivism in International Law*, cit., p. 113 *et seq.*

[63] L.F.L. OPPENHEIM, *International Law*, cit., p. 16.

[64] L.F.L. OPPENHEIM, *The Science of International Law: Its Task and Method*, in *American Journal of International Law*, 1908, pp. 313 *et seq.*, esp. p. 315 *et seq.* and p. 333 *et seq.*

[65] L.F.L. OPPENHEIM, *The Science of International Law*, cit., pp. 335 and 353 *et seq.* Like Anzilotti, Oppenheim refers to specific cases of practice to make a point, but does not dwell into a detailed analysis of practice. This is, in his opinion, the task of scholars addressing a specific aspect in monographs (*ibid.*, pp. 325-326). For the different view that Oppenheim's morals led him to certain conclusions, not reconcilable with the positivist method, see M. GARCÍA-SALMONES ROVIRA, *The Project of Positivism in International Law*, cit., p. 111 *et seq.*

[66] L.F.L. OPPENHEIM, *The Science of International Law*, cit., p. 333 *et seq.* On the cultural and political milieu to which Oppenheim's work may be traced back, see M. GARCÍA-SALMONES ROVIRA, *The Project of Positivism in International Law*, cit., chapters 2 and 3.

[67] L.F.L. OPPENHEIM, *The Science of International Law*, cit., p. 326 *et seq.*

[68] M. GARCÍA-SALMONES ROVIRA, *The Project of Positivism in International Law*, cit., chapters 4-6.

for those rules, and leaves to others their identification.[69] In any case, he accepts the notion of custom as composed by both a long-established practice of States, and the opinion that such a practice is obligatory, or right.[70]

Morelli adopts a similar approach. Like Kelsen, he is fully centered on the theoretical legal construction and does not stop to analyze State practice; but at the same time, whenever he feels the need to invoke final proof for his position, he recalls the standard practice of States on that issue.[71] As for custom, Morelli too requires a uniform practice and a subjective element. This last one is not, in his opinion, a manifestation of will, but rather an intellectual operation concerning the coming into being of the rule.[72] This appears, again, more a theoretical reconstruction, than an indication of a different methodology towards the identification of customary rules.

V. Traces of natural law in international law between the 19th and 20th centuries

By the second half of the 19th century, international law is considered, by some, a field of law which can greatly benefit from a systematic study carried out in an organized way by independent scholars and practitioners. The *Institut de Droit International*, born in 1873[73] with the aim to "promote the progress of international law", is the most well-known example of such spirit. Its founding statutes set out various activities to be pursued by the Institut in the development of international law. In this regard, they declare that to achieve that aim the Institut will "formulate the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world"; and will cooperate "in any serious endeavor for the gradual and progressive codification of international law".[74] The eleven founding Members, coming from different European countries as well as from the United States and Argentina, appear to be liberals with a strong international view, who believed that a collective scientific action might be more effective for peace and cooperation upon the conduct of States and generally diplomacy, than the isolated work of

[69] It is interesting to reproduce here a part of his Preface to H. Kelsen, *Principles of International Law*, reprint 2012, New York: The Law Book Exchange: "[a]s to the formulation of the norms of positive international law and their traditional interpretation I have used [...] the English standard work by L. Oppenheim and H. Lauterpacht" (p. viii).

[70] H. Kelsen, *Principles of International Law*, cit., p. 307 *et seq.*

[71] E.g., G. Morelli, *Nozioni di diritto internazionale*, cit., p. 10 (about the binding power of treaties).

[72] For this reason Morelli regards custom as an international fact, and not an act (G. Morelli, *Nozioni di diritto internazionale*, cit., pp. 28-29).

[73] In 1873 Jules Verne publishes his *Le Tour du monde en quatre-vingts jours*: it may be the date of birth of globalization.

[74] Art. 1 of the *Institut de Droit International*'s Statute.

scholars in their academic roles.[75] They were mostly lawyers and high-profile academics, with an active interest in politics.[76] Their intention was to serve as an "organe à l'opinion juridique du monde civilisé en matière de droit international", by favoring the knowledge, diffusion, development and codification of international law.[77] In the public declaration which accompanied its establishment, the Institut regretted the "imperfection" of international law, as well as its lack of clear rules on some topics. These were observations aimed at stressing the need for "progress" of the law. The task of the Institut was finally thus summarized: "[i]l ne s'agit pas en effet de faire le droit mais de le chercher, dans un sentiment d'équité qui constitue la conscience commune à tous les hommes".[78] Among the founders of the Institut, there were none of the scholars mentioned above as positivists, maybe because this approach came to be discussed in the field just a little later. It seems that the conscience and opinion of the civilized world, and equity, were invoked mostly in support of the improvement of the law.

A not too different aim may be perceived in the Martens clause inserted in the preambles to the Hague Conventions of 1899-1907 on the Laws and Customs of war on land, which famously declares that

> "[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".[79]

Keeping in mind the doctrinal debate which occurred between the end of the 19th and the beginning of the 20th centuries, it is interesting to consider how, in 1920, Art. 38 of the Statute of the Permanent Court of International Justice came to be drafted. With regard to the law to be applied by the new Court, the provision defines custom "as evidence of a general practice accepted as law", and then refers to "the general principles of law recognized by civilized nations".[80]

[75] About the ways and reasons the Institut came to be established, see M. Koskenniemi, *The Gentle Civilizer of Nations*, Cambridge: Cambridge University Press, 2001, p. 12 *et seq.*; as well as A. Rolin, *Les origins de l'Institut de Droit International 1873-1923*, available online at www.idi-iil.org.

[76] Among these last ones, Mancini, Bluntschli, Lorimer, Asser. Moynier, the successor of Dunant in the establishment of the Red Cross, was also a founding member. A biographical description of each of the founders may be found on www.idi-iil.org.

[77] A. Rolin, *Les origins de l'Institut*, cit., p. 15.

[78] *Ibid.*, p. 73. At p. 68, one reads: "[n]otre but principal est d'arriver, par la libre action d'un nombre limité de jurists éminentes, à constater, d'une manière aussi certaine que possible, l'opinion juridique du monde civilisé, et à donner à cette opinion une expression assez claire, assez exacte pour que'elle puisse être acceptée par les different États comme règle de leurs relations extérieures".

[79] Text available at www.ihl-databases.icrc.org.

[80] No examination is here carried out of the "subsidiary means for the determination of rules of law" which Art. 38, para. 1., let. d), of the Statute of the International Court of Justice indicates in "judicial deci-

The Committee of experts designated by the Council of the League of Nations to prepare the Statute included professors of law, Ministers, legal advisers to Foreign Affairs departments and a former US Secretary of State.[81] There were no German members. One participant was the Italian Ricci-Busatti, who, while a diplomat, had also established with Anzilotti the *Rivista di diritto internazionale* in 1906 and had co-signed the program of the new review.[82]

The proceedings of the meetings of the Committee show that there was a lengthy and articulated debate about whether the future Court should apply only "positive law",[83] or whether it should also be charged "to develop law, to 'ripen' customs and principles universally recognized, and to crystallyse them into positive rules".[84] Explicit reference was made to "exigencies of justice and equity", which might suggest to the Court not to apply the law.[85] And the fear was expressed "on the possibility of the Court declaring itself incompetent (*non liquet*)", because "there might be cases in which no rule of conventional or general law was applicable".[86] Such a case was clearly excluded by Ricci-Busatti, who denied the possibility of *non liquet*, because

> "[b]y declaring the absence of a positive rule of international law, in other words an international limitation on the freedom of the parties, nevertheless a legal situation is established. That which is not forbidden is allowed; that is one of the general principles of law which the Court shall have to apply [...] it is not a question of creating rules which do not exist, but of applying the general rule which permit the solution of any question".[87]

sions and teachings of the most highly qualified publicists of the various nations". L.F.L. OPPENHEIM, *The Science of international law*, cit., p. 344, cautions against the "improper use of so-called authorities and to overestimate the value and importance of the mass of the literature on international law".

[81] Elihu Root. Oppenheim had died in October 1919.

[82] F. SALERNO, *La Rivista e gli studi di diritto internazionale nel periodo 1906-1943*, in *Rivista di diritto internazionale*, 2007, p. 305 *et seq.* In the *Introduzione* to no. 1 of the *Rivista*, composed by Anzilotti, Ricci-Busatti and Senigallia, one reads: "[c]onvinti che al buon indirizzo e al progresso di questa disciplina giovi soprattutto di rilevare il carattere positivo delle norme, già così varie e molteplici, che governano i rapporti internazionali di ogni specie".

[83] In this sense, for e.g., E. Root in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, p. 294, available at www.icj-cij.org.

[84] B.C.J. Loder in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p 294. The debate about the law the Court would apply took place from the 13th meeting (July 1st, 1920) through the 15th (July 3rd 1920), in *Advisory Committee of Jurists, Procès-verbaux June 16th-July 24th 1920, cit.,* pp. 293-338.

[85] A.D.G. De La Predelle in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p. 295-296.

[86] M. Hagerup in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p. 296.

[87] A. Ricci-Busatti in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., pp. 314-315. The same remark was later made by H. KELSEN, *Principles of International law*, cit., p. 306.

For the purposes of the present lecture, it is worth recalling the resistance put up by Mr. Root, the former US Secretary of State, to the inclusion of general principles, because such a provision would allow the Court to base "its sentences on its subjective conceptions of the principles of justice. The Court must not have the power to legislate".[88] Descamps, among others, held the opposite view that there could be no uncertainty about "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations".[89] On the whole, it appears that the members of the Committee held different views about what was included in international law and what the general principles were. Lord Phillimore, like Descamps, held a conception close to natural law;[90] Ricci-Busatti was a positivist, in the sense explored in the previous paragraphs, as was probably Root.[91] In the end, the so-called Root-Phillimore plan, which led to the present formulation of Art. 38, emerged, on this point, as a result of mediation among quite diverse approaches.

Anzilotti, who was present as Secretary-General of the Committee during the preparatory works, declared the whole Art. 38 an "infelicissimo articolo".[92] As for the definition of custom, he considered that it is the general practice accepted as law to be custom, and that it was a mistake to identify custom as the evidence of law.[93] On his part, Kelsen was very critical of the inclusion of general principles of law recognized by civilized nations in Art. 38. He thought that such principles could only be applied if they were a part of international law, that is, if they were customary rules or provided for in treaties.[94]

[88] E. Root in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., p. 309.

[89] E. Descamps in *Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920*, cit., pp. 310-311; see also p. 318.

[90] Particularly clear is the debate at *ibid.*, p. 318. Later on, Lord Phillimore "explained that 'by general principles of law' he had intended to mean 'maxims of law'" and that "the principles which formed the bases of national law, were also the sources of international law" (*ibid.*, p. 335). This statement should be understood keeping in mind that, as a common lawyer, he was convinced that "Generally speaking, all the principles of common law are applicable to international affairs. They are in fact part of international law" (*ibid.*, p. 316).

[91] On the relationship between Oppenheim and Root, both personal and theoretical, see M. García-Salmones Rovira, *The Project of Positivism in International Law*, cit., pp. 47, 110 *et seq.* Ricci-Busatti was very critical about mentioning the opinions of authors as a source of law (*Advisory Committee of Jurists, Procès-verbaux*, cit., pp. 332-334).

[92] D. Anzilotti, *Corso di diritto internazionale*, I, cit., p. 97.

[93] *Ibid.*, p. 100.

[94] H. Kelsen, *Principles of International Law*, cit., p. 394. In the preface to this work, Kelsen explained that he had used the word principles in the title, because he had intended not only to offer a presentation of the most important norms of international law, but also a theory of international law (vii).

VI. Positivism in the first half of the 20th century

It is impossible to carry out here a complete survey of the way international law was identified in the first decades of the 20th century, in order to assess whether and to what extent a positivist approach – or one of them – was actually followed. A limited, but meaningful brief look can however consider the work of a self-described positivist like Anzilotti, who happened to sit at the Permanent Court of International Justice throughout its lifetime. He wrote a number of separate and dissenting opinions, but many could see his handwriting on various passages of judgments too.[95]

One such case might be the *Lotus* case. In the judgment, the majority, including Anzilotti, wrote that "[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law".[96] The majority thus propounds a notion of customary law, which is the one of Triepel and Anzilotti mediated through the language of Art. 38 of the Statute of the Court.

Generally speaking, Anzilotti, while dealing in his opinions at times in a very detailed manner with the facts of the case at hand, did not offer a thorough examination of State practice in order to maintain whether a certain rule existed or not. For example, when considering the binding nature of unilateral declarations made by a Foreign Affairs Minister, he observed that

> "[n]o arbitral or judicial decision relating to the international competence of a Minister for Foreign Affairs has been brought to the knowledge of the Court; nor has this question been exhaustively treated by legal authorities. In my opinion, it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs – the direct agent of the chief of the State – with authority to make statements on current affairs to foreign diplomatic representatives [...] Declarations of this kind are binding upon the State".[97]

It may be true for the Permanent Court, as it is for the International Court today, that it was usually the States parties to a dispute which would present extensive analysis of practice to support a certain conception of a rule or its content. However, in the above mentioned *Lotus* case the Permanent Court had observed

> "that in the fulfilment of its task of itself ascertaining what international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law con-

[95] J.M. Ruda, *The Opinions of Judge Dionisio Anzilotti*, cit., p. 100.

[96] Permanent Court of International Justice, *Lotus S.S.* (France v. Turkey), judgment of 7 September 1927.

[97] Permanent Court of International Justice, *Legal Status of Eastern Greenland* (Denmark v. Norway), judgment 5 September 1933, dissenting opinion of judge Anzilotti, para. 91.

templated in the special agreement. The result of these researches has not been to establish the existence of any such principle".[98]

The Court referred here to elements, which appear different from those considered by Anzilotti relevant towards the identification of custom. Also, when considering the argument presented by one of the party, that the lack of a certain practice could be appreciated as "proof of a tacit consent on the part of States and, consequently, shows what positive international law is", the Permanent Court remarked that such a conclusion was not "warranted" because "only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom".[99] It is thus unfortunate not to find some more detailed reference to practice by a well-known positivist scholar/judge. Such reference could have dispelled doubts about which forms of practice were relevant, for that approach. Because custom was conceived as a tacit agreement, Anzilotti, as mentioned above, excluded municipal practice; and arbitral awards or judgments would have been excluded too.[100] But the dissenting opinion recalled above does not appear to follow this line of reasoning.

Anzilotti noticed, on another occasion, that Art. 38, in stating "the sources of law to be applied by the Court, only mentions international treaties or custom and the elements subsidiary to these two sources, to be applied if both of them are lacking".[101] In practice, he may not have recognized only a "subsidiary" role for the general principles of law. From a positivist point of view, the relevance which Anzilotti attributed to those principles is surprising. Some caution is needed with regard to the expression principle, because sometimes it appears to be used interchangeably with rule. In any case, and aside from the theoretical use of the "principle" *pacta sunt servanda* in his doctrine,[102] as a judge he in fact invoked the application of, among others, *inadimplenti non est adimplendum*;[103] the content and limits of *res judicata*;[104] the interpretation of treaties ac-

[98] *Lotus S.S.*, cit., para. 31.

[99] *Ibid.*, para. 28.

[100] D. ANZILOTTI, *Corso di diritto internazionale*, cit., p. 43. See G. GAJA, *Positivism and Dualism in Dionisio Anzilotti*, cit., p. 123, at p. 130 *et seq.*

[101] Permanent Court of International Justice, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, advisory opinion of 4 December 1935, individual opinion of judge Anzilotti, para. 61.

[102] D. ANZILOTTI, *Corso di diritto internazionale*, cit., p. 27.

[103] Permanent Court of International Justice, *Diversion of Water from the Meuse* (Netherlands v. Belgium), judgment of 28 June 1937, dissenting opinion of judge Anzilotti, para. 50.

[104] Permanent Court of International Justice, *Interpretation of Judgments No. 7 and 8 Concerning the Case of the Factory of Chorzow* (Germany v. Poland), judgment of 16 December 1927, dissenting opinion of judge Anzilotti, para. 25 *et seq.*

cording to the ordinary meaning of the words employed in their context;[105] and *qui iure suo utitur neminem laedit*.[106]

In personal notes written after 1928 for his *Corso*, in view of a further edition which was never composed, it appears that he had come to reconsider the standing of general principles of law in international law. He was evaluating whether they should be included in a larger notion of custom.[107] But Anzilotti also distinguished between general principles of international law and general principles of municipal law, and did not consider the latter to be a part of international law.[108] Maybe not too dissimilarly, in the fourth edition of the treatise, which still bore Oppenheim's name (1926-1928), McNair maintained, in contrast to Oppenheim's position, that international law must be "reinforced and fertilized by recourse to rules of justice, equity, and general principles of law".[109]

It is of course impossible to draw significant conclusions from these very limited observations about the application of a positivist method. One may only consider that, if even a strong positivist like Anzilotti admitted to have to face the issue of general principles, for which no proof of an underlying agreement, tacit or not, was sought or given, then the positivist approach had to be to some extent reevaluated.

VII. The critical moment for positivism within and outside international law: World War II

While opponents of positivism were not lacking before,[110] the moment of its crucial crisis, in Western Europe and elsewhere, arrived when totalitarian regimes came to power in the inter-war period and established themselves, through a legitimization of the respective municipal regimes. The detachment from morals propounded by positivists is seen as the vehicle for allowing any sort of tyrannies and denial of the most basic human rights. As a reaction, even former positivists now claim that fundamental principles of human morality are necessarily part of the law.[111]

[105] Permanent Court of International Justice, *Customs Union between Germany and Austria*, advisory opinion of 5 September 1931, individual opinion by judge Anzilotti, para. 60.

[106] Permanent Court of International Justice, *The Electricity Company of Sofia and Bulgaria* (Belgium v. Bulgaria), judgment 4 April 1939, dissidenting opinion by judge Anzilotti, para. 98.

[107] See D. Anzilotti, *Corso di diritto internazionale*, cit., p. 72, note 10, p. 67, notes 4 and 5, p. 108, note 5.

[108] *Ibid.*, p. 67, note 4, and p. 108, note 5.

[109] A.D. McNair, *Oppenheim's International Law*, London: Longmans, 1926, vol. I, p. 121, footnote 2.

[110] Deeply critical of the possibility of conceptualizing law, in general, through principles and within a system are realists in the US in the 1930s, following Roscoe Pound. See G. Shaffer, *Legal Realism and International Law*, in L. Dunoff, M.A. Pollack (eds), *International Legal Theory: Foundations and Frontiers*, Cambridge: Cambridge University Press, 2019.

[111] The most famous example of such a reversal of position may be G. Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, in *Süddeutsch Juristen-Zeitung*, 1946, p. 105, available in English translation in *Oxford Journal of Legal Studies*, 2006, p. 1 *et seq.* See N. Bobbio, *Giusnaturalismo e positivismo giuridico*, cit., p. 12 *et seq.*; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, cit., p. 72 *et seq.*

For international lawyers, the Second World War and its atrocities are particularly challenging. Art. 6 of the Charter establishing the International Military Tribunal, annexed to the London agreement of August 8th, 1945, concluded among the US, UK, France and the Soviet Union, and subsequently ratified by other 19 States members of the United Nations, notoriously establishes the jurisdiction of that court for crimes against peace, war crimes and crimes against humanity, against persons acting in the interest of the European Axis powers.[112] In its judgment of October 1, 1946, the Nuremberg Tribunal had to address the argument raised by the defendants, according to which they were being tried for actions which international law did not punish as individual crimes at the time they were carried out, specifically crimes against peace and against humanity. With regard to the first category, the Tribunal relied on the various treaties in force for Germany before World War II (WW2) and particularly on the Briand-Kellogg Pact of 1928, to maintain that "the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in International Law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing".[113] With respect to the objection that the Pact did not mention individual crimes at all, the Tribunal declared that it was interpreting that treaty keeping in mind

> "that International Law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law [...]. The law of war is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts".[114]

In another passage, the Tribunal opposed the principle *nullum crimen, nulla poena sine lege* with the principle that "it would be unjust if [the wrong of the attacker] were allowed to go unpunished".[115] The Tribunal, thus, on one side interpreted existing treaties in light of custom together with general principles, on the other reinforced its inter-

[112] Texts of the London agreement and of the Annex are available at www.avalon.law.yale.edu.

[113] International Military Tribunal sitting at Nuremberg, Germany, judgment of 1 October 1946, *The United States of America et al. v. Hermann Wilhelm Göring et al.*, para. 53 (p. 445, Part 22 of the original *Proceedings*). H. KELSEN, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, in *International Law Quarterly,* 1947, p. 156, commented: "[t]his statement implies that the Briand-Kellogg Pact, according to the interpretation of the tribunal, established individual criminal responsibility for its violation. But such responsibility can be established only by a rule of international or national law providing punishment to be inflicted upon definite individuals. To deduce individual criminal responsibility for a certain act from the mere fact that this act constitutes a violation of international law...is in contradiction with positive law and generally accepted principles of international jurisprudence". However, see *infra* in the text for the full position by Kelsen.

[114] *The United States of America et al. v. Hermann Wilhelm Göring et al.*, para. 54.

[115] *Ibid.*, para. 52.

pretation with an appeal to other principles as well as logical inferences towards asserting the individual responsibility of the defendants.[116] Perhaps the most-quoted passage of the judgment says, in fact, that "[c]rimes against International Law are committed by men, not by abstract entities, and only by punishing individual who commit such crimes can the provisions of International Law be enforced".[117]

The trials carried out in Germany in the aftermath of the war saw two highly acclaimed scholars like Kelsen and Schmitt, once again, on opposite sides. Carl Schmitt espoused a notion of sovereignty, which had led him first to criticize the Weimar Constitution and later to strongly support the Nazi regime. He had openly and repeatedly criticized Kelsen in his writings, mostly about his public law theories and in particular concerning the role of a Constitutional Court.[118] But Schmitt and Kelsen were very much apart also on their view of international law. Since the end of WW1, Schmitt had advocated against any rule limiting recourse to war, as too restrictive for the political needs of a State;[119] while Kelsen's choice of a monist theory of the relationship between international and municipal systems is openly motivated by the choice to reach a peaceful coexistence among States.

At the end of WW2, before being indicted himself, Schmitt had accepted the defense of a German industrialist accused by a US-created tribunal of financing the Nazi regime and of benefitting from the forced work of prisoners in German camps. The defense carried out by Schmitt carefully analyses the texts of the various treaties, in order to show the non-existence, at the time of the actions, of an international rule criminalizing the individual aggressor. Such a conclusion supported the invocation of the principle *nullum crimen sine lege*.[120] This has appeared to some a rather formalist/positivist

[116] On inference, see H. KELSEN, *Pure Theory of Law*, cit., ch. 58, named *The Application of the Rule of Inference to Norms*.

[117] *The United States of America et al. v. Hermann Wilhelm Göring et al.*, cit., para. 55. As for crimes against humanity, recent accounts of the different approaches followed by H. Lauterpacht and Lemkin, and their influence both on the Charter of the Military Tribunal as well on its judgment, may be found in P. SANDS, *East West Street*, London: Weidenfeld & Nicolson, 2016 and O.A. HATHAWAY, S. SHAPIRO, *The Internationalists*, London: Penguin books, 2018.

[118] An overview of the debate between the two theorists through English translations of their exchanges may be found in L. VINX, *The Guardian of the Constitution*, Cambridge: Cambridge University Press, 2015; see also D. DYZENHAUS, *Legality and Legitimacy*, Oxford: Clarendon Press, 1999. In the famous case *Prussia v. Reich*, published in German in *Reichsgesetzblatt*, vol. 138, p. 1 (also known as *Preussenschlag*), 1932, Schmitt and Kelsen were counsels for the opposite parties. According to some sources, it was Schmitt who acted for the dismissal of Kelsen from the Cologne Law Faculty based on the racial laws.

[119] O.A. HATHAWAY, S. SHAPIRO, *The Internationalists*, cit., ch. 10.

[120] Much of this defense may be read in C. SCHMITT, *The Nomos of the Earth*, New York: Telos press, 2006, English translation by Ulmen, part IV, ch. 4, p. 259 *et seq.* Schmitt had had no qualms in justifying, under his theory of the state of exception, murders carried out by Nazis at various times, from 1932 on. An account of such positions, retold in a narrative way, may be found in O.A. HATHAWAY, S. SHAPIRO, *The Internationalists*, cit., ch. 10.

denial by a scholar, who had always given to politics a large role in assessing the feasibility of theories of public and international law. With regard to crimes against humanity, which he conceived as part of the crimes of war, Schmitt conceded that their *Unmenschlichkeit* was such, the he could not deny their punishment even if a positive rule thus stating was lacking.[121]

Upon request by the US Government for an opinion in view of the agreement to be concluded in London, Kelsen agreed that, while aggressive war was certainly prohibited, international law in 1945 did not "establish individual criminal responsibility for illegal resort to war".[122] However, after a careful analysis of the limits to the principle of non-retroactivity of a criminal rule in the domestic systems (*ex post facto* rule), Kelsen also considered another principle, according to which none can be prosecuted for a conduct he did not know was prohibited at the time he carried it out. He maintained that the accused Nazis knew that they were committing a violation of international law; thus, the London Agreement would only add "to the collective responsibility for an illegal action established by pre-existing International Law, individual responsibility of the perpetrators".[123] This was a limitation to the *ex post facto* rule, which the London Agreement could draw. Kelsen continued: "[s]ince the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice".[124] With regard to crimes against humanity, Kelsen thought that they were mainly actions already prohibited under municipal law; in this regard, he was more concerned about the legality of the jurisdiction of an international tribunal.[125] This notwithstanding, he felt the need to add that "they are certainly open violations of the principles of morality generally recognized by civilized peoples and hence are, at least, morally not innocent or indifferent when they were committed".[126]

[121] On this point, see E. PASQUIER, *De Genève à Nuremberg. Carl Schmitt, Hans Kelsen et le droit international*, Paris: Classiques Garnier, 2012, p. 503 *et seq.*

[122] H. KELSEN, *The Rule Against* Ex Post Facto *Law and the Prosecution of the Axis War Criminals*, memorandum requested by the U.S. Government, without a date (but 1945), available online at www.lawcollections.library.cornell.edu, p. 6. After the judgment was rendered, Kelsen stated again that "[t]he rules created by this Treaty [the London agreement] and applied by the Nuremberg Tribunal, but not created by it, represent certainly a new law, especially by establishing individual criminal responsibility for violations of rules of international law prohibiting resort to war". H. KELSEN, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, in *International Law Quarterly*, 1947, p. 155.

[123] H. KELSEN, *The Rule Against* Ex Post Facto *Law*, cit., p. 7.

[124] H. KELSEN, *Will the Judgment in the Nuremberg Trial Constitute a Precedent*, cit., p. 165.

[125] H. KELSEN, *The Rule Against* Ex Post Facto *Law*, cit., p. 7.

[126] Kelsen concluded: "[i]t stands to reason that the principle which is less important has to give way to the principle which is more important. There can be little doubt that, according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trials,

It may be of some interest to note that in Italy international scholars who had easily embraced the positivist approach, after the war decidedly supported a different view. Perhaps the most eloquent case is the one of Roberto Ago. While in his 1943 lectures he still adhered to an international system of sources which could be logically traced back to a fundamental rule having as its content the norm-creating procedure,[127] by 1950 he firmly propounded the notion that international customary law was a body of law not created by States, but just ascertained in their conscience: a "spontaneous", as against *positum*, law.[128] As some observed, this is "the typical approach of the natural law doctrine".[129]

Undoubtedly, one cannot possibly disregard the profound moral concerns which the atrocities of the war had involved. They were such, that no positivist, not even Kelsen himself, could resolve to adhere to a strict application of the law in force. In any case, positivism did not die out; strong defenses of the approach were put up early in the aftermath of WW2.[130]

VIII. Present challenges to a positivist approach to international law

The development of international law since the second part of the XX century has shown further difficulties with the positivist methodology. A first one concerns the notion of principles.

The International Court of Justice spoke of principles early on. Emblematic is the case of genocide. Relying on General Assembly Res. 96 (I), of 11 December 1946, on the Crime of Genocide, and on the Convention of 9 December 1948, the Court concluded in 1951 "that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[131] After hav-

the rule against ex post facto law, which has merely a relative value and consequently, was never unrestrictedly recognized". H. Kelsen, *The Rule Against* Ex Post Facto *Law*, cit., p. 8.

[127] R. Ago, *Lezioni di diritto internazionale*, Milano: Giuffrè, 1943, p. 30.

[128] R. Ago, *Scienza giuridica e diritto internazionale*, Milano: Giuffré, 1950. Giuliano (*La comunità internazionale e il suo diritto*, cit.) and G. Barile (*La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice*, Milano: Giuffrè, 1953) are also supporters of this approach. Barile envisaged a quasi-normative role for the judge. The methodology employed for the ascertainment of the spontaneous rule does not appear drastically different from the one which Oppenheim had announced; the field of research is still the conduct of States in their international relationships concerning the existence of international rules (State practice) and the knowledge – rather than a will – by States of the existence of those rules (R. Ago, *Scienza giuridica*, cit., p. 80 *et seq.*; and M. Giuliano, T. Scovazzi, T. Treves, *Diritto internazionale*, vol. I, Milano: Giuffrè, 1983, p. 301 *et seq.*)

[129] J.L. Kunz, *The Nature of Customary International Law*, in *American Journal of International Law*, 1953, p. 662, at p. 664.

[130] Generally, N. Bobbio, *Giusnaturalismo e positivismo giuridico*, cit.

[131] International Court of Justice, *Reservation to the Convention on the Prevention and Repression of Genocide*, advisory opinion of 28 May 1951, in *ICJ Reports*, 1951, p. 23.

ing repeated this sentence, in the much later *Armed Activities on the Territory of the Congo* (Congo v. Rwanda) 2006 judgment the Court went on to state that "assuredly" the prohibition of genocide is a peremptory norm.[132] By 2015, in the *Application of the Convention on the Prevention and Repression of the Crime of Genocide* (Croatia v. Serbia) judgment, referring to the 1948 Convention the International Court considered "well established that the Convention enshrines principles that also form part of customary international law [...]. The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law".[133] The Court then confirmed that the prohibition of genocide is a peremptory norm.

It is a reasonable proposition that the nature of the prohibition may have changed over sixty years, and transformed itself from a general principle recognized by civilized nations into a customary norm, as a jus cogens norm should be. However, to support this last statement the Court refers back to its 1951 Advisory Opinion and to the Convention, where there is no indication of custom, probably for the difficulty of proving it at the time. Additionally, the Court appears to equate a principle with a customary rule, not by reference to its development in time, but referring to the present state of the law.

The Court had already spoken of "general and well-recognized principles" in its very first case, the *Corfu Channel* judgment, this time with reference to "elementary considerations of humanity [...] the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[134] The three examples given here for principles are quite different, not only as for their content, but also as for their possible foundation in custom.

At other times, the Court appears to use the expression "principle" with regard to a characteristic feature of the international system. This is the case of the "principle of sovereign equality of States" and its corollaries, which the Court recalled in the *Jurisdictional Immunities of the State*.[135]

The emergence of principles of international law is welcomed as a sign of the development of this body of law into a proper system of law, where no *lacunae* are admissible.[136] The reference to principles of international law is today common and may be

[132] International Court of Justice, *Armed Activities on the Territory of the Congo* (Congo v. Rwanda), judgment of 19 December 2005, in *ICJ Reports*, 2006, pp. 31-32.

[133] International Court of Justice, *Application of the Convention on the Prevention and Repression of the Crime of Genocide* (Croatia v. Serbia), judgment of 3 February 2015, in *ICJ Reports*, 2015, pp. 46-47.

[134] International Court of Justice, *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), judgment of 9 April 1949, in *ICJ Reports*, 1949, p. 22.

[135] International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), judgment of 3 February 2012, in *ICJ Reports*, 2012, p. 123-124.

[136] E. CANNIZZARO, *Diritto internazionale*, Torino: Giappichelli, 2018, p. 136 *et seq.*

found in case-law, treaties, scholarly writings. Their nature, though, remains an open question. While codifying the identification of customary law, the International law Commission decided to put aside the principles, thus indicating that they may not be simply considered a part of customary law. The topic "General principles of law" is currently the object of a new study by the Commission. The first works attest to the need of "an authoritative clarification of the nature, scope and functions of general principles of law, as well as the criteria and methods for their identification".[137] At this stage, the International Law Commission includes in its work principles derived both from municipal legal orders as well as international law. Following the text of Art. 38 of the Statute of the International Court, but also comments made in the Sixth Committee of the General Assembly, recognition by States is required in both cases. This might indicate that a positivist approach is maintained, to some extent, also for this source of law.[138]

Other developments of the international system are challenging the positivist view. One may mention the expansion and relevance of soft law; the role of international organizations in the creation of customary rules; the presence of other non-State actors.

Challenges notwithstanding, the positivist methodology appears in good health. Certainly, it is still the object of much criticisms in the academia, and it is often looked upon as an historical remnant, if not the lazy habit of mind of backwards scholars. But positivism answers some basic needs of the international legal system. A very first one is the insistence of States on the difference between what is law and what it is not law. Rules of recognition, the notion of source of law are crucial to address this main concern.[139] Predictability is a connected factor. Perhaps most significant of all, however, is the capacity of positivism to be a methodology through which entities with very different individualities in terms of history, ideologies, municipal systems, religion, social context, economic capacities can relate to one another and agree on rules of conduct. It is not by chance, nor by a passive reliance upon Art. 38 of its Statute, that the methodology is the one followed by the ICJ and in cases before it. It is because States would not accept another one, at least among the various proposed so far.

[137] International Law Commission, Report on the work of the seventy-first session of 2019, UN Doc. A/74/10, ch. IX, p. 330 *et seq.*

[138] The Special Rapporteur maintains that recognition, as used in Art. 38 of the ICJ Statute, with regard to the general principles is not equivalent to the *opinio iuris* necessary for custom; other members of the Commission agree: *ibid.*, pp. 332 and 335.

[139] J. D'ASPREMONT, *Formalism and the Ascertainment of Legal Rules*, Oxford: Oxford University Press, 2011.

Gaetano Morelli Lectures Series (Vol. 3 – 2020)

Discourses on Methods in International Law: An Anthology

The UN International Law Commission and Customary International Law

Michael Wood*

Table of Contents: I. Introduction. – II. The distinction between progressive development and codification in the Statute of the International Law Commission. – III. Codification in the practice of the International Law Commission. – IV. The Commission's work on the topic *Identification of customary international law*. – V. The International Law Commission's role in the customary process. – VI. Conclusions.

Abstract: Various aspect of the International Law Commission (ILC)'s relationship with customary international law are considered: first, the distinction between codification and progressive development in the ILC's Statute, as well as the distinction between *lex lata* and *lex ferenda* in the ILC's work. The practice of the ILC as regards codification is then set out, and its recently concluded work on *Identification of customary international law* is described. A final section deals with the ILC's own possible contribution to the development and identification of rules of customary international law.

Keywords: International Law Commission – customary international law – codification of international law – General Assembly – Gaetano Morelli – methodology of international law.

I. Introduction

It is an honour to take part in this fourth series of the Gaetano Morelli Lectures. Morelli was a jurist in the great Italian tradition, a scholar in both public and private international law. He had a distinguished career as an academic, a practitioner, and a Member of the International Court of Justice (ICJ) from 1961 to 1970.[1]

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[1] See E. Cannizzaro, *Morelli, Gaetano*, in *Dizionario biografico degli italiani*, 2012, www.treccani.it; E. Stoppioni, *Gaetano Morelli (1900-1990)*, in Société française pour le droit international, *Galerie des internationalistes*, www.sfdi.org; G. Gaja, *Introduction*, in E. Cannizzaro (ed.), *The Present and Future of Jus Cogens – Gaetano Morelli Lectures Series*, Roma: Sapienza Università Editrice, 2015, www.crde.unitelmasapienza.it, p. 1 *et seq*. Among Morelli's major writings on public international law are *Nozioni di diritto internazionale*,

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I would like to think that Gaetano Morelli would have appreciated the subject of this year's lecture series, entitled "Rethinking the doctrine of customary international law". Morelli devoted much of his writings to fundamental questions of international law, including sources. His views on customary international law seem to have been mainstream and straightforward, and he had the opportunity to express and to apply these views as a judge on the ICJ.

Customary international law plays a large role in the work of the UN International Law Commission (hereafter "Commission"), as it does in international law generally.[2] In 1947, when the Commission's Statute was adopted, international law was largely uncodified, with a few exceptions, including the law relating to the use of force and the laws of war.[3] In its essentials, and leaving aside technical fields, international law remained largely unwritten law, that is, uncodified customary international law (or occasionally "general principles of law" within the meaning of Art. 38, para. 1(c), of the Statute of the ICJ). Now the position is quite different, in large part as a result of texts adopted on the basis of the Commission's work. A glance at any general manual on international law will show that many chapters are based largely on the Commission's work, including those on the law of the sea; diplomatic and other immunities; the law of treaties; and international responsibility.

This lecture covers the following matters: the progressive development of international law and its codification as functions of the Commission, and in particular the distinction between these two concepts that was set out in the Commission's Statute of 1947 (Section II), as well as in the practice of the Commission since 1949 (Section III); the Commission's recent work on the topic *Identification of customary international law* (Section IV); and, finally, how to describe the Commission's own role in the customary process (Section V).

First, a preliminary point. It is often suggested, and rightly so, that international law aspires to be a "common language" for the international community.[4] To this end, it is important to have well-understood terminology to describe its principal concepts, and to use terminology consistently. Over the years, the Commission has made significant

Padova: Cedam, 1967 (French translation R. KOLB, *Notions de droit international public, Gaetano Morelli*, traduction de la 7. édition publiée à Padoue, chez CEDAM, en 1967, Paris: Pedone, 2013) and *Cours générale de droit international public*, in *Collected Courses of the Hague Academy of International Law*, vol. 89, 1956, p. 437 *et seq.* (with bibliography). For a more recent bibliography, see *Comunicazioni e studi*, 1975, p. ix *et seq.*

[2] O. SENDER, M. WOOD, *Custom's Bright Future: The Continuing Importance of Customary International Law*, in C.A. BRADLEY (ed.), *Custom's Future: International Law in a Changing World*, Cambridge: Cambridge University Press, 2016, p. 360 *et seq*.

[3] Primarily in the UN Charter and in the Hague Regulations/Geneva Conventions, respectively.

[4] See, as one example among many, J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2019, pp. 14-15: "International law provides – in significant part – not merely the vocabulary of interstate relations but its underlying grammar".

contributions in this regard. Terms and concepts used by the Commission have become standard usage in legal argument and in the decisions of courts and tribunals, as well as in writings. This is just one way in which the Commission makes an important contribution to the system of international law, to its coherence, clarity and consistency.

Agreement on terminology is perhaps even more important in relation to the subject-matter of the present lecture, which seeks to address some fundamental issues concerning the identification and development of international law. It may therefore be helpful to mention one or two terminological points at the outset. The following terms, or pairs of terms, need to be distinguished, or at least explained: codification/progressive development; existing rules of international law (*lex lata*)/proposals for new rules (*lex nova*); *lex ferenda*, a term that seems to be used (or abused) in various ways; even *lex desiderata*.[5] In particular, an important distinction needs to be made between the terms "codification" and "progressive development" on the one hand, and "*lex lata*" and "*lex ferenda*" on the other. At least as used in the Statute of the Commission, the former refers to the outcome of a process of reducing unwritten law to writing; it is inevitably a matter of degree. The latter is a clear-cut distinction: a rule is either existing law or it is not.

For a practitioner, at least, whether judge, legal adviser or advocate, it is important, essential indeed, to distinguish between existing rules of international law (*lex lata*) and proposals for new rules of law (*lex nova*), whether rules that are claimed to be developing (*lex ferenda*) or rules as one would like them to be (*lex desiderata*). To illustrate the practical importance of this distinction in the Commission's work, one may refer to a current topic, *Immunity of State officials from foreign criminal jurisdiction*, where the question which State officials are (or should be) entitled to immunity *ratione personae* and the question of exceptions to immunity *ratione materiae* raise just this issue.[6]

Such terminological questions are distinct from another important matter: the need for terms that correspond in the various languages. The Commission is always mindful of the importance of ensuring that its texts correspond, so far as possible, in the six official UN languages.[7] And it is also important that there is well-understood terminology

[5] In his presentation on the occasion of the commemoration of the Commission's 50th anniversary, Owada made an interesting distinction between three kinds of international legislation, namely "codification", "progressive development" and "law making *de novo*": cf. *Presentation by Hisashi Owada*, in *Making Better International Law: The International Law Commission at 50 – Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, New York: United Nations Publications 1998, www.legal.un.org, pp. 70-72.

[6] M. Wood, *Lessons from the ILC's Work on 'Immunity of State Officials'*, Melland Schill lecture, 21 November 2017, in *Max Planck Yearbook of United Nations Law*, 2018, p. 34 *et seq*.

[7] Frequent references are made in this connection to the importance of "multilingualism" (see, for example, General Assembly, Resolution 71/328 of 11 September 2017, UN Doc. A/RES/71/328). The Commission certainly benefits from drafting in two or more languages, since this can play a major role in promoting greater precision and understanding.

in non-UN languages, not least because nowadays the national courts of many States are called upon to decide questions of international law.

II. The distinction between progressive development and codification in the Statute of the International Law Commission

The International Law Commission is a subsidiary organ of the UN General Assembly, composed of thirty-four persons "of recognized competence in international law" and mandated, in fulfilment of Art. 13, para. 1(a), of the UN Charter (hereinafter "Charter"), with promoting "the progressive development of international law and its codification".[8] It was established by General Assembly resolution 174 (II) of 21 November 1947, to which the Statute of the Commission is annexed. Nowadays, the Commission meets for ten to twelve weeks each year, usually at the UN Office in Geneva.

It is important to recall that, however influential it may sometimes seem, the Commission is not a legislature. This is clear from the cautious wording of Art. 13 of the Charter as well as Art. 1 of the Commission's Statute. Art. 13, para. 1(a), of the Charter provides that the General Assembly "shall initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification". Pursuant to this, Art. 1 of the Commission's Statute provides that "[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification".[9]

Thus, neither the General Assembly, nor its subsidiary organ, the Commission, has the power to make law. This reflects a deliberate choice by the negotiators of the Charter. As is said in the Simma Commentary, "[a]t the San Francisco Conference [...] all attempts to give the [General Assembly] any power to establish the content of international law with binding force were rejected".[10]

It has been suggested that the expression "progressive development of international law and its codification" limits the mandate of the Commission, and that the Commission (and perhaps even the General Assembly) would be acting *ultra vires* if they

[8] Cf., Arts 2, para. 1, and 1, para. 1, respectively, of the Statute of the International Law Commission.

[9] For the drafting history of Art. 13, para. 1(a), of the Charter, see *Documents of the United Nations Conference on International Organization, San Francisco*, 1945 (UNCIO): vol. III, documents 1 and 2; vol. VIII, document 1151; vol. IX, documents 203, 416, 507, 536, 571, 792, 795 and 848. Art. 1 of the Statute goes on to say that the Commission "shall concern itself primarily with public international law, but is not precluded from entering the field of private international law" (though the latter hardly happens in practice).

[10] C.-A. Fleischhauer, B. Simma, *Article 13*, in B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds), *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press, 2012, p. 301. See also H. Briggs, *The International Law Commission* Ithaca, New York: Cornell University Press, 1965, pp. 4-12; United Nations, *The Work of the International Law Commission*, New York: United Nations Publications, 2017, p. 4 ("The Governments participating in the drafting of the Charter of the United Nations were overwhelmingly opposed to conferring on the United Nations legislative power to enact binding rules of international law").

purported to go beyond codification and the progressive development of existing law to work on proposals for entirely new law, except perhaps where the Commission receives a special assignment, in particular from the General Assembly, or has at least the Assembly's endorsement. This is just one reason to seek to understand the terms used in the Statute, in particular as the Commission has on occasion prepared instruments that do indeed propose new law. A recent example is the topic *Crimes against humanity*, where the Commission has drafted articles that for the most part represent new law and which are in any event plainly intended to be embodied in a treaty to be accepted, or not, by States. More generally, the meaning of the terms employed in the Statute (and thus the proper role of the Commission) has a long and fascinating history and continues to be debated today.[11]

Chapter II of the Commission's Statute envisages the progressive development of international law and the codification of international law as distinct functions. Art. 15 attributes to "codification of international law" the following meaning: "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".[12]

The expression "progressive development of international law", on the other hand, has the following meaning: "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".[13] Thus, the definition of "progressive development" in the Statute of the Commission itself includes the preparation of conventions on "subjects which have not yet been regulated by international law".

[11] See, for example, the 2017 debate in the Commission on the first report of the Special Rapporteur on *Succession of States in respect of State responsibility*, especially the statement of Mr Reinisch on 13 July 2017 (International Law Commission, Provisional summary record of the 3374th meeting, 13 July 2017, UN Doc. A/CN.4/SR.3374, p. 16).

[12] Art. 15 of the Statute of the International Law Commission. For an account of the negotiating history of the relevant provisions of the Statute, see J. Crawford, *The Progressive Development of International Law: History, Theory and Practice*, in D. Alland, V. Chetail, O. de Frouville, J.E. Viñuales (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden: Martinus Nijhoff Publishers, 2014, p. 1 *et seq*.

[13] Art. 15 of the Statute of the International Law Commission. McRae has pointed to the ambiguity inherent in the word "progressive" as used in the expression "progressive development", which could refer to a step-by-step process or to something that is "forward-looking": D. McRae, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, in *Kokusaihō gaikō zasshi*, 2013, pp. 75 and 80. For the view that the reference to "progressive development" in Art. 13 of the Charter "was intended to indicate that international law was not to be codified at once in a single code but was to be done in stages", see R. Higgins, P. Webb, D. Akande, S. Sivakumaran, J. Sloan, *Oppenheim's International Law: United Nations*, Oxford: Oxford University Press, 2017, p. 929.

Both meanings, of codification and of progressive development, are said to be "used for convenience",[14] a testimony perhaps to the difficulties encountered by the drafters of the Statute to distinguish clearly between the two concepts.

For each of these functions of codification and progressive development the Statute sets out a different working method. A major difference lies in the power of initiative: it was envisaged that projects involving progressive development would be taken up by the Commission following proposals by the General Assembly, while codification would be undertaken when the Commission itself "considers that the codification of a particular topic is necessary and desirable".[15] Labelling a project as codification or progressive development was also to be relevant for purposes of identifying the procedure to be followed in working on it and, in some measure, the form of the Commission's output. The Commission's Statute contemplates the preparation of draft conventions as the output of any effort of progressive development of international law,[16] but prescribes two additional possible results for products of codification: 1) simple publication of the Commission's final report on the topic; and 2) a resolution of the General Assembly, taking note of or adopting the report.[17]

The seemingly clear distinction between codification and progressive development that appears in the Commission's Statute was drawn by the Committee for the Progressive Development of International Law and its Codification ("Committee of Seventeen"), charged by the General Assembly in 1946 with recommending how to implement the relevant part of Art. 13, para. 1(a), of the Charter. The report of the Committee did, however, recognize that "the terms employed are not mutually exclusive as, for example, in cases where the formulation and systematization of the existing law may lead to a conclusion that some new rules should be suggested for adoption by States".[18]

[14] Art. 15 of the Statute of the International Law Commission.

[15] *Ibid.*, Arts 16 and 18, para. 2, respectively. Under Art. 17 the Commission may also consider proposals submitted by UN Members, other UN organs, specialized agencies and others.

[16] *Ibid.*, Art. 16.

[17] *Ibid.*, Art. 23, para. 1. Some observe (or complain) that nowadays the output of the Commission does not usually lead to the adoption of international conventions. A good example is the debate on the articles on State responsibility. But it is clear from the terms of Art. 23 that it was not the intention that the product should always be a convention, at least not when a topic was seen to be one of codification.

[18] General Assembly, Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, 17 June 1947, UN Doc. A/AC.10/51, para. 7. One member of the Committee of Seventeen, Mr. Bartoš, warned that "it would be impossible to say where codification ends and development begins" (see Summary record of the sixth meeting of the Committee of 20 May 1947, UN Doc. A/AC.10/SR.6, p. 7).

Indeed, as has already been noted, the terms "codification" and "progressive development" are both unclear, in different ways.[19] That may even be a reason why they found their way into the Charter, and then into the Commission's Statute: "constructive ambiguity" can be useful in negotiations, even if sometimes it just postpones a problem for others to grapple with later.

The idea that the law "should be embodied in a systematic written form"[20] has guided the movement for the codification of international law since the early nineteenth century. Unwritten customary international law was considered uncertain and incomplete, and thus in need of clarification and systemization. In the words of one author, "[t]he temple of international justice on near inspection appear[ed] to be rather a storehouse filled with lumber of the ages – a medley of things new and old showing as yet little evidence of order or purpose".[21]

Attributing a precise meaning to "codification" of international law has not been free from difficulty. Is codification simply a process of reducing *lex non scripta* to written form, or is it the case that, given the desire to eliminate any uncertainties and inconsistences found in unwritten law, "all codification involves as an incidence in the process an element of what is really legislation"?[22]

McNair observed in 1927 that codification of international law

> "has at least two distinct meanings, (1) the process of translating into statutes or conventions customary law and the rules arising from the decisions of tribunals with little or no alteration of the law [...] ; and (2) the process of securing, by means of general conventions, of agreement among the States upon certain topics of International Law, these conventions being based upon existing International Law, both customary and conventional, but modified so as to reconcile conflicting views and render agreement possible".[23]

This dual view of the meaning of codification occurs time and time again in later writings and discussions. Differing views as to the meaning to be given to the term "codification" were also among the reasons for the disappointing results of the first international conference specifically called for the purpose of codification, the Hague Codifica-

[19] D. McRae, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., pp. 92-93: "There has never been a consistent view either within the Commission or outside over the meaning of the terms codification and progressive development".

[20] J.L. Brierly, *The Future of Codification*, in *British Yearbook of International Law*, 1931, pp. 1-2 (noting, however, that the ideal could never completely be realized, "because law that is living contains an element of growth and cannot be finally or exhaustively imprisoned in a series of propositions however detailed and numerous").

[21] R.S. Morris, *Codification of International Law*, in *University of Pennsylvania Law Review*, 1925-1926, p. 452.

[22] J.L. Brierly, *The Future of Codification*, cit., pp. 2-3.

[23] A.D. McNair, *The Present Position of the Codification of International Law*, in *Transactions of the Grotius Society*, 1927, p. 129.

tion Conference of 1930. Hudson wrote of the Conference that "[s]entiment grew quite rapidly against any attempt to state what was the existing law as distinguished from new legislation, and after two weeks it became clear that even the use of the term declaration was stoutly opposed. The discussion in the lobbies of the difference between conventions and declarations was quite interesting".[24]

And reflecting on the Conference, Brierly (later a member of the Committee of Seventeen) expressed the view that "[t]he legislative element in the attempt to codify any part of international law is not merely incidental and subordinate; it outweighs the codifying element to such an extent that it becomes misleading to describe the process as one of codification at all".[25]

The Assembly of the League of Nations, for its part, did not make things any clearer. Having adopted in 1924 a resolution establishing a Committee of Experts for the Progressive Codification of International Law to prepare the Hague Conference, it later reaffirmed, when taking note of the work of the Conference, "the great interest taken by the League of Nations in the development of international law, *inter alia*, by codification".[26]

Hurst, observing in 1946 renewed support for the idea that "the prescriptions of international law should be more clearly stated and that there should be general agreement as to what those principles are, in order that all men may understand them and appreciate them", found that the term codification had come to embody "two possible ideas, two possible methods".[27] One of them, "in the strict and proper sense and as the term has generally been understood by British writers", had to do with "ascertaining and declaring the existing rules of international law, irrespective of any question as to whether the rule is satisfactory or unsatisfactory, obsolete or still adequate to modern conditions, just or unjust in the eyes of those who formulate it".[28] The second idea, Hurst explained, was "looser and more prevalent on the Continent of Europe. It incorporates the idea of amending the law as well as defining it, so that the provisions in the code shall state the rules of international law as they ought to be, regardless of whether they are so. [...] Codification in this sense is legislative in character".[29]

[24] M.O. HUDSON, *The First Conference for the Codification of International Law*, in *American Journal of International Law*, 1930, p. 449.

[25] J.L. BRIERLY, *The Future of Codification*, cit., p. 3.

[26] Assembly of the League of Nations, Resolution of 22 September 1924, League of Nations, *Official Journal, Special Supplement*, No. 21, p. 10; Resolution of 25 September 1931, League of Nations, *Official Journal, Special Supplement*, No. 92, p. 9.

[27] C. HURST, *A Plea for the Codification of International Law on New Lines*, in *Transactions of the Grotius Society*, 1946, p. 146.

[28] *Ibid*.

[29] *Ibid*. Watts has similarly observed that "codification has a double meaning: it carries on the one hand the broad meaning of establishing a systematic body of rules, including both existing rules and those which have had to be developed for achieving a coherent and comprehensive treatment of the subject, and on the other hand – and more narrowly – the written formulation of rules which already existed

In keeping with the Charter formulation, in which "progressive development" was apparently intended to refer to a way of modifying or adding to existing rules of international law,[30] the members of the Committee of Seventeen, which drafted the Commission's Statute, must presumably have generally intended to refer to codification in its narrower sense. But they did not insist on a strict, abstract distinction between the two methods; on the contrary, they took the view that "no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice".[31]

III. Codification in the practice of the International Law Commission

The codification/progressive development debate that was live during the drafting of the Statute continued from the very outset of the Commission's work. Underlying the legal arguments were no doubt deeper political divisions, this being the Cold War. The Soviet Union and its followers remained deeply suspicious of unwritten law, in which they considered they had had no hand.

As members of the Committee of Seventeen had foreseen, a rigid distinction between codification and progressive development proved impractical. The Commission early on gave up any attempt to uphold the distinction envisaged in its Statute by following the different procedures set out there. Although initially several delegations in the General Assembly complained, it has long been accepted that the Commission does not and cannot follow the distinction made in its Statute, at least so far as working methods are concerned. This early abandonment by the Commission of the theoretically attractive but practically hard distinction between progressive development and codification "set the pattern for the future".[32]

Already at its first session, in 1949, when preparing (at the request of the General Assembly) the Draft Declaration on Rights and Duties of States, the Commission con-

whether in unwritten, i.e. customary, form or in existing treaties, but in either case primarily as a matter of consolidation with little or no alteration of the law": A. Watts, *Codification and Progressive Development of International Law*, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2006, www.opil.ouplaw.com, para. 17.

[30] See also Committee II/2 UNCIO, Summary Records of 21st Meeting of 7 June 1945, Document 848-II/2/46, UNCIO IX, p. 177 *et seq*.; M. Reisman, *Metamorphoses: Judge Shigeru Oda and the International Court of Justice*, in *Canadian Yearbook of International Law*, 1995, pp. 200-203. McRae likewise concludes that "given the definition in Article 15 [of the Commission's Statute] the term 'development' [in Article 13 of the Charter and in the Statute of the Commission] must have meant the articulation of conventions on matters that were not yet law" (D. McRae, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., p. 80).

[31] Report of the Committee on the Progressive Development of International Law and its Codification, (UN Doc. A/AC.10/51), cit., para. 10.

[32] I. Sinclair, *The International Law Commission*, Cambridge: Cambridge University Press, 1987, p. 46.

cluded that the Draft Declaration constituted a special assignment and that it was thus competent to adopt in relation to this task any procedure it deemed conducive to the effectiveness of its work.[33] The General Assembly, for its part, deemed the draft "a notable and substantial contribution towards the progressive development of international law and its codification".[34]

Also in 1949, the Commission had before it a memorandum entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission*,[35] which was submitted by the UN Secretary-General. In fact, as is now well-known, it was largely the work of Hersch Lauterpacht. The report began:

> "The selection of topics for codification must depend to a large extent upon the meaning which the Commission will attach to the term 'codification' having regard to its Statute, to the discussions which preceded it, and to the experience of the previous efforts at codification. [...] These definitions [in the Statute] of what constituted 'progressive development' and 'codification' were adopted for the sake of convenience. In particular it may be assumed that there was no intention that the Commission should limit itself, in the matter of codification, to mere recording, in a systematized form, of the existing law, i.e., of the law as to which there exists an agreed body of rules".[36]

The report also noted that there were anyway "only very few branches of international law with regard to which it can be said that they exhibit such a pronounced measure of agreement in the practice of States as to call for no more than what has been called consolidating codification".[37]

The Commission itself, in 1949, having considered that "the codification of the whole of international law was the ultimate objective", concluded that nevertheless "it was desirable for the present to begin work on the codification of a few topics, rather than discuss a general systematic plan which might be left for later elaboration".[38] It also decided that it had the competence to proceed with the work of codification without awaiting approval

[33] Y.-L. LIANG, *The First Session of the International Law Commission: Review of its Work by the General Assembly*, in *American Journal of International Law*, 1950, p. 535.

[34] General Assembly, Resolution 375(IV) of 6 December 1949, Draft declaration on rights and duties of States, UN Doc. A/RES/375(IV).

[35] General Assembly, Survey of International Law in Relation to the Work of Codification of the International Law Commission of 10 February 1949, Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission, Memorandum submitted by the Secretary-General, UN Doc. A/CN.4/1/Rev.1.

[36] *Ibid.*, para. 3.

[37] *Ibid.*, para. 10.

[38] International Law Commission, Report on the work of its first session, in *Yearbook of the International Law Commission*, 1949, p. 280, para. 14.

by the General Assembly of topics selected by it.[39] No decision was taken as to more precise definitions of the terms "codification" and "progressive development".

In 1950, it was the General Assembly that requested the Commission to study the question of reservations to multilateral conventions "both from the point of view of codification and from that of the progressive development of international law".[40]

By 1951, during the Commission's third session, Hudson had no hesitation in asserting that "there could be no codification without development".[41] Two years later, in connection with its draft on arbitral procedure that admittedly had such "a dual aspect", the Commission said:

> "The Statute of the Commission clearly envisages, and regulates separately, these two functions [of codification and progressive development]. This does not mean that these two functions can be invariably – or even normally – kept apart in the drafts prepared by the Commission. In the case of some topics it may be possible to limit the function of the Commission to one or the other of these two fields of its activity. In the case of other topics these two functions must be combined if the Commission is to fulfil its dual task of, in the language of Article 13 of the Charter of the United Nations, "progressive development of international law and its codification".[42]

At the same time, the Commission went on to add that it "considers it of utmost importance that the difference between these two aspects of its activity should be constantly borne in mind".[43] One can sympathise with those involved in a discussion that led the Commission to reach such seemingly contradictory positions in one and the same paragraph.

Ultimately, however, after conceding again that "the present final draft of the Commission falls within the category both of the progressive development and the codification of international law", the Commission said that "[i]t is probable that the same cumulation of functions must apply, in varying proportions, to other aspects of the work of the Commission".[44] And it added that

> "So far as recommendations proposed by the Commission [as to action to be taken by the General Assembly on the basis of the Commission's output] are concerned, it seems to

[39] Y.-L. LIANG, *The First Session of the International Law Commission*, cit., p. 528. The Sixth Committee was divided as to this decision of the Commission (*ibid.*, pp. 529-532).

[40] General Assembly, Resolution 478(V) of 16 November 1950, Reservations to multilateral conventions, UN Doc. A/RES/478(V).

[41] General Assembly, Summary record of the Commission's 96th meeting of 5 June 1951, in *Yearbook of the International Law Commission*, 1951, Vol. I, p. 123, para. 120 (adding that he "would be in favour of minimizing the distinction by adopting the same procedure for both").

[42] International Law Commission, Report covering the work of its fifth session (1 June-14 August 1953), in *Yearbook of the International Law Commission*, 1953, Vol. II, pp. 201-202, para. 15.

[43] *Ibid.*

[44] *Ibid.*, p. 208, para. 54.

> matter little whether a final draft falls within the category of development or that of codification [...]. There seems to be no reason for any differentiation between the two kinds of recommendation. Neither does it appear that any such differentiation was intended".[45]

Just such a differentiation seems to have been envisaged by the authors of the Statute, though it proved unworkable in practice.

The Commission was even less hesitant in 1956 when it said that

> "In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognized principle of international law', have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either".[46]

In fact, the law of the sea was probably one field where such a distinction could be maintained, to some degree at least. In the preamble to the 1958 Geneva Convention on the High Seas, for example, the States Parties state that they desire "to codify the rules of international law relating to the high seas".

Hersch Lauterpacht, who was member of the Commission between 1952 and 1954, explained that "there is very little to codify if by that term is meant no more than giving, in the language of Article 15 of the Statute of the International Law Commission, precision and systematic order to rules of international law in fields 'where there already has been extensive State practice, precedent and doctrine'".[47]

For Lauterpacht, the Statute's dichotomy between "codification" and "development" was anyhow defective since it did not cover the widest and typical cases of codification on the international plane: where there exists practice but no agreement, or where development is called for because existing practice ought to be changed.[48] He continued:

> "It is probable that the result thus achieved is due to an oversight in drafting; it is so drastically out of keeping with experience and with the views persistently expressed on the subject that it cannot be regarded as intentional. It is not surprising that the relevant Article 15 of the Statute of the Commission has been disregarded in practice. It must be

[45] *Ibid.*

[46] International Law Commission, Report covering the work of its eighth session (23 April-4 July 1956), in *Yearbook of the International Law Commission*, 1956, Vol. II, pp. 255-256, para. 26.

[47] H. LAUTERPACHT, *Codification and Development of International Law*, in *American Journal of International Law*, 1955, p. 17.

[48] *Ibid.*, p. 29.

> so left out of account in the future unless the work both of codification and development is to be reduced to nominal dimensions".[49]

While one can understand and agree with this assessment overall, it seems improbable that Brierly, Hudson and the other members of the Committee of Seventeen committed an "oversight in drafting". It is more likely that the Statute was deliberately crafted as it was, taking into account political considerations, and perhaps with no expectation that it would be followed to the letter.[50]

Speaking in 1961, one of the Commission's members, Gilberto Amado, said that he

> "had been a member of the Committee which had drafted the Statute of the International Law Commission. It had not been the intention to draw in that Statute a clear-cut distinction between the codification of international law and its progressive development. A codification should fill any gaps which might appear; the rules had to be arranged, clarified and if necessary amplified. The task of codification and that of development of international law could not therefore be separated".[51]

The Commission expressly conflated the two working methods in 1958, when referring to both in seeking the views of governments on its provisional set of draft articles on diplomatic intercourse and immunities.[52] In 1960 the Commission reported that its work on the subject of consular intercourse and immunities "is both codification and progressive development of international law in the sense in which these concepts are defined in Article 15 of the Commission's Statute".[53] Such was also the approach explicitly adopted with respect to later topics, such as succession of States in respect of trea-

[49] *Ibid.*, pp. 29-30.

[50] See also J. CRAWFORD, *The Progressive Development of International Law*, cit., p. 14.

[51] General Assembly, Summary record of the Commission's 615th meeting (21 June 1961), in *Yearbook of the International Law Commission*, 1961, Vol. I, p. 215, para. 46.

[52] See International Law Commission, Report covering the work of its tenth session (28 April-4 July 1958), in *Yearbook of the International Law Commission*, 1958, Vol. II, p. 89, para. 48 ("In accordance with articles 16 and 21 of its statute, the Commission decided to transmit this draft, through the Secretary-General, to Governments for their observations").

[53] International Law Commission, Report covering the work of its twelfth session (25 April-1 July 1960), in *Yearbook of the International Law Commission*, 1960, Vol. II, p. 145, para. 23. The Commission explained that "[t]he codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law, and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perforce remain incomplete and have little practical value. For this reason the Commission agreed, in accordance with the Special Rapporteur's proposal, to base the articles which it is now drafting not only on customary international law, but also on the material furnished by international conventions, especially consular conventions" (*ibid.*, para. 20).

ties (1974);[54] the most-favoured-nation clause (1978);[55] and the law of treaties between States and international organizations or between international organizations (1982).[56]

By 1979 the Commission considered that "the techniques and procedures provided for in the Statute of the Commission, as they have evolved in practice, are well suited to the tasks entrusted to the Commission by the General Assembly [and] are flexible enough to allow the Commission to make, within its general framework, such adjustments as the specific features of a topic or other circumstances may demand".[57]

In 1996, in reply to a request by the General Assembly that it "examine the procedures of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law",[58] the Commission again said that

> "As is well known [...] the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in order to give more precise effect to a principle. Moreover, it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons".[59]

The Commission further said that it had thus "inevitably proceeded on the basis of a composite idea of 'codification and progressive development'. In other words, its work has involved the elaboration of multilateral texts on general subjects of concern to all or many States, such texts seeking both to reflect accepted principles of regulation, and to provide such detail, particularity and further development of the ideas as may be required".[60]

Against this background, the Commission called for a revision of its Statute by which the distinctions drawn between the procedures of codification and progressive

[54] International Law Commission, Report on the work of its twenty-sixth session (6 May-26 July 1974), in *Yearbook of the International Law Commission*, 1974, Vol. II (Part One), p. 174, para. 83 ("The Commission's work on succession of States in respect of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements of both progressive development as well as of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls").

[55] International Law Commission, Report on the work of its thirtieth session (8 May-28 July 1978), in *Yearbook of the International Law Commission*, 1978, Vol. II (Part Two), p. 16, para. 72.

[56] International Law Commission, Report on the work of its thirty-fourth session (3 May-23 July 1982), in *Yearbook of the International Law Commission*, 1982, Vol. II (Part Two), p. 15, para. 55.

[57] International Law Commission, Report on the work of its thirty-first session (14 May-3 August 1979), in *Yearbook of the International Law Commission*, 1979, Vol. II (Part Two), p. 188, para. 95.

[58] General Assembly, Resolution 50/45 of 26 January 1996, UN Doc. A/RES/50/45.

[59] International Law Commission, Report on the work of its forty-eighth session (6 May-26 July 1996), in *Yearbook of the International Law Commission*, 1996, Vol. II (Part Two), p. 86, para. 156.

[60] *Ibid.*, para. 157.

development would be eliminated.[61] But this has not happened, and no real difficulties seem to have arisen in practice.

Neither the Statute nor the Commission's views have since changed. In its 2011 Guide to Practice on Reservations to Treaties, for example, the Commission stated that "[t]he very concept of a 'codification convention' is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and its progressive development".[62]

A similar approach may be found in the Commission's Articles on the responsibility of international organizations of 2011, the commentary to which refers to "the border between codification and progressive development".[63] The 2014 Draft articles on the expulsion of aliens are similarly said to be "both a work of codification of international law and an exercise in its progressive development".[64] As already noted, such an approach may also be evident on the part of some members of the Commission in the context of the current work on the topic Immunity of State officials from foreign criminal jurisdiction.[65]

Thus, from the very beginning of the Commission's work, the "formal, rather rigid, distinction between codification and progressive development was both unclear and unworkable and it quickly became rather irrelevant".[66] The result, in Rosenne's words, has been that "in practice a single consolidated procedure has been made applicable to both

[61] *Ibid.*, p. 84, para. 147(a), and p. 97, para. 242.

[62] International Law Commission, Report on the work of its sixty-third session (26 April-3 June and 4 July-12 August 2011), in *Yearbook of the International Law Commission*, 2011, Vol. II (Part Three), p. 223, para. 11 of the commentary to guideline 3.1.5.3. The Introduction to the *Guide to Practice on Reservations to Treaties* indicates that "the various provisions in the guidelines cover a wide range of obligatoriness and have very different legal values" (*ibid*., p. 36, para. 3). Moreover, the Commission stated that "[t]his range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion – made, *inter alia*, during discussions in the Sixth Committee of the General Assembly – that a distinction should be made between guidelines reflecting *lex lata* and those formulated *de lege ferenda*" (*ibid.*, fn. 5).

[63] International Law Commission, Report on the sixty-third session (26 April–3 June and 4 July–12 August 2011), in *Yearbook of the International Law Commission*, 2011, Vol. II (Part Two), pp. 46-47, general commentary, para. 5.

[64] International Law Commission, Draft articles on the expulsion of aliens, 2014, p. 3, para. 2, www.legal.un.org.

[65] M. Wood, *Lessons from the ILC's Work on 'Immunity of State Officials'*, cit.

[66] D. McRae, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., p. 79. McRae suggests that the Commission has been through three broad phases (the "fused model" of avoiding making a distinction between codification and progressive development; the "clear separation model" beginning in the 1980s; and the more recent "responsibility of international organizations model", by which the Commission provides only a general "consumer warning" that some – unspecified – draft articles may be progressive development while others are a codification). While that is an interesting perspective, it tends to rationalize what has been somewhat messier in reality (indeed McRae himself observes, at p. 91, that "there is overlap and no clear distinction").

types of work, and the formal differentiation established in the Statute has been blurred. This result seems to be, on the whole, uncontroversial, and is probably inevitable".[67]

By treating the concepts of codification and progressive development as closely interlinked or even inseparable (or, to put it another way, by adopting a "looser" definition of codification), the Commission has afforded itself greater freedom in elaborating and proposing international legal texts. And as a result, it may be difficult to disregard a rule proposed by it solely as an exercise of "progressive development" unless the Commission itself has acknowledged this to be the case.

Yet at the same time, in the words of the Commission, it is "of utmost importance that the difference between these two aspects of its activity should be constantly borne in mind".[68] For States, for courts, for international lawyers generally, it may be crucially important to know how far a particular text emanating from the Commission is intended to reflect existing law or amount to a proposal for new law, even if at the end of the day one may have to make an independent assessment of the matter, taking into account whatever can be gleaned from the Commission's work.

In fact, within the Commission, the notions of "codification" and "progressive development" remain very much present, and it has not always sought to blur or ignore them. The question whether (and if so how) to distinguish between the two concepts remains a live one within the Commission, both in general and with regard to particular topics or draft provisions. But such a discussion is often in reality about the distinction between *lex lata* and *lex ferenda*, which are indeed "a variation on the question of what constitutes customary international law".[69]

To begin with, the Commission has not infrequently labelled particular draft provisions expressly as codification or as progressive development. For the Commission to state that in its view a draft provision, especially one that the Commission considers to be central to a topic it has worked on, represents codification of an already existing rule, can carry great weight and help to clarify and consolidate the law. This is usually done in commentaries that accompany the draft provisions, which often indicate the sources underlying the adopted provisions.

Clarifying that a certain draft article represents (or in any event may represent) an effort at progressively developing the law, on the other hand, has been done on occasions where the Commission sought to suggest a change to an established rule; or where State practice and/or *opinio juris* was lacking or insufficient to distil a rule, if only in the eyes of certain members of the Commission.

[67] S. Rosenne, *The International Law Commission, 1949-59*, in *British Yearbook of International Law*, 1960, p. 142.

[68] International Law Commission, Report covering the work of its fifth session, cit., p. 202, para. 15.

[69] D. McRae, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., p. 90.

The label "progressive development" is indeed a way to secure the agreement of such members to the inclusion of the provision in the Commission's eventual output, as it may offer them comfort that it is indeed recognized as a policy preference rather than existing law.[70] An example is Art. 41 of the *Articles on State responsibility*, which proclaims a duty to cooperate to bring to an end a serious breach of *jus cogens*. The Commission's commentary states: "It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law".[71]

It may also be that the Commission, or the General Assembly, wishes a certain topic or certain issues within a topic to be approached as an exercise in codification *stricto sensu* or, on the other hand, as progressive development. This depends of course on the subject-matter, including how well-established and indeed satisfactory the existing law is thought to be. For example, the law of treaties and State responsibility, being well-established in the case-law and literature, were for the most part exercises in codification.

Somewhat paradoxically, then, differentiating between codification and progressive development has been seen to be both difficult (if not undesirable) and useful for the Commission. Again, all depends on context. It is important for some topics, particularly those that are likely to come before the domestic courts, such as all aspects of international immunities. It is less important where the topic concerns largely practical issues between States, especially in relatively new fields, such as the protection of persons in the event of disasters.

Whatever the approach ultimately adopted in a particular topic or provision, it must also be borne in mind that the Commission should always approach a topic by first surveying State practice in order to ascertain whether and which relevant rules of customary international law already exist. At the preliminary stage of considering whether or not to add a topic to its work programme, the Commission looks into, inter alia, the question whether the topic is sufficiently advanced in terms of State practice to permit progressive development and codification. In other words, the Commission does seek to identify the *lex lata* in the strict sense for purposes of assessing the legal situation as part of its work on any particular topic.

[70] McRae has similarly suggested that "[t]he distinction becomes important when Commission members wish to oppose the inclusion of a particular provision. Characterizing it as progressive development is a way to diminish its weight and authority and the claim for its inclusion": D. McRae, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., pp. 93-94. He adds that "[a] reference to progressive development may well have been reached in the drafting committee in order to gain support for a particular provision, rather than a considered collective judgment that the Commission was engaging in codification in some cases and progressive development in others" (*ibid.*, p. 92).

[71] International Law Commission, Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), in *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 114, para. 3.

In so doing, the Commission has consistently adhered to the definition of customary international law enshrined in the Statute of the International Court of Justice: "a general practice accepted as law".[72] Its methodology in seeking to identify rules of customary international law has recently been described in a memorandum by the Commission's Secretariat, on the basis of a systematic review of the final versions of the various drafts adopted by the Commission over the years: "[t]o identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists".[73]

The care and thorough manner of identifying rules of customary international law when the Commission engages in such a task may endow its eventual analysis (output) with much authority. As Watts observed, the Commission's formulations "constitute a reasonable *prima facie* indication of the 'world view' on a particular legal question. They are a convenient articulation of the position in international law, which is what one is always seeking in an essentially customary law regime. By virtue of its global and collegiate basis, the Commission's articulation is not just convenient but authoritative".[74]

IV. The Commission's work on the topic *Identification of customary international law*

At a time when questions of customary international law increasingly fall to be dealt with also by "those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than ministries for foreign affairs, and those working for NGOs"[75], and given the considerable differences of approach amongst writers, the Commission considered in 2012 that there was a need for some reasonably authoritative guidance on the process of identifying customary international law. It was thought that the Commission itself, given its role and experience, its privileged relationship with States, and its composition and working methods, might be well placed to offer such guidance. While aware of the difficulties inherent in an attempt to "codify the relatively flexible process by which rules of

[72] Art. 38, para. 1(b), of the Statute of the International Court of Justice.

[73] International Law Commission, Formation and evidence of customary international law – Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, A/CN.4/659, p. 7.

[74] A. Watts, *The International Law Commission 1949-1998*, Vol. I, Oxford: Clarendon Press, 1999, p. 15. For important qualifications, however, see p. 33 *et seq*. below.

[75] International Law Commission, Report on the work of its sixty-third session (26 April-3 June and 4 July-12 August 2011), Annex I, para. 3, in *Yearbook of the International Law Commission*, 2011, Vol. II (Part Two), p. 183.

customary international law are formed",[76] the Commission added the topic Formation and evidence of customary international law to its current programme of work. (In 2013, the title of the topic was changed to Identification of customary international law.) Members of the Commission agreed that the outcome of the project should be of an essentially practical nature; it was not the aim to seek to resolve largely theoretical controversies. Nor, of course, was the topic concerned with the substantive rules of customary international law: it dealt only with the methodology for identifying such rules. The conclusions – together with commentaries – seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, they aim to offer clear and concise guidance without being overly prescriptive.

In August 2016 the Commission adopted, on first reading, a set of 16 draft conclusions.[77] A second and final reading took place in 2018, bringing the topic to completion after taking into account input from States and others on the first reading text.[78] On 20 December 2018, the UN General Assembly took note of the conclusions, the text of which was annexed to the resolution, with the commentaries thereto; brought them to the attention of States and all who may be called upon to identify rules of customary international law; and encouraged their widest distribution.[79]

The Commission has long dealt with items concerning the sources of international law, and it was not for the first time that, in 2012, it took up a topic concerning customary international law. An earlier foray into this field (*Ways and means of making the evidence of customary international law more readily available*) was mandated by Art. 24 of its Statute, leading the Commission in 1950 to call on States to make evidence of their practice more accessible.[80] In his working paper on the topic, Hudson thought that "sub-heading (b) of article 38 of the Statute of the International Court of Justice was not

[76] Report of the Study Group on the Future Work of the International Law Commission, in M.R. ANDERSON, A.E. BOYLE, A.W. LOWE, C. WICKREMASINGHE, (eds.), *The International Law Commission and the Future of International Law*, London: British Institute of International and Comparative Law, 1998, p. 42.

[77] The draft conclusions together with their accompanying commentaries, adopted by the Commission on 5 and 8 August 2016, may be found in International Law Commission, Report on the work of its sixty-eighth session (2016), UN Doc. A/71/10, pp. 79 *et seq*.

[78] In May 2018 the Commission adopted the set of draft conclusions on identification of customary international law on second reading, and in August that year adopted the commentaries thereto; the final text may be found in International Law Commission, Report on the work of its seventieth session, 2018, UN Doc. A/73/10, p. 119 *et seq*. The written comments and observations received from Governments on the first reading draft conclusions and commentaries are reproduced in UN Doc. A/CN.4/716. The Special Rapporteur's fifth report, taking into account these comments and observations, is in UN Doc. A/CN.4/717.

[79] General Assembly, Resolution 73/203 of 20 December 2018, Identification of customary international law, UN Doc. A/RES/73/203.

[80] International Law Commission, Report covering its second session (5 June – 29 July 1950), in *Yearbook of the International Law Commission*, 1950, Vol. II, pp. 367–74, especially paras 90-94.

very happily worded",[81] and sought to offer "a few guiding principles" as to the "elements which must be present before a principle or rule of customary international law can be found to have become established".[82] Almost 70 years later, much of that (rather brief) discussion remains highly instructive.

Dealing as they do with the identification of rules of customary international law, the Commission's more recent conclusions do not address, at least not directly, the processes by which customary international law develops over time. But, as the commentary indicates, in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the process by which it has developed. The conclusions thus inevitably refer in places to the formation of rules; they do not, however, deal systematically with how rules emerge, or how they change or terminate.

In approaching this topic, the first place for the Commission to look for guidance in determining how to identify customary international law was Art. 38, para. 1(b) of the Statute of the ICJ, which in a sense tells one all one needs to know with its now almost century-old formula: "international custom, as evidence of a general practice accepted as law". Then there is what States do and say about the methodology, although that is often hard to come by – at least it was until the Commission commenced work on the topic. Fortunately, there is considerable guidance in decisions of the International Court of Justice and – to a lesser extent – in those of other international courts and tribunals as well as regional courts. We have of course looked at national courts as well, studying carefully the decisions of the courts of as many States as possible.

The conclusions are to be read together with the commentaries.[83] Although not part of the conclusions *per se*, the commentaries are not separable from them and should be read in combination with them: they provide more detailed explanation on each conclusion as well as the context, wording and interrelation between the conclusions. In addition, they often provide concrete examples supporting the points made. One question within the Commission and among States was whether the balance between conclusions and commentary was right. Some wished to see more detail in the conclusions them-

[81] Summary record of the Commission's 40th meeting of 6 June 1950, in *Yearbook of the International Law Commission*, 1950, Vol. I, p. 4, para. 5.

[82] *Ibid*. See also International Law Commission, *Article 24 of the Statute of the International Law Commission*, Working Paper by Manley O. Hudson, Special Rapporteur, UN Doc. A/CN.4/16, in *Yearbook of the International Law Commission,* 1950, Vol. II, p. 26, para. 10.

[83] A concern to emphasise this for users who may not be conversant with the work of the Commission led to the inclusion in the 2016 commentaries of an initial footnote (245 in the *ILC Report*, 2016) reading "As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries". In the text adopted in 2018, this sentence has been relocated to the first paragraph of the general commentary (*ILC Report*, 2018, p. 122). For a discussion on the role of the Commission's commentaries, see G. Gaja, *Interpreting Articles Adopted by the International Law Commission*, in *British Yearbook of International Law*, 2015, p. 10 *et seq*.

selves, but that was not always easy. It will be noted that the commentaries themselves do not refer to any of the vast literature on the subject, but an extensive bibliography has been prepared to accompany the conclusions and commentaries.[84]

Conclusion 2 reads: "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)".[85]

This basic approach would have likely won the approval of Morelli, who, in his 1956 Hague lectures, said that

> "The custom arises from two elements: (a) an objective or material element, consisting in the use, that is to say, in a conduct constantly held by the States with regard to certain conflicts of interest; and (b) a subjective or psychological element consisting in the conviction, gradually acquired by the same States, that that conduct is in conformity with a rule of law, that it is, in other words, the obligation or the exercise of a legal right (*opinio juris sive necessitatis*).[86]

Conclusion 2 confirms the two-element approach to the identification of rules of customary international law, which has been widely endorsed not only by the members of the Commission but also by States in the Sixth Committee of the General Assembly and in abundant international practice and international jurisprudence. That is already a significant conclusion to be drawn from the Commission's work – significant, if not particularly surprising. It is important because in recent years there have been calls to abandon the two-element approach – essentially, to abandon custom as we know it. Several writers have called for a reduced role for "acceptance as law", arguing that in most cases widespread and consistent State practice alone is sufficient for constructing customary international law. Others, particularly those working in the field of human rights, as also international humanitarian law and international criminal law, have claimed the opposite – reducing the significance of the practice requirement and concentrating instead on the *opinio juris* element. Yet the two-element approach has withstood both political pressures and the test of time: customary international law continues to require "a general practice accepted as law". The identification of a rule of customary international law, in all fields of international law, requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).

The reference in conclusion 2 to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both

[84] See International Law Commission, Addendum to Fifth report on Identification of customary international law: revised bibliography by Michael Wood, Special Rapporteur, 6 June 2018, UN Doc. A/CN.4/717/Add.1.

[85] International Law Commission, Report on the work of its seventieth session, cit., p. 124.

[86] G. MORELLI, *Cours général de droit international public*, cit., p. 453 (my translation).

the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise contours are disputed. This may be the case, for example, where there is disagreement as to whether a particular formulation (usually found in written texts such as treaties or resolutions) does in fact equate to an existing rule of customary international law; consider, for example, the issue of freedom from arbitrary detention, where the International Covenant on Civil and Political Rights and the European Convention on Human Rights formulations are quite different. Instances where the precise content may be disputed also include cases where the question arises whether there are exceptions to a recognized rule of customary international law.

There may, however, be a difference in the application of the two-element approach by a careful assessment that considers, in each case, the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found. This is reflected in the latter part of conclusion 3, para. 1, which, as the commentary indicates, is "an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual".[87] It implies, among other things, that the type of evidence consulted (and consideration of its availability or otherwise) may be adjusted to the situation, with certain forms of practice and evidence of acceptance as law being of particular significance. This was the case, for example, in the *Jurisdictional Immunities of the State* case, where the ICJ said that for purposes of identifying the scope and extent of the customary rule on State immunity,

> "[i]n the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States".[88]

Regard must be had to the particular circumstances in which any evidence is to be found because relevant conduct may often be fraught with ambiguities. As the commentary to conclusion 3 explains,

> "[w]hen considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will

[87] International Law Commission, Report on the work of its seventieth session, cit., p. 127.

[88] International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), judgment of 3 February 2012, para. 55.

> count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State's failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. Practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law".[89]

Taking account of the particular circumstances and context in which an alleged rule has arisen and operates affords flexibility, while respecting the essential nature of customary international law as a general practice accepted as law. In other words, the underlying approach is the same: both elements are required. Any other approach would risk artificially dividing international law into separate fields, and would run counter to the systemic nature of international law.

Conclusion 3, para. 2, specifies that "Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element".[90] As the commentary explains, "while practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, two distinct inquiries are to be carried out. The constituent elements may be intertwined in fact (in the sense that practice may be accompanied by a certain motivation), but each is conceptually distinct for purposes of identifying a rule of customary international law".[91]

Part Three of the conclusions deals with the constituent element of "a general practice", which "both defines and limits" customary international law,[92] and seeks to provide guidance as to what this requirement is about and how it may be evidenced. Also known as the "material" or "objective" element, this element refers (in the aggregate) to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. Judge Morelli similarly said in his Dissenting Opinion in the *North Sea Continental Shelf* cases that State practice may at times be

[89] International Law Commission, Report on the work of its seventieth session, cit., p. 128.

[90] *Ibid*., p. 127.

[91] *Ibid.*, pp. 128-129.

[92] See International Court of Justice, *Right of Passage over Indian Territory* (Portugal v. India), judgment of 12 April 1960, dissenting opinion of Judge Spender: "The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined".

"relevant not as a constitutive element of a custom which creates a rule, but rather as a confirmation of such rule".[93]

Part Three begins with conclusion 4, which seeks to answer the question: whose practice counts? It will be recalled that the basic text, Art. 38, para. 1(b) of the Court's Statute, does not answer this question. It refers simply to "a general practice", without saying whose practice. Conclusion 4 consists of three paragraphs: the first deals with States; the second with international (intergovernmental) organizations; and the third with "other actors", that is, actors other than States and international organizations.

Conclusion 4, para. 1, explains that the requirement of a general practice refers primarily to the practice of States as contributing to the formation, or expression, of rules of customary international law.[94]

The practice of States, the primary subjects of international law, is self-evidently of paramount importance to the identification of customary international law. But conclusion 4, para. 2, indicates that "[i]n certain cases" the practice of international organizations also contributes to the identification of rules of customary international law.[95] This statement deals with practice attributed to international organizations themselves, not that of their member States acting within or in reaction to them (which is to be attributed to the States in question). This has not been free from controversy, within the Commission and outside. And it is indeed a difficult area, not least given the great number of international organizations, the many and significant differences between them, and their limited powers and functions (the principle of speciality).

The formula "a general practice accepted as law", enshrined in Art. 38, para. 1(b) of the ICJ Statute, is flexible enough to include the practice of international organizations: the suggested Root-Phillimore formulation of "International custom, as evidence of a common practice in use between nations and accepted by them as law", like Baron Descamps's original reference to international custom as "being practice between nations accepted by them as law", ended up on the cutting room floor. Authors have thus argued that custom "[is] not required to be followed or acknowledged 'by states' only, as it is actually required [in the Statute] […] when referring to conventions. So that, in principle, practices may emanate from state and non-state actors".[96]

Para. 2 reflects, first, the fact that although most international organizations lack a genuinely autonomous law-making power, their contribution to the creation and expression of customary international law seems undeniable where the member States

[93] See International Court of Justice, *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), judgment of 20 February 1969, dissenting opinion of Judge Morelli, para. 6.

[94] International Law Commission, Report on the work of its seventieth session, cit., p. 130.

[95] *Ibid.*

[96] For example, J.P. Bohoslavsky, Y. Li, M. Sudreau, *Emerging Customary International Law in Sovereign Debt Governance?*, in *Capital Markets Law Journal*, 2014, p. 63.

have transferred exclusive competences to them, such that the States themselves do not engage in practice with respect to the issue at hand. In such cases, international organizations exercise some of the public powers of their member States, and their practice may (some would say must) thus be equated with the practice of those States. This is sometimes the case with the European Union, and possibly also with some other international organizations, including regional international economic organizations.

Relevant practice may also arise, in certain cases, where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are functionally equivalent to the powers exercised by States. Examples include the practice of secretariats of international organizations when serving as treaty depositaries, the deployment of military forces (such as for peacekeeping), or the taking of positions on the scope of privileges and immunities for the organization and its officials.

The practice of international organizations is likely to be of particular relevance with respect to rules of customary international law that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties.

The Commission explained, however, that caution is required in assessing the relevance and weight of such practice by international organizations. As the commentary stipulates, international organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. The reaction of member States to such practice is of importance. Among other factors that may need to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; whether the conduct is *ultra vires* the organization or the organ; and whether the conduct is consonant with that of the member States of the organization.[97]

At the same time, conclusion 4, para. 3, provides that the conduct of actors other than States and international organizations – for example, NGOs, non-State armed groups, transnational corporations and private individuals – is neither creative nor expressive of customary international law.[98] As such, their conduct does not serve as direct (primary) evidence of the existence and content of rules of customary international law. Para. 3 recognizes, however, that such conduct may have an important indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law by States (and international organizations). For example, the official statements of the International Committee of the Red Cross (ICRC), such as ap-

[97] International Law Commission, Report on the work of its seventieth session, cit., p. 131.
[98] *Ibid.*, p. 130.

peals and memoranda on respect for international humanitarian law, play an important role in shaping the practice of States when reacting to such statements; and publications of the ICRC may serve as helpful records of relevant practice. Such activities may contribute to the development and determination of customary international law; but they are not practice as such. Similarly, although the conduct of non-State armed groups is not practice that may be constitutive or expressive of customary international law, the reaction of States to it may well be. All of this is consistent with the Commission's approach in the context of its work on the topic *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*. There it was decided that "Other conduct, including by non-State actors, does not constitute subsequent practice [...] Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty".[99]

Conclusion 5 provides that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions".[100] This is fairly straightforward, though in the past it was sometimes argued that relevant practice may emanate only from those authorized to represent the State in its international relations. The conclusion and its commentary do raise a few interesting points, however, including those relating to attribution of conduct and to confidential practice.

Conclusion 6, which lists prominent forms of practice (and states that "[t]here is no predetermined hierarchy among the various forms of practice"),[101] provides further illustration that the Commission's work on the topic has shown that several longstanding theoretical controversies related to customary international law have by now been put to rest. It seems to be no longer seriously contested, for example, that verbal acts, and not just physical conduct, may count as "practice". Writers have also been divided on whether practice may only be relevant for the purposes of customary international law when it relates to a situation at the international level and to some actual incident of claim-making (as opposed to assertions *in abstracto*),[102] a position that seems now to have been abandoned.

Conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of conclusion 8). As the two paragraphs of conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.[103]

[99] *Ibid.*, p. 14 (Draft conclusion 5(2)).

[100] *Ibid.*, p. 132.

[101] *Ibid.*, p. 133.

[102] See, for example, J.L. KUNZ, *The Nature of Customary International Law*, in *American Journal of International Law,* 1953, p. 666.

[103] International Law Commission, Report on the work of its seventieth session, cit., p. 134.

As the commentary explains, the requirement to assess the available practice "as a whole" is illustrated by the *Jurisdictional Immunities of the State* case, where it was described that the Hellenic Supreme Court had decided in one case that, by virtue of the "territorial tort principle", State immunity under customary international law did not extend to the acts of armed forces during an armed conflict. Yet a different position was adopted by the Greek Special Supreme Court; by the Greek Government when refusing to enforce the Hellenic Supreme Court's judgment and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision. Assessing such practice "as a whole" led the International Court of Justice to conclude "that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument".

Conclusion 8 seeks to capture the essence of the requirement that the relevant practice be "general" as well as the inquiry that is needed in order to verify whether this requirement has been met in a particular case. It defines "general" as "sufficiently widespread and representative, as well as consistent", the commentary explaining that this "does not lend itself to exact formulations, as circumstances may vary greatly from one case to another". Citing the Court's case-law, the commentary further explains that complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform; some inconsistencies and contradictions are thus not necessarily fatal to a finding of "a general practice".[104] No particular duration is required for the emergence of a rule of customary international law (if the practice is general and accepted as law), as is made clear in conclusion 8, para. 2.

Conclusions 9 and 10 deal with the second constituent element, that of "acceptance as law", sometimes referred to as the "subjective" or "psychological" element.[105] This element is commonly referred to as *opinio juris*, but the Commission has followed the Statute of the Court in referring to acceptance as law (a term that seems to capture more accurately what is involved); at the same time, the Latin term *opinio juris* appears in brackets, mainly out of deference to its frequent use in practice.

Acceptance as law is yet another issue that has provided scholars with much to ponder. The Commission has been able to avoid much of the theoretical debate connected with *opinio juris* (to a large extent given its focus on identification, as opposed to the formation, of customary international law), seeking to clarify its nature and function as well as how it may be proved. The non-exhaustive list of forms of evidence of acceptance as law offered by the Commission includes public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; and inaction (under cer-

[104] *Ibid.*, pp. 135-138.
[105] *Ibid.*, pp. 138-142.

tain circumstances). Guidance has also been provided on how to distinguish between acceptance as law and other motives that may accompany a certain practice.

The relevance of treaties to the formation or identification of customary international law is familiar ground. It is dealt with in conclusion 11, which indicates that (a) a treaty rule may codify a rule existing at the time of the conclusion of the treaty; (b) a treaty rule may have led to the crystallization of a rule that had started to emerge prior to the conclusion of the treaty; and (c) a treaty rule may give rise to a general practice that is accepted as law, thus generating a new rule of customary international law.[106] As the conclusion indicates, caution is needed when establishing whether this is so. Treaty texts alone cannot serve as conclusive evidence as to the existence or content of rules of customary international law: in order to establish the existence in customary international law of a rule found in a written text, the rule must find support in external instances of practice coupled with acceptance as law. In the words of the *Libya/Malta* judgment, "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".[107]

One may also recall in this context Judge Morelli's thoughtful methodological approach in his Dissenting Opinion in the *North Sea Continental Shelf* cases, where he said that he thought that

> "in order to find the principles and rules of general international law concerning the delimitation of the continental shelf it might be useful, whenever the circumstances so require, to take account of the Convention [on the Continental Shelf] as a very important evidential factor with regard to general international law, because the purpose of the Convention is specifically, at any rate in principle, to codify general international law and because this purpose has been, within certain limits, effectively realized".[108]

The role of resolutions adopted by international organizations or at international conferences used to be very controversial. Conclusion 12 deals with this matter and begins with a negative statement, perhaps a word of warning: "[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law".[109]

In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to

[106] *Ibid*., p. 143.

[107] International Court of Justice, *Continental Shelf* (Libyan Arab Jamahiriya v. Malta), judgment of 21 March 1984, para. 27.

[108] *North Sea Continental Shelf*, dissenting opinion of Judge Morelli, cit., para. 1.

[109] International Law Commission, Report on the work of its seventieth session, cit., p. 147.

a general practice that is accepted as law. There is no "instant custom" arising out of such resolutions on their own account.

Conclusion 12, para. 2, strikes a more positive note. As the International Court of Justice observed in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, resolutions "even if they are not binding [...] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[110] This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, "[t]he effect of consent to the text of such resolutions [...] may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".[111] Conversely, negative votes, abstentions, or disassociations from a consensus may be evidence that there is no acceptance as law, and thus that there is no rule.

Conclusion 12, para. 3, as a logical consequence of paras 1 and 2, clarifies that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law.[112] Thus, a provision in a resolution may reflect a rule of customary international law only if it is established that the provision corresponds to a general practice that is accepted as law.

The next point addressed in the conclusions is the role of judicial decisions in relation to customary international law. This is dealt with in conclusion 13.[113] As is well-known, Art. 38, para. 1(d) of the ICJ Statute refers to "judicial decisions" and to "teachings of the most highly qualified publicists of the various nations" as "subsidiary means for the determination of rules of international law". What does "subsidiary" imply here? It indicates that judicial decisions and teachings are not primary sources of law in the same way as international conventions, international custom, and general principles of law. Rather they are secondary means for assisting in determining the law: for interpreting treaties, for identifying the existence of rules of customary international law and their content, and for the determination of general principles of law. Judicial decisions, and the writings of learned authors, may be looked to for guidance as to the law, but are not themselves law. On the other hand, the word "subsidiary" should not be taken

[110] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, para. 70 (referring to UN General Assembly resolutions).

[111] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, judgment of 27 June 1986, para. 188. See also *Ad hoc* Arbitral Tribunal, *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, final award of 24 March 1982, in *International Legal Materials*, 1982, p. 1032, para. 143.

[112] International Law Commission, Report on the work of its seventieth session, cit., p. 147.

[113] *Ibid.*, p. 149.

as suggesting that they are of no great importance, which is clearly not true, especially for judicial decisions.

What is the position of national courts? It is clear that decisions of national courts may count as State practice and as evidence of the *opinio juris* of States, and thus contribute directly to the formation (and evidence) of customary international law under Art. 38, para. 1(b).[114] But may they also be used as a subsidiary means for the determination of rules of customary international law under Art. 38, para. 1(d) in the same way as decisions of international courts and tribunals? There is no reason in principle not to include decisions of national courts within Art. 38, para. 1(d) as it relates to customary international law. Such landmark cases as *Paquete Habana* and *McLeod* have contributed greatly to international law. But the decisions of domestic courts have to be approached with great care, and in context, since they may reflect national legal systems and approaches, not necessarily the position under international law. This is perhaps particularly so with respect to domestic judgments dealing with human rights, which are situated within a particular legal (and political) framework.[115]

Next comes another subsidiary means for the determination of rules of international law, "teachings of the most highly qualified publicists" as the ICJ Statute puts it.[116] As with decisions of courts and tribunals, referred to in conclusion 13, writings are not themselves a source of customary international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that they may have in systematically compiling State practice and synthesizing it; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law. This is what conclusion 14 seeks to capture.[117]

There is a need for caution when drawing upon writings. Their value for determining the existence of a rule of customary international law varies markedly; this is reflected in the words "may serve as". First, and this is often the case, for example, with writings on international human rights law, writers may aim not merely to record the state of the law as it is, but also to advocate its development. In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual positions of their authors. Third, writings differ greatly in quality. Assessing the authority of a given work is thus essential: in the well-

[114] See draft conclusions 6(2), and 10(2), *ibid.*, pp. 133 and 140.

[115] See International Law Commission, Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, Memorandum by the Secretariat, 9 February 2016, UN Doc. A/CN.4/691.

[116] The word "publicists" in the ICJ Statute is a curious one in English. It seems that the French word *publicistes* refers to lawyers qualified in public law, as opposed to those who teach or practice private law.

[117] International Law Commission, Report on the work of its seventieth session, cit., p. 150.

known words of the United States Supreme Court in *Paquete Habana*, "the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat [...] are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".[118]

Conclusion 15 concerns the persistent objector rule, and provides, inter alia, that "[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection".[119]

This is another issue that has proven somewhat less contentious than in the past, perhaps given the amount of State practice now available in support of the rule's existence.[120] But the conclusion emphasises that in each case, stringent conditions must be met: "The objection must be clearly expressed, made known to other States, and maintained persistently".

Conclusion 16 concerns "particular customary international law", that is, rules of customary international law, whether regional, local or other, that apply only among a limited number of States.[121] In his Hague Academy lectures, Morelli, too, chose to refer to "particular" custom rather than "special custom", "regional custom", "local custom" etc.[122] The conclusion and its commentary explain that the two-element approach applies in the identification of such rules, too, but taking into account their special nature by virtue of their limited reach. The practice must be general in the sense that it is a consistent practice "among the States concerned", that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves.

The fourth report on *Identification of customary international law*,[123] presented to the Commission in May 2016, envisaged three parts to the final output of the Commission on this topic. First, the conclusions and commentaries; second, a bibliography; and, fi-

[118] US Supreme Court, judgment of 8 January 1900, *The Paquete Habana and The Lola*. In the same case, Chief Justice Fuller, dissenting, said of writers that "[t]heir lucubrations may be persuasive, but not authoritative". Compare the much-quoted remarks of the English Court of Admiralty in the *Renard Case,* judgment of 9 December 1778: "A pedantic man in his closet dictates the law of nations; and who shall decide, when doctors disagree? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius".

[119] International Law Commission, Report on the work of its seventieth session, cit., p. 152.

[120] See, for example, the practice collected in International Law Commission, Third report on Identification of customary international law by Michael Wood, Special Rapporteur, 27 March 2015, UN Doc. A/CN.4/682, pp. 60-61, para. 87; and in J.A. Green, *The Persistent Objector Rule in International Law,* Oxford: Oxford University Press, 2016.

[121] International Law Commission, Report on the work of its seventieth session, cit., p. 154.

[122] G. Morelli, *Cours général de droit international public*, cit., p. 458.

[123] International Law Commission, Fourth report on Identification of customary international law by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/695 and Add.1.

nally, a new study of ways and means for making the evidence of customary international law more readily available. So far as the study is concerned, the Commission requested its Secretariat to prepare a memorandum, which surveys the present state of the evidence of customary international law and make suggestions for its improvement. The Commission looked into this matter some sixty-five years ago. Revisiting it was considered appropriate given what even 20 years ago was referred to as the "enormous proliferation of the available material on the many aspects of international law and relations [...] the rising costs associated with its accumulation, storage, and distribution [...] [and the] revolutionary developments in global information technology".[124]

V. The International Law Commission's role in the customary process

An interesting question is the weight to be given to pronouncements emanating from the ILC itself when one is seeking to determine whether a rule of international law exists or not, the precise contours of such rule, or even when a rule came into existence. Such questions arise most often in connection with the identification of customary international law, but could also arise in relation to the interpretation of a treaty.

The importance of the Commission's role is clear. This is particularly the case where the Commission's output is endorsed by States within the General Assembly and elsewhere. But even where States do not endorse the work, expressly or otherwise, the Commission's output may be influential and even contribute to the formation of new law. This is not a recent phenomenon, as some suppose. What was almost the Commission's very first output, the Nürnberg Principles, was not endorsed by the General Assembly yet became highly influential.[125] Even "failed" topics, those that the Commission has begun to work on but at some point chose not to proceed with, may have an impact.[126] The Commission's output often constitutes a reference point that serves as a catalyst for practice and expressions of legal opinion;[127] and it has also been a significant influence on courts and on writers, shaping international law through their distinct roles as well.

[124] To borrow the words of A. Watts, *The International Law Commission 1949-1998*, cit., Vol. III, p. 2106. The updated study was published by the Commission's Secretariat and considered by the Commission in 2018 (see International Law Commission, Ways and means for making the evidence of customary international law more readily available, Memorandum by the Secretariat, 12 January 2018, UN Doc. A/CN.4/710).

[125] See General Assembly, Resolution 488 (V) of 12 December 1950, Formulation of the Nuremberg principles, UN Doc. A/RES/488 (V).

[126] Such as the topic "Question of defining aggression" (1950-1951), where the Commission decided not to prepare a conclusive definition of aggression but to continue considering the matter in the context of the Draft Code of Offences against the Peace and Security of Mankind: in *Yearbook of the International Law Commission*, 1951, Vol. II, pp. 131-133, paras 35-53.

[127] This reality is referred to in several of the conclusions on *Identification of customary international law*, in particular those dealing with forms of practice, forms of evidence of acceptance as law (*opinio ju-*

Still, the Commission has not found it easy to describe its own role in relation to the identification of rules of customary international law. Its output undoubtedly merits special consideration because, as may easily be observed in many decisions of the ICJ and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may be given particular weight (as may a conclusion by it that no such rule exists). Judge Tomka has said that "the codifications produced by the International Law Commission have proven most valuable [to the Court in ascertaining whether a rule of customary international law exists], primarily due to the thoroughness of the procedures utilized by the ILC".[128] Judicial decisions of national courts and tribunals referring to the work of the Commission are also abundant.

It may be asked whether the Commission's output falls within Art. 38, para. 1(d) of the ICJ Statute as "teachings of the most highly qualified publicists of the various nations" that may serve as subsidiary means for the determination of customary rules. If not, how is it to be classified?

The 1949 *Survey of International Law in Relation to the Work of Codification of the International Law Commission* suggested that texts produced by the Commission but not turned into conventions "would be at least in the category of writings of the most qualified publicists, referred to in Article 38 of the Statute of the International Court of Justice as a subsidiary source of law to be applied by the Court".[129]

It went on to say that

> "Most probably their authority would be considerably higher. For they will be the product not only of scholarly research, individual and collective, aided by the active co-

ris), and the potential relevance of treaties. Of course, the Commission's work may also feed into resolutions of the General Assembly, which may serve as impetus to legal development as well.

[128] P. TOMKA, *Custom and the International Court of Justice*, in *The Law & Practice of International Courts and Tribunals*, 2013, p. 202, reproduced as *Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification/Le droit international coutumier dans la jurisprudence de la Cour mondiale: l'importance croissante de la codification*, in L. LIJNZAAD, Council of Europe (eds.), *The Judge and International Custom*, Leiden-Boston: Brill-Nijhoff, 2016, p. 10. It has been said that "the ICJ and other tribunals [...] rely on ILC conventions without overtly enquiring whether particular articles represent existing law, revision of existing law or a new development of the law": A. BOYLE, C. CHINKIN, *The Making of International Law*, Oxford: Oxford University Press, 2007, p. 200. Villalpando has noted that, where the Court has applied the Commission's draft articles: "the Court's finding that these provisions reflect customary international law is as brief and categorical as its own autonomous determinations of rules of law, which apparently indicates an increasing trust placed by the Court in the Commission": S. VILLALPANDO, *On the International Court of Justice and the Determination of Rules of Law*, in *Leiden Journal of International Law*, 2013, p. 247. For an account of the Court's reliance on the work of the Commission up to 1987, see I. Sinclair, *The International Law Commission*, cit., pp. 127-138.

[129] General Assembly, Survey of International Law in Relation to the Work of Codification of the International Law Commission of 10 February 1949, Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission, Memorandum submitted by the Secretary-General, UN Doc. A/CN.4/1/Rev.1, p. 16.

> operation of Governments, of national and international scientific bodies, and the resources of the United Nations. They will be the result of the deliberations and of the approval of the International Law Commission. Outside the sphere of international judicial settlement, they will be of considerable potency in shaping scientific opinion and the practice of Governments".[130]

A number of judges of the Court have agreed with this assessment.[131] Judge Shi, addressing the Commission in 1997 on behalf of the Court, said that "ICJ had always held the Commission's work in very high esteem. It viewed the draft articles produced by the Commission and the reports prepared for it as sources at least as authoritative as the writings of the most eminent publicists".[132]

Several authors have taken a similar view.[133] According to David Caron, for example, "[i]f the Commission's work was only a subsidiary means of determining interna-

[130] *Ibid*.

[131] See also, for example, International Court of Justice, *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment of 13 July 2009, declaration of Judge Guillaume, para. 9 ("The question of the effect of the passage of time on treaty interpretation has been the subject of spirited debate in the literature between proponents of "contemporaneous" (also called "fixed reference") interpretation and advocates of "evolutionary" (also called "mobile reference") interpretation. Thus, within the International Law Commission "there was support for the principle of contemporaneity as well as the evolutive approach", but a consensus seems to have emerged to the effect that the problem should be resolved through the application of ordinary methods of treaty interpretation" (citations omitted)); International Court of Justice, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Provisional Measures, order of 8 December 2000, declaration of Judge *ad hoc* Van den Wyngaert, para. 7, fn. 14 (treating the Commission's products as "legal doctrine").

[132] Summary record of the Commission's 2503rd meeting (2 July 1997), in *Yearbook of the International Law Commission*, 1997, Vol. I, p. 214, para. 64. Addressing the Commission in 2003 as President of the Court, Judge Shi similarly said that "If the Commission's work was only a subsidiary means of determining international law, according to Article 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means": summary record of the Commission's 2775th meeting, 15 July 2003, in *Yearbook of the International Law Commission*, 2003, Vol. I, p. 163, para. 4.

[133] See, for example, M.E. VILLIGER, *Customary International Law and Treaties, A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties,* Dordrecht: Martinus Nijhoff Publishers, 1985, p. 79; A. WATTS, *The International Law Commission 1949-1998*, Vol. I, cit., pp. 14-15 (suggesting, however, that "there is something inappropriate" about such classification); S. ROSENNE, *The Perplexities of Modern International Law*, Leiden: Martinus Nijhoff Publishers, 2004, p. 52; F.L. BORDIN, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, in *International and Comparative Law Quarterly*, 2014, p. 559 ("[c]odification conventions and ILC draft articles are not, of course, to be assimilated with custom, and their characterization as subsidiary sources remains technically correct. And yet, the tendency to associate these texts with customary international law makes it somewhat simplistic to treat them as mere evidence of State practice or as the work of publicists"); H. THIRLWAY, *The Sources of International Law*, Oxford: Oxford University Press, 2019, p. 23; M. PEIL, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, in *Cambridge Journal of International and Comparative Law*, 2012, p. 136 *et seq*.; F. BERMAN, *Authority in International Law*, KFG Working Paper Series, No. 22, Berlin

tional law, according to Art. 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means".[134]

Others, such as Ian Brownlie, considered the draft articles prepared by the Commission to be "[s]ources *analogous* to the writings of publicists, and at least as authoritative" (emphasis added).[135]

Still others, however, have seen the Commission's output as wholly distinct from writings of the most highly qualified publicists of the various nations. Judge Álvarez, for example, in commenting on sources of international law, stated that, in addition to treaties and customary international law, "[r]eference must also be made to the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, *the works of the Codification Commission set up by the United Nations*, and finally, the opinions of qualified jurists" (emphasis added).[136]

In my third report as the Commission's Special Rapporteur for the topic *Identification of customary international law* (2015), I adopted what I thought was the orthodox view and treated the work of the Commission as falling within the subsidiary means for the determination of rules of law listed in Art. 38, para. 1(d) of the ICJ Statute.[137] I did not include any express reference to the Commission's work in the proposed draft conclusions proposed in that report. I did, however, point to the particular importance of the Commission: "Special importance may attach to collective works, in particular the texts and commentaries emerging from the work of the International Law Commission, but also those of private bodies such as the Institute of International Law and the International Law Association".[138]

But, on reflection this was perhaps not the best description, especially in apparently equating the Commission, the *Institut de droit international* and the International Law

Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin, November 2018, available at www.kfg-intlaw.de.

[134] D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, in *American Journal of International Law*, 2002, p. 873.

[135] I. Brownlie, *Principles of Public International Law*, seventh edition, Oxford: Oxford University Press, 2003, p. 25. This language is retained in Crawford's eighth edition (Oxford: Oxford University Press, 2014), p. 43, as well as his ninth edition (Oxford: Oxford University Press, 2014), p. 41.

[136] International Court of Justice, *Fisheries case* (United Kingdom v. Norway), judgment of 18 December 1951, at p. 149. See also, for example, International Court of Justice, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, judgment of 30 November 2010, dissenting opinion of Judge *ad hoc* Mahiou, at p. 828 ("This viewpoint, widely accepted within the doctrine, is also taken up in the draft Articles adopted by the International Law Commission in 2006").

[137] International Law Commission, Third report on Identification of customary international law, cit., para. 65.

[138] *Ibid*. See also M. Wood, *Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)*, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, last updated 2017, opil.ouplaw.com.

Association, and in the debate on the third report, in 2015, and in the Sixth Committee that year, the matter received much attention. Some members of the Commission and States felt that to omit any explicit reference to the work of the Commission in a guide designated to assist practitioners in the task of identifying rules of customary international law would not do justice to the role played by the Commission in international legal argument. They also protested that placing the Commission's output under "teachings" did not reflect its real standing or role, as it did not equate to scholarly work given the Commission's status and relationship with States as a subsidiary organ of the General Assembly. And, after all, the members of the Commission, even those who were academics, were not fulfilling an academic role, but were acting as independent experts in fulfilment of the mandate of the Commission.

Others, however, insisted that the Commission's output was "teachings" within the meaning of the term in the Court's Statute, albeit teachings of the highest authority. At the same time, they also suggested that not all of the Commission's products were deserving of the same status: the weight to be given to any determination by the Commission, they explained, ought to depend on various factors, including the sources relied upon by the Commission, the stage reached in its work, and, above all, upon States' reception of it. They also considered it inappropriate for the Commission to blow its own trumpet, so to speak, by including a draft conclusion dedicated only to this matter.

In the end, a compromise was struck. In the first reading draft, the Commission's output and its significance were highlighted in a paragraph dedicated to this matter in the commentary to the draft conclusions. This paragraph was not found under the draft conclusion dealing with "teachings", but was instead highlighted in the introductory commentary to Part Five of the set of conclusions, the part which deals with the significance of certain materials for the identification of customary international law (including teachings). This approach was maintained in the final text adopted on second reading, where the paragraph reads:

> "The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification; the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various

factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output".[139]

Of course, the Statute of the Court and the notion of "subsidiary means" predate the establishment of the Commission and the very idea of a permanent organ dedicated to promoting the codification (and progressive development) of international law in the service of governments. At the end of the day, it may not matter on what ground the Commission's output is invoked. The Court itself has not concerned itself with this formal question, at least not publicly, when invoking the work of the Commission.

It is surely correct that the Commission's output should be treated as a "subsidiary means". After all, the Commission, like its parent body, the General Assembly, does not have a mandate to legislate. Nonetheless, it is rightly seen as a particularly influential and important subsidiary means, if only because of its unique mandate from States, which necessarily involves a process of elucidation of customary international law. And what makes the Commission different from other bodies doing more or less the same thing (such as the *Institut de droit international* and the International Law Association) is that it works closely with the General Assembly and with States as part of the process envisaged in Art. 13, para. 1(a) of the UN Charter. Indeed, there are obvious features that distinguish the Commission's output from other writings. Most significant are the composition, working methods, mandate, and above all the privileged relationship of the Commission with States: at all stages, the work of the Commission is looked at and commented on in the Sixth Committee, and States also have the opportunity to provide examples of their practice and to make written comments on the provisionally adopted texts. So, the Commission has the benefit of an interaction with States and the General Assembly on the substance of its work. This and the other factors tend to give the Commission's output a particular authority.

At the same time, it is not possible to generalize about the value of the Commission's work in attempts to identify rules of customary international law. Each case should be examined on its own merits, and it thus seems necessary to emphasise the caution with which the product of the Commission needs to be approached. In most cases it is only the final output that carries particular weight, generally not first-reading drafts or reports of the Special Rapporteurs, still less the views of individual Commission members.

In addition, and this brings us back to where we began, it may sometimes be essential to seek to distinguish between work that is intended to reflect *lex lata* and that which is intended as *lex ferenda* or new law. That, as we have seen, is not always easy in practice. Perhaps most important, then, is the response of States to the Commission's work. Only where the output of the Commission receives the general endorsement of

[139] International Law Commission, Report on the work of its seventieth session, cit., pp. 142-143 (commentary para. (2)).

States should it be considered as authoritative. At the very least, where significant disagreement by States is recorded it should carry less weight.

VI. Conclusions

A few concluding remarks may be in order. First, although it may have been thought that codification would drive out customary international law or push it into the background, in fact, notwithstanding its many achievements, the Commission's work has maintained the place of customary international law and its role as a central source of international law. This may be particularly so at a time when States seem generally reluctant to embark on further "codification" conventions. And it is well established that the conclusion of conventions does not mean that the corresponding rules of customary international law cease; conventional and customary rules continue in parallel. Customary international law continues to be important and indeed has a "bright future".[140]

Second, and closely related: while customary international law feeds regularly into and guides the work of the Commission, the same may be said in reverse. As has been explained, the Commission's work not only surveys and evaluates State practice and judicial pronouncements; it may also influence them. Thus the output of the Commission, whatever title or form it takes, contributes to the development of the law. In this sense, too, codification and progressive development go hand-in-hand.

Third, despite the persistent difficulty in differentiating between codification of international law and its progressive development, it remains both important and useful to bear the distinction in mind, whether generally or in assessing any particular legal pronouncement. And the distinction between *lex lata* and *lex ferenda* (or new law) remains fundamental in the practice of international law: the identification of law is distinct from the progressive development of law.

The Commission's recent work on *Identification of customary international law* may be seen as an effort to maintain the legitimacy, integrity and effectiveness of custom as a source of international law. Such an impact is highly desirable:

> "if custom were truly in crisis, the stability of the international legal system as a whole would be endangered. Even if, admittedly, "it may not be the ultimate source of law, [custom] is still the most basic source of rules to govern the activities of States" and "the principal construction material for general international law" (in the sense of its capability to generally bind all States). Being a central means of bringing under one legal regime all members of a large and heterogeneous international community, and underpinning as it does the other sources of international law, not least treaties, customary international law is now more necessary and important than ever".[141]

[140] O. Sender, M. Wood, *Custom's Bright Future*, cit.
[141] *Ibid.*, p. 369.

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Discourses on Methods in International Law: An Anthology

The Role of the International Court of Justice in the Identification of General Principles of Procedure

Serena Forlati*

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Abstract: This *Chapter* discusses the role of the International Court of Justice (ICJ) in the development of general principles of procedure and the methods it uses in identifying them. The "World Court" has a special role in the identification of general principles of procedure, and its findings on issues of procedure often reverberate on the work of other international courts tribunals – albeit governed by different instruments regulating their composition, function, jurisdiction and procedure *stricto sensu*. This notwithstanding, the existence of general rules regulating the exercise of their functions has long been recognized. Also in the field of procedure general principles can be drawn from both the inherent features of international law and from domestic legal systems, although the ICJ does not often explain how it identifies them. Whatever their origin, they mould the interpretation of instruments governing the work of international jurisdictional bodies and play a harmonizing function in the multifarious world of international arbitration and adjudication.

Keywords: International Court of Justice – general principles of international law – international procedural law – international courts and tribunals – domestic legal traditions – analogies between domestic and international law.

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I. Introduction

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations.[1] It is one of the oldest international judicial institutions operating today and, moreover, is the successor of the Permanent Court of International Justice (PCIJ).[2] Its special authoritativeness in the – by now very rich – world of international jurisdictional institutions is however not only due to age; a number of other factors contribute to shaping the role of an institution often referred to as the "World Court".

Firstly, the Court's permanent nature enhances its ability to develop a coherent body of case law.[3] While this prerogative is now shared by a number of other judicial institutions, the ICJ's vocation to universality – one of the many elements of continuity with the PCIJ – has been present ever since its establishment and is enhanced nowadays by the broad participation in the United Nations Organisation, which reverberates in the Court's virtually universal jurisdiction *ratione personae* – at least potentially and in respect to States.[4] Moreover, the ICJ remains the only international court of general jurisdiction *ratione materiae*; its institutional link to the United Nations, while not hindering its independence,[5] enhances its role in the promotion of international peace and security through the judicial settlement of international disputes and its overall influence in the international society. This applies specifically as regards its relationship with other international courts and tribunals, although the ICJ is seldom in a position of formal supremacy towards them.[6] A further element contributing to this is a "general perception of legitimacy and fairness of its opinion-forming process";[7] beyond accounting for the ICJ's authority in the assessment and development of substantive international law, this perceived fairness of the Court's decision-making process also explains the influence of the procedural rules and solutions it applies on other arbitral and judicial bodies.[8] To give just one example, in *Larsen v. Kingdom of Ha-*

[1] See Art. 92 of the UN Charter and Art. 1 of the ICJ Statute.

[2] On the relationship between the two Courts see R. Kolb, *The International Court of Justice*, Oxford, Portland: Hart, 2013, p. 51 *et seq.*

[3] *Ibid*., pp. 49-50.

[4] That only States have *ius standi* in contentious proceedings before the Court is not deemed in line with the present structure of the international society – although advisory proceedings have been used at times to settle disputes involving other international legal entities, notably international organisations.

[5] R. Jennings, R. Higgins, P. Tomka, *General Introduction*, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, C.J. Tams (eds), *The Statute of the International Court of Justice: A Commentary*, Oxford: Oxford University Press, 2019, pp. 4-5.

[6] G. Gaja, *Relationship of the ICJ with other International Courts and Tribunals*, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, C.J. Tams (eds), *The Statute of the International Court of Justice*, cit., pp. 580 and 583.

[7] T.M. Franck, *Fairness in the international legal and institutional system. General course on public international law*, in *Collected Courses of the Hague Academy of International Law*, The Hague: Nijhoff, 1993, p. 9 *et seq.*, p. 303.

[8] See M.N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Vol. III, Leiden: Brill, 2016, p. 254.

waii the parties contended that "indispensable third party" principle (first upheld by the ICJ in the *Monetary Gold* case)[9] "should be regarded as confined to proceedings in the International Court of Justice and not as extending to arbitral proceedings of a mixed character".[10] The Arbitral Tribunal took an opposite view, holding that: "[a]lthough there is no doctrine of binding precedent in international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice".[11] A recent judgment of the International Tribunal for the Law of the Sea (ITLOS) acknowledged that "the notion of indispensable party is a well-established procedural rule in international judicial proceedings developed mainly through the decisions of the ICJ",[12] although the Tribunal also found that the principle would not apply in the case, as "[t]he decision of the Tribunal on jurisdiction and admissibility does not require the prior determination of Spain's [*i.e.*, the third Party's] rights and obligations"[13].

While specifically the relevance of the indispensable third party principle remains doubtful or was ruled out altogether in the context of other international jurisdictional systems (as in *Turkey-Textiles* within the WTO),[14] the experience of the ICJ offers a number

[9] International Court of Justice, *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), judgment of 15 June 1954.

[10] Permanent Court of Arbitration, case no. 1999-01, award of 5 February 2001, *Larsen v. Hawaiian Kingdom*, para. 11.16.

[11] *Ibid*.

[12] International Tribunal for the Law of the Sea, judgment of 4 November 2016 on preliminary objections, *The M/N "Norstar" Case* (Panama v. Italy), para. 172. See also Permanent Court of Arbitration, case no. 2013-19, award on jurisdiction and admissibility of 29 October 2015, *The Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People's Republic of China*, para. 179 *et seq.*

[13] *The M/N "Norstar" Case*, cit., para. 173. The arbitral tribunal in *Chevron and Texaco v Ecuador* left the question open of whether the the principle applies to non-State actors: see UNCITRAL, Third Interim Award on Jurisdiction and Admissibility of 27 February 2012, case no. 2009-23, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, para. 4.60.

[14] WTO DSB, panel report of 31 May 1999, case no. ds34/R, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 9.5; the Panel considered that "there is no WTO concept of 'essential parties'", and that the European Communities, "had it so wished, could have availed itself of the provisions of the [Dispute Settlement Understanding], which we note have been interpreted with a degree of flexibility by previous panels, in order to represent its interests" (*ibid*., para. 9.11). Moreover, AGWathelet opined that "the principle [...] does not exist in the Statute of the Court of Justice of the European Union and, in any event, could not exist in EU law since it would automatically preclude the possibility of reviewing the compatibility with the EU and FEU Treaties of the international agreements concluded by the Union if the third State that signed the agreement with the Union was not a participant in the proceedings before it" (Opinion of AG Wathelet delivered on 10 January 2018, case C-266/16, *Western Sahara Campaign UK*, para. 57). The issue was raised by France before the European Court of Human Rights (the European Court) in the *Banković* case (decision of 12 December 2001, no. 52207/99, *Banković and Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, para. 31) but the Grand Chamber decided the case

of other indications as regards the exercise not only of its own judicial functions but also those of other international courts or other judicial bodies. Rosenne notes, in this regard, that the PCIJ drew heavily on the practice of international arbitration, whereas today "[i]n many respects the situation is reverse, the practice of international arbitration between two or more States (and between a State and an international intergovernmental organization) is being closely influenced by the practices of the International Court".[15] These reasons explain the choice to discuss specifically the role of the ICJ in the identification of general principles of procedure, although this process is never one-sided: the ICJ not only influences choices of other international jurisdictions, but also draws from their experience in order to address procedural problems.[16] Rather than attempting a comprehensive treatment of the topic,[17] this *Chapter* discusses a number of issues that are illustrative of how the ICJ performs this role *vis-à-vis* other jurisdictional bodies – that is, international courts called upon to settle disputes impartially and by applying international legal standards.[18] In analysing these interactions it is always necessary to use some caution, as judicial dialogue is meaningful with reference to comparable situations whereas international courts and tribunals are far from homogeneous and operate in contexts that are often very different from one another. Moreover, they are mutually independent and usually operate without any formal coordination.[19]

on different basis; in other instances, the European Court has addressed the legal position of third States in explicit terms (see M. SCHEININ, *The ECtHR Finds the US Guilty of Torture*, in *EJIL: Talk!*, 28 July 2014, www.ejiltalk.org).

[15] M.N. SHAW, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., p. 254.

[16] Cf. J-M. SOREL, H. RUIZ FABRI, *L'exportation du modèle universel vers les juridictions internationales*, in S. GUINCHARD (dir.), *Droit processuel, droit commun et droit comparé du procès*, Paris: Dalloz, 2013, p. 1233 *et seq.* See further below, Section VI.1.

[17] See for this B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, London: Stevens & Sons, 1953, p. 256 *et seq*.; R. KOLB, *The International Court of Justice*, cit., p. 919 *et seq.*; M.N. SHAW, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., p. 254 *et seq.* Cf. also H. THIRLWAY, *The Law and Procedure of the International Court of Justice – Fifty Years of Jurisprudence*, Oxford: Oxford University Press, 2013, p. 1111.

[18] See further below, Section III.

[19] See M. BENNOUNA, *How to Cope with the Proliferation of International Courts and Coordinate Their Action*, in A. CASSESE (ed.), *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press, 2012, p. 289, stressing that each court is "subject only to the intellectual scrutiny of scholars". This is not entirely true, as courts are subject also to the (potentially more pervasive) scrutiny of their constituencies, notably the States and other entities that have established them. Dissatisfaction with the outcome of judicial activities may eventually lead to curtailing a court's powers (see the example of the Eurasian Economic Union Court, as discussed by M. KARLIUK, *The Limits of the Judiciary within the Eurasian Integration System,* in A. DI GREGORIO, A. ANGELI (eds), *The Eurasian Economic Union and the European Union: Moving toward a Greater Understanding*, The Hague: Eleven international Publishing, 2017, p. 171 *et seq.*), unilateral withdrawal from its jurisdiction (see on a recent case N. DE SILVA, *Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania*, in *EJILTalk!*, 16 December 2019, www.ejiltalk.org) or the suspension of its operations (as may soon be the fate of the WTO Appellate Body).

In light of this it is important to clarify whether it is at all possible to identify any general principles in the field of international procedure before discussing the scope of these principles; their sources; and their possible content.

I will focus, on one hand, on the perspective adopted by the ICJ on general principles of procedure; and, on the other hand, on whether and in which terms the principles it identifies apply also to proceedings pending before other international jurisdictional bodies, which operate in very different settings and *vis-à-vis* different legal entities. I will mainly consider international jurisdictions (be they permanent or arbitral), although the procedural principles guiding their action arguably also apply to other institutions.

II. Do general principles of procedure exist in international law?

The idea that international adjudication as such is governed by a set of uniform principles – regulating the management of proceedings from their institution to their conclusion but also the structure and organisation of the institution which decides a case, its relationship to the parties, the remedies it grants, and the role it can have in the post-adjudication phase, notably as regards review and implementation – is certainly present in the international legal tradition. Morelli himself devoted a significant part of his scholarly reflection to international judicial procedure, including in his 1937 Hague lectures on *Théorie générale du procès international* where he opined that "[l]e problème central de la théorie du procès international consiste dans la détermination de la nature juridique de la sentence".[20] The international legal environment has changed significantly since then, as have the terms of scholarly discussion on these topics. This is due, on one hand, to the proliferation of international courts and tribunals (which now are much more diverse than at the time of Morelli's lectures) and, on the other hand, to the growing institutionalisation of international adjudication, which has helped to solve many of the theoretical problems with which Morelli and other Italian scholars were long concerned.[21] Notably the ICJ shares the international legal personality of the United Nations – whereas no similar status was formally attached to the PCIJ when Morelli wrote his Hague lectures. Other international tribunals, such as the International Criminal Court, are autonomous international organisations;[22] and the idea that even non-

[20] G. Morelli, *Theorie générale du procés international*, in *Collected Courses of the Hague Academy of International Law*, 1937, p. 262. Morelli construed international judgments as "legal facts" ("faits juridiques au sens étroit"), which create legal effects but could not be attributed to any entity endowed with international legal personality (*ibid.*, p. 276).

[21] See among many others D. Anzilotti, *Corso di diritto internazionale – I modi di risoluzione delle controversie internazionali*, Vol. III, Roma: Athenaeum, 1915, p. 110; G. Salvioli, *Les règles générales de la paix*, in *Collected Courses of the Hague Academy of International Law*, The Hague: Nijhoff, 1933-IV, p. 5 *et seq.*, p. 88 *et seq.*

[22] Under Arts 1 and 4, para. 1, of the International Criminal Court (ICC) Statute, the Court is a "permanent institution" which "shall have international legal personality".

institutional arbitral tribunals may be endowed with international legal personality, which Morelli objected to,[23] can more easily be accepted today.[24] This issue is not the subject of much discussion at present; scholarly reflection focuses rather on the "judicialisation" of international law and international relations,[25] including the problems stemming from the proliferation of international courts and tribunals;[26] the difficulties they encounter;[27] and comparisons between different judicial bodies operating at the international (and at the national) level.[28]

Comparative analysis does confirm a strong degree of cross–fertilisation also in the field of procedure, leading to the emergence of what is now considered a "common law of international adjudication".[29] Thus, the constitutive instruments of international courts and tribunals – in the case of the ICJ the Statute (ICJ Statute), the Rules of Court (ICJ Rules) and the other texts regulating procedure – are deemed to reflect procedural fairness[30] and, hence, general principles of procedure. Often, however, the relevance of principles of procedure can rather be detected by analysing solutions adopted in specific decisions, which may in turn inspire later amendments to the ICJ Rules or other relevant texts: indeed, "le droit du contentieux international [...] est dans la cohérence des precedents".[31]

A comparative analysis of precedents does point to the existence of a set of shared principles guiding the activities of any international jurisdictional organ and which are applied with a significant degree of uniformity notwithstanding the differences in the constitutive instruments, structures, composition, and mandates of courts and tribunals and the diversified nature of the entities that are entitled to appear before them. These differences do imply, however, that the manifestations of procedural principles may at

[23] G. MORELLI, *Theorie générale du procés international*, cit., p. 275 *et seq*. Morelli also rejected the idea that arbitral tribunals should be considered as organs of the parties to the case.

[24] C. SANTULLI, *Droit du contentieux international*, Paris: LGDJ-Lextenso éditions, 2015, pp. 86-87.

[25] See M. BENNOUNA, *How to Cope with the Proliferation of International Courts and Coordinate Their Action*, cit., pp. 286-288; C.P.R. ROMANO, *Trial and Error in International Judicialization*, in C.P.R. ROMANO, K. ALTER, Y. SHANY (eds), *The Oxford University Press Handbook of International Adjudication*, Oxford: Oxford University Press, 2013, p. 111 *et seq*.

[26] J.E. DUPUY, C.-M. VIÑUALES, *The Challenge of "Proliferation": An Anatomy of the Debate*, in C.P.R. ROMANO, K. ALTER, Y. SHANY (eds), *The Oxford University Press Handbook of International Adjudication*, cit., pp. 135 *et seq.*

[27] C.P.R. ROMANO, *Trial and Error in International Judicialization*, cit., p. 112.

[28] Cf. J-M. SOREL, H. RUIZ FABRI, *L'exportation du modèle universel vers les juridictions internationales*, cit., *passim*.

[29] C. BROWN, *A Common Law of International Adjudication*, Oxford: Oxford University Press, 2007.

[30] See for instance International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), judgment of 27 June 1986, para. 31: "The provisions of the Statute and the Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice and a fair and equitable opportunity for each party to comment on its opponent's contention".

[31] C. SANTULLI, *Droit du contentieux international*, cit., p. 68, also points to the customary nature of such norms (see further below, Section IV).

times vary significantly within each jurisdiction;[32] the aim of attaining the "sound administration of justice" can be pursued in very different ways, based also on practical restraints that each court or tribunal may face. Thus, factors such as the number of applications on the docket of a given court or tribunal, the number of parties involved in a specific case or financial and other practical constraints may influence the timing and form of presentation of defences. For instance, under Art. 43 of the ICJ Statute the oral phase is a structural feature of proceedings before the ICJ,[33] but it may be dispensed with or is absent altogether in different contexts;[34] this is not per se incompatible with the principle of party equality or with the requirement that the parties be given a reasonable opportunity to present their case.[35]

The existence of general principles of procedure is expressly acknowledged by the ICJ: notably in *Land, Island and Maritime Frontier Delimitation (Nicaragua Intervening)*, the Court referred to this notion with regard to the status of interveners in international judicial proceedings.[36] In *South West Africa*, the ICJ also referred to the existence of a "universal and necessary, but yet almost elementary principle of procedural law" when discussing the "distinction […] between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim, and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims".[37] More recently, the ICJ held that "the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal".[38]

[32] S. Forlati, *Fair Trial in International Non-Criminal Tribunals*, in A. Sarvarian, F. Fontanelli, R. Baker, V. Tzevelekos (eds), *Procedural Fairness in International Courts and Tribunals*, London: British Institute of International and Comparative Law (BIICL), 2015, p. 110 *et seq.*

[33] An exception is envisaged only for proceedings before Chambers, under Art. 92, para. 3, of the ICJ Rules, in the event that the parties agree to dispense with the oral phase and the Chamber consents.

[34] Thus, a hearing is not mandatory before the European Court of Human Rights (see Rules 51.5, 54.5, 58.2, 59.3 and 71.2 of the Rules of the European Court of Human Rights) and there is no oral phase before UN Treaty Bodies (see e.g. Rules 88 *et seq*. of the Rules of Procedure of the Human Rights Committee of 11 January 2012, UN Doc. CCPR/C/3/Rev.10).

[35] These requirements, which are set out in Art. 17, para. 1, of the 2012 Permanent Court of Arbitration Rules, are deemed to reflect general principles of procedure: see further below, Section V.

[36] International Court of Justice, *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), judgment of 13 September 1990, para. 102, to the effect that Nicaragua, an intervening State, would not be a party to the case "under the Statute and Rules of Court or the general principles of procedural law".

[37] International Court of Justice, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), judgment of 18 July 1966, p. 39, para. 64.

[38] International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v. Colombia), judgment of 17 March 2017, para. 59. Cf. International Court of Justice, *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, advisory opinion of 13 July 1954, p. 53.

At the same time, precisely this example, where the Court was sharply divided as regards the relevance of the principle to the instant case,[39] shows the difficulty of identifying the precise implications of norms whose existence is unanimously acknowledged.

III. The scope of the general principles of procedure identified by the ICJ

Generally speaking, international courts and tribunals are established through instruments governed by international law and decide disputes in accordance with international law;[40] however, the characterisation of international dispute settlement bodies as "courts" or "tribunals" is not always self-evident.[41] When addressing such issues the ICJ adopts a model that reflects its own experience, but is in principle universal. Thus, in qualifying the United Nations Administrative Tribunal as a "truly judicial body" it emphasised that the provisions of the latter's Statute (notably those on *Kompetenzkompetenz* and on the finality of its judgments) "are of an essentially judicial character and conform with rules generally laid down in statutes or laws issued for courts of justice, such as, for instance, in the Statute of the International Court of Justice".[42] Independence and the finality of judgments, which the ICJ has considered to be key features of a "Tribunal",[43] characterise permanent judicial institutions, as well as institutional and *ad hoc* arbitration; they are guided by general principles of procedure also in the exercise of any advisory competences they may be endowed with.[44] Such principles arguably also apply to institutions exercising similar functions, notably quasi-judicial bodies such as the UN expert bodies or the WTO dispute settlement system:[45] although their views and

[39] The Court was evenly split in deciding on Nicaragua's request relating to the delimitation of its continental shelf beyond the 200 nautical miles, which was eventually deemed admissible due to President Abraham's casting vote: see para. 2, let. b), of the dispositif of *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, cit., and the joint dissenting opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower alleged to the same judgment.

[40] See Art. 15 of the 1899 Hague Convention for the Pacific Settlement of International Disputes.

[41] R. Kolb, *The International Court of Justice*, cit., p. 69, also for further references.

[42] *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, cit. p. 52, and cf. also, p. 55, on revision of judgments.

[43] *Ibid.*, p. 53: "This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions".

[44] See Art. 68 of the ICJ Statute.

[45] On this point, see J-M. Sorel, H. Ruiz Fabri, *L'exportation du modèle universel vers les juridictions internationales*, cit., p. 1152. According to C. Santulli, *Droit du contentieux international*, cit., p. 32, the findings of expert bodies are actually "jugements déclaratoires". While this stance is difficult to accept as such, international properly judicial bodies often treat the findings of expert bodies as authoritative, when they

reports are not formally or automatically binding on the parties, whenever they exercise a function of independently assessing the facts and the law in specific cases their function is very similar to that of the ICJ, and the requirements of procedural fairness, which enhance the legitimacy of any substantive decision, are perceived in largely equivalent terms. The situation is different as regards decisions taken by political bodies: for instance, the ICJ has observed that the General Assembly, "in view of its composition and functions, could hardly act as a judicial organ – considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them".[46]

In some instances procedural rules applied by political bodies may be reminiscent of principles of (jurisdictional) procedure: an example of this is provided by Art. 32 of the UN Charter, which stipulates that every State which "is party to a dispute under consideration by the Security Council shall be invited to participate, without vote, in the discussion relating to the dispute" (thus embodying the right to be heard). [47] Nonetheless, general principles of procedure developed in the field of international adjudication do not necessarily apply in such contexts:[48] as noted by Judge Cançado Trindade, "[i]nternational legal procedure has a logic of its own, which is not to be equated with that of diplomatic relations".[49] While Judge Cançado Trindade criticised the ICJ for not

follow a "jurisdictional" procedural model (cf., on views not supported by any reasoning, International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), order of 14 June 2019, Joint Declaration of Judges Tomka, Gaja and Gevorgian, para. 5).

[46] *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, cit., p. 56. An opportunity to reconsider the issue may come from the case recently submitted to the ICJ by Bahrain, Egypt and the United Arab Emirates, challenging a decision of the International Civil Aviation Organization (ICAO) Council *(Appeal against a Decision of the ICAO Council dated 29 June 2018 on preliminary objections (Application (B)) (Kingdom of Bahrain, Arab Republic of Egypt and the United Arab Emirates v State of Qatar),* Joint Application Instituting Proceedings of 4 July 2018). The applicants consider that the Council 'is to act in a judicial capacity, with all necessary requirements that are attendant upon that capacity' when deliberating under Article II of the International Air Services Transit Agreement (Application, para 7) and contend, *inter alia*, that the omission to decide on a preliminary objection (*ibid*., para 30(iv)) is incompatible with the *ne infra petita* principle.

[47] The decision-making process of the Security Council (with informal consultations between members being organized almost daily) may anyway render this right ineffective: see R. DOLZER, C. KREUTER-KIRCHHOF, *Article 31*, in B. SIMMA, D.-E. KHAN, G. NOLTE, A. PAULUS (eds), *Charter of the United Nations*, Oxford: Oxford University Press, 2012, p. 1059.

[48] Cf. D. HOVELL, *Due Process in the United Nations*, in *American Journal of International Law*, 2016, p. 1 *et seq.*, arguing that in this context the "formalistic 'one-size-fits-all' approach to due process – in which the only option is to embrace or reject the judicial approach – lacks normative foundation".

[49] International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data* (Timor–Leste v. Australia), order of 3 March 2014, separate opinion of Judge Cançado Trindade, para. 22. The reference to judicial proceedings is clearer in the French version of the opinion: "Le règlement judiciaire d'un différend international a une logique propre, qui ne saurait être assimilée à celle des relations diplomatiques".

adequately considering the distinction in that specific instance,[50] the Court's case law does confirm that procedural principles applying to international adjudication are not necessarily of relevance in different contexts, including other forms of dispute settlement by third parties. For example, in the *Qatar v. Bahrain* case the ICJ maintained that the decision taken in 1939 by the Government of the United Kingdom concerning the sovereignty over the Hawar Islands was not an international arbitral award, as "no agreement existed between the Parties to submit their case to an arbitral tribunal made up of judges chosen by them, who would rule either on the basis of the law or ex aequo et bono. The Parties had only agreed that the issue would be decided by 'His Majesty's Government', but left it to the latter to determine how that decision would be arrived at, and by which officials".[51] While this did not deprive the decision of its binding force (which depended on the agreement of the parties to the dispute), the ICJ dismissed Bahrein's allegations of bias and unfairness in the decision-making process, on the assumption that "[t]he validity of that decision was certainly not subject to the procedural principles governing the validity of arbitral awards".[52]

IV. The ambiguous notion of "general principles of procedure" at stake

Even with this proviso, the notion of "general principles of procedure" remains inherently ambiguous and, as Rosenne and Shaw note, "its implications are not self-evident".[53] Indeed, the word "principles" in itself can be used with different meanings in a legal context. Thus the "principle theory", whereby principles are seen as optimisation commands that can be fulfilled to different degrees (whereas rules "are norms that can only be complied with or not")[54] is of relevance also as regards international law and can help understanding the way in which the ICJ and other international courts or tribunals manage procedure.

Furthermore, the notion has also been used at times with more or less direct reference to principles of natural law – such as when the ICJ emphasised that the Genocide Convention's object "on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the *most elementary principles of*

[50] The separate opinion of Judge Cançado Trindade, *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., takes issue with the fact that the order relied on unilateral engagements by Australia as a basis for partially rejecting the requests of Timor–Leste.

[51] International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), judgment of 16 March 2001, para. 114.

[52] *Ibid.*, para. 140.

[53] M.N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., p. 254.

[54] R.M. Dworkin, *The Model of Rules*, in *The University of Chicago Law Review*, 1967, p. 25; R. Alexy, *On the Structure of Legal Principles*, in *Ratio Juris*, 2000, p. 295.

morality". [55] The reference to "universal and necessary" principles in the passage of the *South West Africa* judgment quoted above similarly hint to this understanding of the notion.[56] However, this same judgment is to the effect the ICJ, being a court of law, "can take account of moral principles only in so far as these are given a sufficient expression in legal form",[57] in line with the positivist stance that permeates the Statute.

A different approach looks instead at the structural function of principles, which are seen as "general normative propositions"[58] moulding the international legal order. Robert Kolb's analysis of general principles applicable to contentious proceedings draws from this concept to argue that principles

> "begin by seising upon profound forces, so to speak upon the gravitational pillars on which legal matters, even entire legal systems, are based. This hierarchy of weight and importance makes it possible to see a legal system as a coherent corpus, based on fundamental legal values. Principles also make it possible to apprehend and understand the law within a certain fundamental conceptual unity and balance, rather than just as a collection of scattered and disconnected rules. Principles govern various branches of the law simultaneously, operating as bridges between them and so contributing to the unity and coherence of legal thinking".[59]

In this perspective, a further element of ambiguity relates to the fact that some structural principles of international law have implications on issues of both substance and procedure: for example, the principle of good faith is extremely important in the realm of substantive law – notably in the law of treaties – but also in the field of procedure – for instance as regards estoppel,[60] the duty of loyalty between the parties,[61] or remedies.[62] The

[55] International Court of Justice, *Reservations to the Convention on Genocide*, advisory opinion of 28 May 1951, p. 15 *et seq.*, p. 23 (emphasis added).

[56] *South West Africa Cases*, cit., para. 64.

[57] *Ibid.*, para. 49.

[58] R. KOLB, *The International Court of Justice*, cit., p. 919; also according to A. PELLET, *Article 38*, in A. ZIMMERMANN, C.J. TAMS (eds), *The Statute of the International Court of Justice. A Commentary*, Oxford: Oxford University Press, 2019, p. 925, para. 257, "when associated with 'general' the word 'principle' implies a wide-ranging norm".

[59] R. KOLB, *The International Court of Justice*, cit., p. 919. Cf. further C. TOMUSCHAT, *Obligations Arising for States Without or Against their Will*, in *Collected Courses of the Hague Academy of International Law*, 241 (1993-IV) 195 ss., pp. 239-240; R. WOLFRUM, *General International Law (Principles, Rules and Standards)*, in *Max Planck Encyclopedias of International Law*, 2010, p. 354.

[60] R. KOLB, *The International Court of Justice*, cit., p. 949.

[61] *Ibid.*, p. 946. See e.g., on the late submission of claims or requests, International Court of Justice *LaGrand* (Germany v. United States of America), judgment of 27 June 2001, dissenting opinion of Judge Buergenthal, para. 22, and *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 136; on the integrity of evidence, see *Maritime Delimitation and Territorial Questions between Qatar and Bahrein*, cit., para. 15 *et seq.*; on the possibility of an "abuse of process", see International Court of Justice: *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), judgment of 6 June 2018, paras 145 *et seq.*; *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), preliminary objec-

principle of the sovereign equality of States is another good example, as it is reflected not only in substantive norms (such as those relating to immunities)[63] but also underlies important procedural principles such as that of party equality,[64] or the right to conduct arbitral and judicial proceedings without undue interference by other States.[65]

Yet, a discussion of the role of the ICJ in the identification of general principles of procedure necessarily has to focus on Art. 38, para. 1, of the ICJ Statute. According to this provision the Court, in deciding disputes in accordance with international law, "shall apply (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations". Even in this specific perspective, however, the way in which the ICJ uses the notion of "general principles of procedure" (or similar ones) is not always such as to shed much light on the ambiguities inherent in it.

V. The approach in the case law of the ICJ

It would seem natural to construe principles of procedure as "general principles of law" under Art. 38, para. 1, let. c), of the ICJ Statute especially since the change in the chapeau of Art. 38 (as compared to the PCIJ Statute)[66] has contributed to clarifying that "general principles of law recognized by civilized nations" are in any case part of international law. Yet, whether "general principles of law" under Art. 38, para. 1, let. c), of the ICJ Statute should be construed by considering only domestic legal traditions is still controversial.[67] The ICJ does not often explicitly draw a general principle of law from domestic legal systems: an example may be found in the *Corfu Channel* case, as regards indirect evidence, which "is *admitted in all systems of law*, and its use is recognized by international decisions".[68] A less clear reference may be found in the *U.N. Administrative Tribunal* advisory

tions, judgment of 13 February 2019, para. 113; *Jadhav* (India v. Pakistan), preliminary objections, judgment of 17 July 2019, para. 49.

[62] The ICJ has at times refused to impose guarantees of non repetition because it presumed that the losing party would implement the judgment in good faith: see International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy), judgment of 2 February 2012, para. 138.

[63] *Ibid.*, para. 57.

[64] On this principle see further below, Section VI.

[65] *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 27. See further M.N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., p. 254.

[66] The words "whose function is to decide in accordance with international law such disputes as are submitted to it" were not included in Art. 38, para. 1, of the PCIJ Statute, and were added in 1945.

[67] See R. Wolfrum, *General International Law*, cit., p. 346 *et seq*. For a different view see C. Tomuschat, *Obligations Arising for States*, cit., p. 314; G. Gaja, *The Protection of General Interests in the International Community*, in *Collected Courses of the Hague Academy of International Law*, 2011, p. 35.

[68] International Court of Justice, *Corfu Channel* (United Kingdom v. Albania), judgment of 9 April 1949, p. 18 (emphasis added). The ICC relied on this precedent to admit indirect evidence in decision on victim's

opinion where the ICJ described *res iudicata* as "a well-established and generally recognized principle of law", thus apparently hinting at recognition at the domestic level.[69]

It may be worth stressing that these examples all relate to issues of procedure; reference to general principles existing in domestic legal systems on issues of substance is even rarer, although not completely absent. Notably, in its advisory opinion on *Reservations to the Genocide Convention* the ICJ opined that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[70] Judge Ammoun, despite criticizing the formulation of Art. 38, para. 1, let. c), of the ICJ Statute, also construed equity as a principle drawn from domestic legal traditions. In his separate opinion in the *North Sea Continental Shelf* cases he maintained that:

> "general principles of law mentioned by Article 38, paragraph 1(c), of the Statute, are nothing other than the norms common to the different legislations of the world. United by the identity of the legal reason therefor, or the ratio legis, transposed from the internal legal system to the international legal system, one cannot fail to remark an oversight committed by arbitrarily limiting the contribution of municipal law to the elaboration of international law: international law which has become, in short, particularly thanks to the principles proclaimed by the United Nations Charter, a universal law able to draw on the internal sources of law of all the States whose relations it is destined to govern, by reason of which the composition of the Court should represent the principal legal systems of the world".[71]

In other instances, the ICJ has ruled out altogether that specific principles could fall under the scope of Art. 38, para. 1, let. c), as when, in the *South West Africa* cases, it held that although *actio popularis* "may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1 (c), of its Statute".[72] In yet other cases, it has grounded those principles in international law as such, rather than in the domestic legal orders. Thus, in the *Fisheries Jurisdiction* case the principle *iura novit curia* was stated in axiomatical terms, and linked to the qualification of the ICJ as an international judicial organ.[73] In *Timor-Leste v. Australia* the parties had

application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 of 10 August 2007, ICC-02/04-101, *Situation in Uganda*, para. 5.

[69] *Effects of Awards of Compensation made by the U.N. Administrative Tribunal*, cit. p. 53.

[70] *Reservations to the Convention on Genocide*, cit., p. 23.

[71] International Court of Justice, *North Sea Continental Shelf* (Denmark v. Federal Republic of Germany; Federal Republic of Germany v. The Netherlands), judgment of 20 February 1969, separate opinion of Judge Ammoun, p. 135.

[72] *South West Africa Cases*, cit., para. 88.

[73] International Court of Justice, *Fisheries Jurisdiction* (United Kingdom v. Iceland), judgment of 25 July 1974, para. 17: "[t]he Court [...], as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to

argued that the right to confidentiality of communications between States and their legal advisers was a general principle of law "akin to legal professional privilege", while disagreeing on the exact content of this right.[74] The ICJ deemed it plausible that States have a right to communicate with counsel and lawyers in a confidential manner, but held that such right "might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations",[75] rather than deriving it from municipal legal systems. On a number of other occasions, the ICJ has referred to "principles" that are clearly not derived from domestic law, but are rather inherent to the international legal order – at times apparently distinguishing between principles and custom only on the basis of the more general or structural scope of the former. Thus, in the *Corfu Channel* case, the obligation to notify the existence of a minefield in Albanian territorial waters was drawn from "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[76] In the *Gulf of Maine* case, the Chamber stated that "the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character".[77] In several other instances the two terms are used jointly, and apparently interpreted as being equivalent to "international customary law"; or at least there is no any clear identification of the part of Art. 38 of the ICJ Statute which is at stake. Thus, in the advisory opinion on the *Interpretation of the Agreement between the WHO and Egypt* the Court identified the existence of an obligation to give a reasonable period of notice for the termination of an existing headquarters agreement stemming from the "*general*

consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute". See also *Military and Paramilitary Activities in and against Nicaragua*, cit., para. 29.

[74] *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., paras 24-25.

[75] *Ibid.*

[76] Separate opinion of Judge Cançado Trindade, *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 44 *et seq.*, on the principle of the legal equality of States.

[77] International Court of Justice, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), judgment of 12 October 1984, para. 79. The ICJ further emphasised that, in the context of maritime delimitation, "international law – and in a matter of this kind the Chamber has to refer primarily to customary international law – can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective"; "more specific provisions" for the delimitation of maritime areas could be determined only for the purposes of each specific case, whereas there would be no "possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned" (*ibid.*, para. 81).

legal principles and rules applicable in the transfer of the seat of a Regional Office from the territory of a host State".[78] It further specified that the precise duration of periods of consultation and negotiation "are matters which necessarily vary according to the requirements of the particular case".[79] Moreover, the use of the term "principle" meant to imply "customary rules" is apparent in cases such as the *Mavrommatis Palestine Concessions*,[80] as regards diplomatic protection, or *Oil Platforms*, as regards the prohibition of the use of force.[81]

This reading of the notion of "principles" is based not only on the case law of the ICJ: the reference to "principles and rules of international law" in Art. 21, para. 1, let. b), of the Statute of the International Criminal Court (ICC Statute) may likewise be construed as a reference to customary international law.[82] In the context of the ICC Statute, this is not problematic, also because Art. 21, para. 1, let. c), specifically provides that, failing other relevant sources, the ICC should also apply "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".[83] Although this formulation is not completely satisfactory,[84] for our purposes it is important to note that the ICC Statute makes a

[78] International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion of 20 December 1980, para. 49 (emphasis added). A few lines earlier a reference to "applicable legal principles and rules" apparently had the same meaning.

[79] *Ibid.*

[80] Permanent Court of International Justice, *The Mavrommatis Palestine Concessions* (Greece v. Britain), judgment of 30 August 1924, p. 12, where the PCIJ stated: "[i]t is an *elementary principle of international law* that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels" (emphasis added).

[81] International Court of Justice, *Oil Platforms* (Islamic Republic of Iran v. United States of America), judgment of 6 November 2003, para. 43.

[82] A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA, J. JONES (eds), *The Rome Statute of the International Criminal Court*. *A Commentary*, Oxford: Oxford University Press, 2002, pp. 1071-1072, where he writes: "[i]s it necessary to make a distinction between 'principles' of international law on the one hand, and 'rules' on the other? Undoubtedly not, at least with regard to their nature: in both cases they ar customary norms". See also, in regard to the implementing practice, C. CALLEJON, *Article 21 – Droit applicable*, in J. FERNANDEZ, X. PACREAU (eds), *Statut de Rome de la Cour pénale internationale, commentaire article par article*, Paris: Pedone, 2012, p. 775 *et seq*.

[83] No reference to general principles in Art. 293 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), to which Art. 23 of the ITLOS Statute refers: "Article 293 – Applicable law – 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention. 2. Paragraph l does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree".

[84] For a criticism of this formulation see A. PELLET, *Applicable Law*, cit., p. 1070.

clear distinction between principles drawn from the international legal order as such and principles drawn from municipal legal systems – which apply only residually and subject to their consistency with international law. Other international criminal tribunals have been open not only to rely on general principles of law[85] but also to embark on fairly detailed comparative analysis of solutions adopted at the domestic level.[86]

On the contrary, the ICJ usually acknowledges the existence of general principles in axiomatical terms. This is in part linked to the fact that international courts and tribunals emphasise the "creative" component of international adjudication whenever relying on general principles of law – and this does not depend on whether the principles are stake are drawn from the international or the domestic legal orders. For instance, according to Christian Tomuschat "[t]o invoke such principles looks as if politics were allowed to make a direct inroad into the field of international law, thereby annihilating the autonomy of law with regard to politics".[87] Hermann Mosler similarly pointed out, in this context, that

> "the international judge does not decide on the basis of an accumulation of domestic legal principles [...]. Starting from a common denominator, he has the creative task of maintaining the essential features of the general principle while at the same time finding the appropriate solution for the international legal relation upon which he has to pass judgment. The norm which he applies is a norm of international law, taken from principles observed in domestic legal orders and adapted by him to the particular needs of international relations".[88]

The method used by the ICJ in identifying general principles is, moreover, part of the more general approach of the ICJ in assessing international legal rules. Indeed the Court, which has only recently begun to rely on pronouncements of other international judicial and quasi-judicial bodies, is similarly reluctant to engage in surveys of State practice when assessing the existence and content of customary rules of international

[85] Thus in *Prosecutor v. Erdemović* the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber decided to raise preliminarily, and *proprio motu*, the question of the validity of the guilty plea entered by the Appellant finding "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties" (judgment of 7 October 1997, IT-96-22-A, para. 16). For further examples see B. BONAFÉ, P. PALCHETTI, *Relying on general principles in international law*, in C. BRÖLMANN, Y. RADI (eds), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham: Elgar, 2016, p. 171, and see also p. 168, for judicial and arbitral practice in other areas.

[86] See for instance ICTY, judgment of 14 January 2000, IT-95-16-T, *Prosecutor v. Kupreškič and Others*, paras 539 and 730 *et seq.* (on the possibility for the Trial Chamber to requalify facts). Some hybrid tribunals apply domestic procedural law: see L. CARTER, F. POCAR (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham: Elgar, p. 10.

[87] C. TOMUSCHAT, *Obligations Arising for States*, cit., p. 311.

[88] H. MOSLER, *General Principles of Law*, in *Encyclopedia of Public International Law*, vol. 7, 1984, pp. 95-96; A. PELLET, *Article 38*, cit., p. 929, para. 266.

law[89] and only exceptionally makes express reference to national judicial decisions for this purpose.[90] Nonetheless, the case law discussed above shows that the ICJ as well applies both principles belonging to the international legal order as such[91] *and* principles initially elaborated *in foro domestico* – the latter being relevant only insofar as they are compatible with the structural features of the international legal order and can thus be transposed thereto.[92] While this dichotomy is detectable also as regards procedure, a further layer of complexity relates to the fact that arguably principles of procedure are gradually being consolidated into customary international law through the case law of the multifarious international courts active today.[93]

VI. The interaction between structural features of the international legal order and national legal traditions in the field of procedure

The ICJ's apparent reluctance to rely on national legal standards in identifying general principles of law does not only depend on the "large amount of discretion"[94] inherent in selecting from domestic legal rules or in the difficulties of conducting a comparative analysis.[95] While these factors may explain its hesitations at least in part, another reason lies in the difficulty of transposing this kind of principles into a legal order with very different structural features. In the *Status of South West Africa* advisory opinion,[96] Judge McNair acknowledged that "International law has recruited and continues to recruit many of its rules and institutions from private systems of law" but warned against the risks of "importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules"[97]. In the *Barcelona Traction* case Judge Fitzmaurice highlighted:

> "when private law concepts are utilized, or private law institutions are dealt with in the international legal field, they should not there be distorted or handled in a manner not in conformity with their true character, as it exists under the system or systems of their crea-

[89] G. Gaja, *The Protection of General Interests*, cit., p. 37.

[90] The judgment in *Jurisdictional Immunities of the State*, cit., refers extensively to domestic judicial decisions at paras 72 *et seq*., as the practice of many countries in the field of immunity mainly stems from case law.

[91] Whether these principles should be construed as falling under the scope of Art. 38, para. 1, let. b), rather than Art. 38, para. 1, let. c), of the ICJ Statute has relatively little practical importance.

[92] A. Pellet, *Article 38*, cit., p. 929, para. 267; F. Salerno, *Principi generali di diritto (diritto internazionale)*, in *Digesto*, 1995, p. 524 *et seq.*

[93] See C. Santulli, *Droit du contentieux international*, cit., p. 68, defining general principles of procedure as "droit coutumier voulu".

[94] G. Gaja, *General Principles of Law*, in *Max Planck Encyclopedias of International Law*, Oxford: Oxford University Press, last update 2013, p. 373 *et seq*.

[95] The caution of the ICJ in this regard is in contrast with the practice of some arbitral tribunals (*ibid*.).

[96] International Court of Justice, *International Status of South West Africa*, advisory opinion of 11 July 1950, separate opinion of Judge McNair, p. 149.

[97] *Ibid.*

> tion. But, although this is so, it is scarcely less important to bear in mind that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level. Neglect of this precaution may result in an opposite distortion, – namely that qualifications or mitigations of the rule, provided for on the internal plane, may fail to be adequately reflected on the international, – leading to a resulting situation of paradox, anomaly and injustice".[98]

Specifically as regards judicial and arbitral settlement of disputes, the international legal order lacks a unitary jurisdictional system, which is typical feature of modern domestic jurisdictions; as discussed above, this has not prevented the emergence of a coherent body of principles regulating procedure. Other differences between international law and domestic legal orders do, however, raise some sensitive issues also as regards the identification of general principles of procedure: as Rosenne notes, "in connection with procedural law the Court has frequently had occasion to reject analogies drawn from internal law, principally because the analogies were false and irrelevant".[99] At the same time, the drafting history of the Statute shows that reference to general principles of law under Art. 38, para. 1, let. c), was deemed appropriate on issues of procedure as well. Thus, in an often quoted statement to the Advisory Committee of Jurists Lord Phillimore "pointed out that the general principles referred to [...] were those which were accepted by all nations in foro domestico, *such as certain principles of procedure*, the principle of good faith (bona fide), *the principle of res iudicata*, etc.".[100]

Indeed, some features of international procedure are closely connected to the structure of the international legal order and have very little in common with domestic principles of procedure (Section VI); others are also inherent to national judicial systems and are components of the right to a "fair trial" – although in international law they may be articulated differently reflecting the peculiarities of this specific legal order (as is the case, for instance, with the principle of party equality) – (Section VI).

[98] International Court of Justice, *Barcelona Traction, Light and Power Co.* (Belgium v. Spain), judgment of 5 February 1970, separate opinion of Judge Fitzmaurice, pp. 66-67. The same need for caution was emphasised also in the framework of the ICTY, notably in President Cassese's separate and dissenting opinion in the *Erdemović* case: "[T]he body of law into which one may be inclined to transplant the national law notion cannot but reject the transplant, for the notion is felt as extraneous to the whole set of legal ideas, constructs and mechanisms prevailing in the international context. Consequently, the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law" (ICTY, appeal judgment of 7 October 1997, IT-96-22-A, *Prosecutor v. Drazen Erdemović*, separate and dissenting opinion of Judge Cassese, para. 3; cf. also his criticism of the treatment of duress by the Appeals Chamber, *ibid.*, para. 11 *et seq.*).

[99] M.N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit. p. 376.

[100] League of Nations, *Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice. Proces-Verbaux of the Proceedings of the Committee June 16th-July 24th 1920. With Annexes*, The Hague, 1920, p. 335.

VI.1. Structural features of the international legal system and general principles of procedure: the principle of consent

Among structural differences between domestic legal orders and international law shaping the identification of general principles of procedure is the consensual nature of international jurisdiction.

The main difference between the domestic and the international legal orders lies in the role of consent, which is rather limited in the case of national courts but of paramount importance in the field of international adjudication and international dispute settlement more generally. In line with the contention that international procedural law is "essentially volitional",[101] the ICJ has construed the existence of a "general principle of consensual jurisdiction";[102] this general principle of procedure is embodied in several provisions of the Statute, as it moulds not only jurisdiction and access to the ICJ but also the composition of the Bench in specific cases, the actual management of procedure and the post-adjudication phase. The principle, however, has a much broader impact, as it also influences the interpretation of other rules embodied in the ICJ Statute or in the ICJ Rules, well beyond what the Statute's express provisions convey.[103] An apt example in this regard is the "indispensable third party" principle, mentioned above: in the *Monetary Gold* case the ICJ held that 'to adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".[104] Still, in this kind of situation jurisdiction (and, therefore, consent) does exist over the original parties to the case; the fact that the ICJ and other inter-State courts or tribunals abstain from exercising their jurisdiction under these specific circumstances is ultimately a matter of judicial propriety,[105] and testifies to the overarching influence of consent in inter-State adjudication. In this respect it is not surprising that the principle has been actually applied in the context of the ICJ and of non-institutional arbitration (and specifically with reference to the position of States), whereas judicial institutions endowed with compulsory jurisdiction and/or considering the position of non-State actors either have not formally acknowledged the principle or have not applied it *in concreto*.

The importance of the principle of consent in the interpretation of the Statute is apparent also in the field of intervention, which has been the subject of a complex case

[101] M.N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., p. 254.

[102] *Land, Island and Maritime Frontier Dispute*, cit., para. 99.

[103] S. Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?*, Cham: Springer, 2014, p. 31 *et seq.*

[104] *Monetary Gold Removed from Rome in 1943*, cit., p. 32.

[105] H. Thirlway, *The Law and Procedure*, cit., p. 870. Cf. however B.I. Bonafé, *Indispensable Party*, in *Max Planck Encyclopedia of International Procedural Law*, Oxford: Oxford University Press, last update February 2018, para. 35 *et seq*., on the different readings of the principle's rationale.

law.[106] Notably in *Land, Island and Maritime Frontier Dispute* the ICJ distinguished between intervention "as a party" and "as a non-party" (a stance that finds no textual basis in the Statute).[107] According to the Chamber, "[t]he competence of the Court in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute";[108] there is therefore no need to prove the existence of a specific jurisdictional link between the intervening State and the original parties in order for intervention under Art. 62 to be admissible. At the same time, the intervening State does not automatically become a party to the case if a further jurisdictional link is missing: as the ICJ pointed out in the *Continental Shelf* case, any exception to the "fundamental principles underlying its jurisdiction; primarily the principle of consent, but also the principles of reciprocity and equality of States [...] could not be admitted unless it were very clearly expressed".[109]

A different solution, whereby interveners under Art. 62 of the ICJ Statute should be considered as parties to the case, has been advocated also in light of a comparative analysis of domestic legal systems – where voluntary interveners usually qualify as parties to the proceedings.[110] I do not purport to take a stance on this specific issue, but one aspect is worth noting: even if one should consider that such a conclusion is correct under municipal law, automatic transposition of this "general principle of procedure" in the realm of international adjudication would raise some difficulties, precisely because of the paramount role of consent in the international context. Arguably the ICJ has taken its interpretative approach too far, thus depriving Art. 62 of its potential as a means of ensuring legal certainty in complex situations (since the judgment it renders is not deemed to be *res iudicata* between the intervening State and the original parties);[111] nonetheless, it is not surprising that the ICJ rejects any analogy with solutions adopted at the domestic level in this particular field as this is exactly one of the aspects where general principles of international procedure would diverge from national ones.

It is also noteworthy that consent shapes intervention in different international jurisdictional systems, albeit with very different practical outcomes. On the one hand, in-

[106] See only M.N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., para. 355 *et seq*.

[107] See *Land, Island and Maritime Frontier Dispute*, cit., para. 99.

[108] *Ibid*., para. 96.

[109] International Court of Justice, *Continental Shelf* (Libyan Arab Jamayria v. Malta), judgment of 21 March 1984, para. 35.

[110] A. Davì, *L'intervento davanti alla Corte internazionale di giustizia,* Napoli: Jovene, 1985, p. 146; Davì, who was writing before the developments in the *Land, Island and Maritime Frontier Dispute* case, considered the existence of a jurisdictional link to be a requirement for intervention under both Arts 62 and 63 of the ICJ Statute (*ibid.*, pp. 194 and 255).

[111] S. Forlati, *The International Court of Justice*, cit., p. 200 *et seq*.

tervention it is virtually unknown in the framework of non institutional arbitration;[112] on the other hand, it is fairly common in other contexts where, however, it is either more clearly framed in the form of an *amicus curiae*[113] or at any rate it is part of a system based on compulsory jurisdiction.[114]

VI.2. General principles of procedure common to domestic legal systems

In the past it seemed difficult to draw any general principles of procedure from domestic law, due to the differences in the various legal traditions.[115] While many of these differences are still present today, the principle of fair trial and its different components, which are embodied in human rights standards, have arguably become a common denominator applying at municipal level. This is true especially for the "equality of arms" principle, which is now considered as a key component of the right to a fair trial, with its two main ramifications pertaining on one hand to the independence and impartiality of courts,[116] and on the other hand the "adversarial principle", that is the right to be heard, on a basis of equal footing with the other party.[117] Other components of the right to a fair trial concern the rights of access to a court,[118] to effective judicial proceedings within a reasonable time,[119] and to the finality and execution of judicial decisions.[120]

Not all of these principles apply to international adjudication: most notably, the right of access to a court is ensured at the international level only insofar this is in keep-

[112] S. Yee, *Intervention in Arbitral Proceedings under Annex VII to the UNCLOS?*, in *Chinese Journal of International Law*, 2015, p. 79 *et seq.*

[113] This is the case of intervention under Art. 36, para. 2, of the European Convention on Human Rights.

[114] See Art. 10 of the WTO Dispute Settlement Understanding (DSU); in this framework the possibility for potential interveners to begin parallel cases facilitates third party participation beyond what is mandatory under the DSU, notably by allowing their participation at the preliminary consultation stage (C. Carmody, *Fairness as Appropriateness: Some Reflections on Procedural Fairness in WTO Law*, in A. Sarvarian, F. Fontanelli, R. Baker, V. Tzevelekos (eds), *Procedural Fairness in International Courts and Tribunals*, cit., p. 286) and through attribution of enhanced third party rights.

[115] A.P. Sereni, *Principi generali di diritto e processo internazionale*, cit., p. 40.

[116] See Human Rights Committee (CCPR), General Comment no. 32 (2007) on the Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14 of the International Covenant on civil and political rights) of 23 August 2007, CCPR/C/GC/32, para. 3.

[117] See the ICJ stance in *Military and Paramilitary Activities in and against Nicaragua*, cit. See also European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotins v. Latvia*, para. 119: "the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a 'fair hearing' within the meaning of Article 6 § 1 of the Convention. They require a 'fair balance' between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent or opponents".

[118] General Comment No. 32, cit., para. 9.

[119] *Ibid.*

[120] See European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights (civil limb)*, Council of Europe, 2019, para. 92 *et seq*.

ing with the principle of consent to jurisdiction discussed above.[121] At the same time, the ICJ's case law points to the fact that other components of the principle of fair trial are key features of *international* adjudication as well, and should be applied not only when this is set forth expressly by the instruments governing the activities of an international court (as is the case, notably, for international criminal tribunals).[122]

For instance, it was pointed out above that the ICJ has identified the independence and finality of judgments as typical features of a "truly judicial body",[123] and that it took its own Statute – which embodies the principle of impartiality in Art. 2 and includes a number of safeguards to effectively guarantee it[124] – as a model to "test" the independence of other institutions. Comparable safeguards also exist as regards other permanent international courts, but independence is a key component also of non-institutional arbitration: according to the Partial Award in the *Croatia v. Slovenia*, "Procedural fairness includes the right to an impartial and *independent* judge".[125]

The principle of *res judicata*, as embodied in Art. 59 of the ICJ Statute, is also considered a feature of the international judicial function although the case law of the ICJ is in itself unclear as to its scope, and oscillates between broad readings of the principle – notably in *Bosnia v. Serbia*[126] – and more restrictive stances.[127] In *Nicaragua v. Colombia* the ICJ posited: "the decision of the Court is contained in the operative clause of the judgment. However, in order to ascertain what is covered by res judicata, it may be nec-

[121] See further, S. FORLATI, *Fair Trial in International Non-Criminal Tribunals*, cit., p. 103 *et seq*.

[122] See Art. 21, para. 3, of the ICC Statute; Art. 21, para. 2, of the ICTY Statute; Art. 20, para. 2, of the International Criminal Tribunal for Rwanda (ICTR) Statute.

[123] *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, cit. p. 52.

[124] See notably Art. 4, para. 1, of the ICJ Statute on the role of national groups in the Permanent Court of Arbitration in nominating candidates to the Bench; Art. 16 of the ICJ Statute stipulating restrictions to the exercise of political and administrative functions, or professional activities; Art. 17 of the ICJ Statute prohibiting the involvement in any case as an agent, counsel or advocate and setting the standard for diqualification in specific cases; Art. 18 of the ICJ Statute on dismissal. On the ICJ's independence from UN political organs see R. JENNINGS, R. HIGGINS, *General Introduction*, pp. 4-5.

[125] Arbitral Tribunal, *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Govermnent of the Republic of Slovenia*, partial award of 30 June 2016, para. 227.

[126] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, paras 135–136. See S. WITTICH, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, in *European Journal of International Law*, 2007, p. 599. See also C. BROWN, *Article 59*, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, C.J. TAMS (eds), *The Statute of the International Court of Justice*, cit., p. 1561.

[127] See International Court of Justice, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), judgment of 11 November 2013, joint declaration appended by Judges Owada, Bennouna and Gaja.

essary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question".[128] Moreover,

> "[i]t is not sufficient, for the application of res judicata, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled".[129]

The ICJ then concluded that in its previous judgment "it did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast"[130] – whereas the according to the joint dissenting opinion Nicaragua's claim had been rejected as the burden of proof was not met.

The objections of the dissenting judges and the uncertainties in the case law show the difficulty of identifying a generally accepted notion of *res judicata*, which may well depend on different approaches to this issue in domestic legal traditions.[131] At the same time Judge Greenwood has emphasised that

> "[a]lthough the doctrine of res judicata has its origins in the general principles of law [...] it is now firmly established in the jurisprudence of the Court [...]. Res judicata is also well established in the case law of other international tribunals [...]. It is therefore unnecessary to examine the not inconsiderable differences which exist between different national legal systems regarding the concept of res judicata [...]. It is the principle of res judicata in international law, in particular as developed in the jurisprudence of the Court, which has to be applied".[132]

This is an approach that finds some support also as regards the ICJ's reading of other principles of international procedure.

Notably, the ICJ deems that also the principles of equality between the parties and of the equality of arms are part of the general principles of international procedure, where they are corollaries of the principle of sovereign equality among States – one of the "fun-

[128] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, cit., para. 59.

[129] *Ibid.*, para. 61.

[130] *Ibid.*, para. 83. The criticism by the dissenting judges (para. 19 *et seq*. of the joint declaration appended by Judges Owada, Bennouna and Gaja) related to this aspect of the Court's findings.

[131] S. WITTICH, *Permissible Derogation from Mandatory Rules?*, cit., p. 607.

[132] Joint dissenting opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, cit., para. 4.

damental principles underlying its jurisdiction".[133] The procedural components of party equality and of the equality of arms are difficult to typify rigidly; they affect the Court's composition, the possibility to respond to claims, the treatment of evidence, financial aid – and at times also indirectly safeguard other interests (such as the ones to the protection of witnesses[134] or to the integrity of judicial proceedings as such).[135] Similar considerations apply to the principle of good faith and loyalty between the parties;[136] to the principle of effectiveness of judicial proceedings, as it emerges notably in the ICJ case law on provisional measures;[137] and to the principle *onus probandi incumbit actori*.[138]

As was noted previously, the ICJ applies these principles of procedure on bases that are at times different from the ones relevant in domestic legal orders. On the other hand, the *IFAD* advisory opinion confirms that the principles of procedure that the ICJ applies at inter-State level (and, more specifically, the principle of party equality) play a role also as regards situations where non-State actors are involved.[139] In that Advisory Opinion the ICJ expressly relied on the Human Rights Committee's General Comment No. 32 in order to assess whether fair trial standards, and more specifically the principle of the equality of arms, had been respected in the very peculiar framework it was dealing with – that of advisory proceedings concerning the review of a judgment of the ILO Administrative Tribunal on a complaint brought by an employee. The ICJ stressed that "the principle of equality of parties follows from the requirements of good administration of justice" and "must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified ed on objective and reasonable grounds".[140] The flexibility granted by Art. 66, para. 2, of its Statute

[133] See *Continental Shelf beyond 200 Nautical Miles*, cit., para. 53 and, *supra*, Section VI.1. Cf. Institut de droit international, Resolution on *Equality of the Parties before International Investment Tribunals*, The Hague Session, 31 August 2019, Preamble.

[134] International Court of Justice, *Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), judgment of 3 February 2015, para. 18 *et seq*.

[135] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, cit., para. 15 *et seq*.

[136] See above, footnote 61 and corresponding text.

[137] See notably *LaGrand*, cit., para. 102: "The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved". See K. Oellers-Frahm, *Article 41*, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, C.J. Tams (eds), *The Statute of the International Court of Justice*, cit., p. 1049 *et seq*.

[138] R. Kolb, *The International Court of Justice*, cit., p. 928 *et seq*.; C. Santulli, *Droit du contentieux international*, cit., p. 538 *et seq*.

[139] For international criminal law see S. Negri, *Equality of Arms : Guiding Lights or Empty Shell?*, in M. Bohlander (ed.), *International Criminal Justice: A Critical Appraisal of Institutions and Procedures*, London: Cameron May, 2007, p. 13 *et seq.*, p. 43.

[140] International Court of Justice, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, advisory

in order to safeguard party equality, by ensuring that the affected individual could make her views known in writing and by not holding a hearing,[141] was in line with its previous practice in this context. The ICJ did, however, also call into question the compatibility of the Administrative Tribunal of the International Labour Organization (ILOAT) review system with the "present-day principle of equality of access to courts and tribunals", insofar as only one party, in this case the International Fund for Agricultural Development (IFAD), could seek a review of an ILOAT judgment by the ICJ, whereas the affected employee did not have a corresponding right.[142] While, for the reasons explained above in this pages, it would be difficult to draw from this case the assumption that the principles of fair trial, as enshrined in International Human Rights Law, apply as such also before international courts and tribunals, this case is emblematic of the convergence between standards of procedural fairness as applicable in international and domestic jurisdictional proceedings. This convergence is particularly important whenever proceedings before international courts and tribunals replace domestic remedies; in such situations individuals and other private legal persons are arguably entitled to full respect for the principle of fair trial.[143]

VII. Implementation of general principles of procedure by different international courts and tribunals

The general principles of procedure mentioned above with reference to the ICJ are also applied by other international courts and tribunals, although not necessarily in an identical way. Lack of uniformity in their implementation may depend on a number of different factors. For instance, the different limitations that usually apply to the office of members of permanent and *ad hoc* jurisdictions influence the way in which the appear-

opinion of 1 February 2012, para. 44. See also International Court of Justice, *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*, advisory opinion of 23 October 1956, p. 86.

[141] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, cit., para. 44.

[142] *Ibid.* See also para. 39: "While in non-criminal matters the right of equal access does not address the issue of the right of appeal, if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds … In the case of the ILOAT, the Court is unable to see any such justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member".

[143] According to L. Carter, F. Pocar (eds), *International Criminal Procedure*, cit., p. 8, "the consideration that the exercise of criminal jurisdiction over international crimes is primarily a prerogative and responsibility of State authorities […] requires that the complementary exercise of such jurisdiction by international or hybrid courts must conform with the same fair trial conditions that are required and expected from States". The same consideration would seem to apply to comparable situations beyond the area of international criminal law.

ance of impartiality is implemented in these different contexts;[144] and human rights courts may be more likely to shift the burden of proof or to rely or adverse inferences than inter-State courts because in that particular setting it is easier to detect structural imbalances in the position of the parties which may justify such a step.[145] In respect of the issue of timeliness of proceedings, according to the Arbitral Tribunal in the *Croatia v. Slovenia* arbitration procedural fairness also includes "the right to a timely decision in respect of the matters consigned to the Tribunal under the Arbitration Agreement".[146] The ICJ itself has not laid much emphasis on the requirement that judicial proceedings be concluded within a reasonable time; in this and other contexts, such as the ITLOS or the WTO, the issue has been discussed mainly as one of overall efficiency of the Court's working methods, rather than in terms of respect for parties' rights.[147] Nevertheless, the *Congo v. Uganda* case discussed below shows a growing awareness of the importance of this element especially in proceedings directly affecting individual rights. It is of course true that systemic difficulties may hinder full implementation of this principle, as the experience of the European Court of Human Rights shows.

At the same time, international courts and tribunals enjoy a measure of discretion in settling issues of procedure that is not typical of contemporary national legal systems, where procedure is usually rather rigidly regulated by the legislature.[148] It is by now acknowledged that international courts and tribunals have an inherent power to regulate procedure, and they use it so as to ensure respect for general principles of procedure. This discretion, which led the ICJ to be described as "master of its own procedure",[149] finds expression in Art. 30, para. 1, of the ICJ Statute – whereby "[t]he Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure".[150] Comparable provisions are included in the constitutive instruments of

[144] S. FORLATI, *Fair Trial in International Non-Criminal Tribunals*, cit., pp. 111-112.

[145] *Ibid.*, p. 110.

[146] *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Govermnent of the Republic of Slovenia*, cit., para. 227.

[147] See D.W. BOWETT, J. CRAWFORD, I. SINCLAIR, A.D. WATTS, *The International Court of Justice. Efficiency of Procedures and Working Methods: Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law*, in *International and Comparative Law Quarterly*, 1996, p. 1 *et seq.*; R. HIGGINS, *Respecting Sovereign States*, cit., p. 121; H. CAMINOS, *The International Tribunal for the Law of the Sea*, in *The Law and Practice of International Courts and Tribunals*, 2006, p. 13 *et seq.*, p. 21.

[148] A.P. SERENI, *Principi generali di diritto e processo internazionale*, Milano: Giuffré, 1955, p. 65 *et seq*. Common law judges certainly have broader flexibility in this regard than their civil law counterparts.

[149] See for example separate opinion of Judge Cançado Trindade, *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 3.

[150] A greater proximity with the role of judges in domestic proceedings exists as regards Art. 48 of the ICJ Statute, which sets forth: "[t]he Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence".

other international courts, and arbitral tribunals similarly enjoy an inherent power to regulate proceedings (albeit usually to a lesser extent than permanent courts).[151] This element may help in explaining the greater readiness of the ICJ and other international jurisdictional bodies to rely on general principles (including those stemming from domestic legal systems) precisely in the field of procedure.[152]

Judicial discretion does not imply, however, that international courts and tribunals are free to decide which procedural rules to apply. Notably the conduct of proceedings before the ICJ is governed by its Statute, by its Rules, and by other relevant instruments, such as the Practice Directions and the Resolution on Internal Judicial Practice.[153] The PCIJ pointed out, in this regard, that it is only when "[n]either the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court's jurisdiction" that the Court itself "is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law".[154] As this passage makes clear, neither the parties nor the Court itself may derogate from the ICJ Statute – in this specific sense, the Statute is peremptory.[155] Broadly speaking, general principles of procedure that are not directly embodied in the constituent instruments of a given court or tribunal are applied as a tool for interpreting statutory provisions and other applicable rules of procedure, or in order to fill any gaps. As is also suggested by the *Mavrommatis* judgment, this discretion is granted to courts so that they can ensure the "sound administration of justice". This rather elusive principle covers considerations related to the protection of the judicial function, to efficiency and integrity of proceedings, as well as the rights of third parties,[156] thus counterbalancing, at least to some extent, the role of consent and of party autonomy.

The issue was recently raised by Judge Cançado Trindade in the *Reparations* phase of the *Congo v. Uganda Case*: in addressing the request by Uganda to postpone the deadline for submission of the counter-memorial, he stressed that reparations,

> "in cases involving grave breaches of the International Law of Human Rights and of International Humanitarian Law, cannot simply be left over for 'negotiations' without time-limits between the States concerned, as contending parties. Reparations in such cases

[151] S. Forlati, *The International Court of Justice*, cit., p. 19 *et seq*., also for further references.

[152] B. Bonafé, P. Palchetti, *Relying on general principles in international law*, cit., p. 173.

[153] The latest versions of these documents are available online at www.icj-cij.org.

[154] *Mavrommatis Palestine Concessions*, cit., p. 16.

[155] R. Kolb, *The International Court of Justice*, cit., p. 80 *et seq*.

[156] R. Kolb, *La maxime de la 'bonne administration de la justice'*, in *L'Observateur des Nations Unies*, 2009, p. 5 *et seq*. For a critique see H. Thirlway, *Procedural Fairness in the International Court of Justice*, in A. Sarvarian, R. Baker, F. Fontanelli, V. Tzevelekos (eds), *Procedural Fairness in International Courts and Tribunals*, cit., p. 243 *et seq.*, pp. 245-246.

> are to be resolved by the Court itself, within a reasonable time, bearing in mind not State susceptibilities, but rather the suffering of human beings, – the surviving victims, and their close relatives, prolonged in time –, and the need to alleviate it".[157]

The Court emphasised "the need to rule on the issue of reparations without undue delay" in its order on the time limits for the filing of the counter-memorials.[158]

While in this situation Uganda's position was not shared by the Democratic Republic of the Congo, arguably in many circumstances respect for the parties' shared choices and wishes in the management of procedural matters is actually conducive to the sound administration of justice[159]– as also shown by the fact that several provisions of the Statute leave specific procedural choices to the parties or require the ICJ to hear the their opinion before settling such kind of issues.[160] Even when this is not specifically set forth by the Statute, the ICJ leaves some room for parties' choices, in line with the principle of party autonomy. Thus, for instance, in the *Construction of a Road* and *Certain Activities* cases, the Court invited the parties to "to come to an agreement as to the allocation of time for the cross-examination and re-examination of experts" within a certain deadline;[161] only when no agreement could be found in this respect did the Court inform the parties of its "decision in respect of the maximum time that could be allocated for the examinations".[162] As this example shows, in any case, in most procedural instances party autonomy has to be exercised under the ICJ's control: under specific circumstances the ICJ could arguably depart from the parties' shared wishes and/or act *proprio motu* in this field, in order to protect its judicial function and for considerations related to efficiency, timeliness and integrity of the proceedings – including protection of the parties, witnesses and victims. The weight a jurisdictional body gives to each of these components varies significantly also in light of the circumstances in which it oper-

[157] International Court of Justice, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), declaration appended to the order of 15 July 2015, para. 7. See also Judge Cançado Trindade's declaration appended to the order of 11 April 2016, especially para. 20; and Judge Cançado Trindade separate opinion appended to the order of 6 December 2016, which concerned the time-limits for the filing of the counter-memorials. Cf. also R. HIGGINS, *Respecting Sovereign States and Running a Tight Courtroom*, in *The International and Comparative Law Quarterly*, 2001, p. 121 *et seq.*

[158] International Court of Justice, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), order of 6 December 2016, cit.

[159] See, as regards provisional measures, S. FORLATI, *Il potere della Corte internazionale di giustizia di modificare misure cautelari precedentemente adottate: quali limiti all'esercizio della funzione giudiziaria internazionale?*, in *Rivista di diritto internazionale*, 2015, p. 903 *et seq*.

[160] See, for instance, Art. 26, para. 3, of the Statute on Chambers; Art. 39 thereof on the use of languages; Art. 101 of the ICJ Rules.

[161] International Court of Justice, *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), judgment of 16 December 2015, paras 34-35.

[162] *Ibid.*, para. 37.

ates.[163] While the interpretative powers inherent in adjudication may at times be stretched to the limit out of consideration for such principles, it is not admissible for courts or tribunals to disregard provisions included in their constitutive instruments and that are not in themselves flexible. The question arises as to whether the ICJ, or other international tribunals, should nonetheless apply provisions that they deem incompatible with the general principles of procedure and what other option is left to them. The issue has been addressed in the *IFAD* advisory opinion,[164] where inconsistency with the principle of party equality stemmed directly from the "inequality of access to the Court arising from the review process under Article XII of the Annex to the Statute of the ILOAT".[165] The ICJ came to the conclusion that, in light of the steps it took "to reduce the inequality in the proceedings before it, [...] the reasons that could lead it to decline to give an advisory opinion are not sufficiently compelling to require it to do so".[166] While in this context the ICJ's power of interpreting the Statute was used to avert, to the extent possible, the risk of inequality, the ICJ clearly indicated that it would have abstained from exercising its functions, for reasons of propriety, had it deemed the conflict with the principle of equality of the parties to be irredeemable. The ICJ also took similar steps in the framework of contentious proceedings (notably when applying the principle of the "indispensable third party");[167] arguably, this would be open to other international courts or tribunals whenever they considered that compliance with the instruments governing their activities would be in open conflict with general principles of procedure or that the integrity of the judicial proceedings would otherwise be disrupted. This was confirmed by the Partial Award made by the Arbitral Tribunal in the *Croatia v. Slovenia* arbitration. According to this decision an international tribunal has not only, "in the absence of any agreement to the contrary [...], jurisdiction to determine its own jurisdiction";[168] but also "inherent jurisdiction to decide whether the 'arbitration process as a whole has been compromised to such an extent that [...] the arbitration process cannot continue'".[169] More specifically, the Tribunal considered that it "has the

[163] For instance, the high number of applications pending before the European Court of Human Rights significantly influences the way it manages procedure.

[164] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, cit., p. 10.

[165] *Ibid.*, para. 48.

[166] *Ibid*.

[167] See S. FORLATI, *The International Court of Justice*, cit., p. 113 *et seq*.

[168] *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Govermnent of the Republic of Slovenia*, cit., para. 157.

[169] *Ibid*., para. 168. This option was advocated by Croatia, as the arbitration was tainted by the inappropriate behaviour of a party-appointed arbitrator and encountered a series of other difficulties (an account of the events is *ibid*., para. 9 *et seq*., and para. 169 *et seq*.). See also A. SARVARIAN, R. BAKER, *Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal*, in *EJILTalk!*, 28 July 2015, www.ejiltalk.org and A. SARVARIAN, R. BAKER, *Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)*, in *EJILTalk!*, 7 August 2015, www.ejiltalk.org.

duty to safeguard the integrity of the arbitral process and to stop that process if it cannot ensure that integrity",[170] concluding however that the "procedural balance between the Parties is secured", "on the basis of all remedial action taken" and in light of its readiness to reopen the oral phase giving "each Party a further opportunity to express its views concerning what it regards as the most important facts and arguments".[171] The Tribunal further took the stance that "as long as an impartial and independent decision-making process can be guaranteed, procedural fairness requires that the process be continued, rather than be put on hold with uncertain consequences for the ultimate resolution of the Parties' dispute".[172] While both the ICJ and the Arbitral Tribunal have been reluctant to abstain from performing their functions in such circumstances, it is ultimately for each international court to assess whether this aim can be ensured appropriately in light of the circumstances of each case.

VIII. Conclusions

Although international jurisdiction is not organised as a unitary and coordinated system, the case law of the ICJ testifies to the existence of general principles of procedure that apply to all international courts and tribunals and identify the international jurisdictional function as such. Some of these principles – specifically, the principle of consent – are inherent in the international legal order, where, moreover, especially permanent international courts enjoy broad discretion to regulate the exercise of their functions in order to attain the sound administration of justice. Other principles – notably the principles of independence, party equality, and *res iudicata* – are applied also at domestic level, where they are embodied in the notion of "fair trial". In the *IFAD* advisory opinion the ICJ has relied on this notion to indicate that the principle of party equality applies not only in inter-State proceedings, as a corollary of the principle of sovereign equality, but also in situations where individuals or other non-State actors are involved.

However, precisely this case shows that, even when it relies on principles that apply also at a domestic level, the ICJ looks at international standards rather than domestic practice in order to identify them. International procedural law has developed on the basis on international judicial practice: Judge Greenwood's observations in this regard are confirmed by the fact that other international courts and tribunals also deem to be bound by the general principles of procedure identified by the ICJ, although some uncertainties exist and the actual modalities of implementation of such principles may

[170] *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Govermnent of the Republic of Slovenia*, cit., para. 183.

[171] *Ibid.*

[172] *Ibid*. para. 227. In a rather unusual move, the Arbitral Tribunal also decided that Slovenia should provisionally cover the additional costs originated by the prolongation of the proceedings "beyond the originally envisaged timetable" (*ibid.*, para. 231, let. e)).

vary significantly. Moreover the approach of the ICJ – whereby an impossibility of reconciling the texts governing the exercise of its judicial function with general principles of procedure would lead it to decline to exercise jurisdiction – is also shared by other jurisdictions, although appropriate use of judicial discretion in matters of procedure may often avert this risk.

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Discourses on Methods in International Law: An Anthology

International Investment Proceedings: Converging Principles?

Jorge E. Viñuales*

Table of Contents: I. Introductory observations. – II. The broader context of investment proceedings. – III. The scope of jurisdictional power. – III.1. Objective vs subjective definitions of investment. – III.2. Contribution to the development of the host State. – III.3. Legality of investments. – IV. The uncertain place of admissibility. – IV.1. Illegality between jurisdiction and admissibility. – IV.2. Indirect shareholder claims. – V. (Over-)Reliance on investment treaties. – V.1. Treaty and custom in investment arbitration. – V.2. The police powers doctrine. – V.3. Countermeasures. – VI. Concluding observations.

Abstract: Several key issues relating to the conduct of international investment proceedings converge towards competing and parallel solutions. The purpose of this study is to identify such solutions and spell out their overall systemic implications when taken together.

Keywords: investment law – ISDS - definition of investment – legality of investments – indirect shareholders claims – treaty and custom in investment arbitration.

I. Introductory Observations

International arbitration proceedings have featured prominently in the literature on international law in the last two decades. This is likely a result of the surge in investment arbitration since the 1990 decision in *AAPL v. Sri Lanka*,[1] which admitted the proposition that a treaty clause may serve as a sufficient basis for a State to consent to arbitration with a foreign investor, despite the absence of privity of contract between the two.[2] Much has been written regarding the nature of investment arbitration proceedings,

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[1] ICSID, final award of 27 June 1990, case no. ARB/87/3, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*.

[2] This point was emphasised by J. Paulsson, *Arbitration Without Privity*, in *ICSID Review-Foreign Investment Law Journal*, 1995, p. 232 *et seq*.

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which rely heavily but not entirely on the techniques of international commercial arbitration,[3] as well as regarding their legitimacy, to the extent that they bestow on one or, more frequently three private individuals the power to decide disputes with potentially important public dimensions.[4] Those discussions, however significant, are not the primary target of these lectures. Nor are the debates over the role of precedent in investment arbitration,[5] or the – alas too frequent – contradictory positions taken by investment tribunals on similar issues.[6]

Instead, I would like to make the case for a change of approach in the way we – as academics and practitioners – analyse investment law. The suggested change has two main aspects. *Firstly, I believe that legal analysis should focus not on treaties, rules or cases, but on certain "stances" or "positions" that are important – perhaps the most important – "micro drivers" of the dynamics of the entire investment law system. Secondly, these stances should be analysed in the light of their implications not only for investment proceedings or even the overall relation between foreign investors and host States but as one part of a larger context, involving other stakeholders, values and legal systems*. In many ways, these lectures are an attempt at bringing the analysis closer to the topography of international investment proceedings so as to identify the spectrum of positions regarding the application of certain major principles and their wider implications. This spectrum is not unlimited. As I will endeavour to show, whereas it is rare not to find fluctuation and ambiguity in the application of virtually all principles governing investment proceedings, the divergence tends to settle or crystallise around a limited number – two, perhaps three and in some cases four – approaches or ways of applying a principle. Technically, these approaches are presented as "interpretations" of the applicable rules and, sometimes, they even purport to express common positions widely adopted in the jurisprudence. But, in fairness, they are conceptual stances, broad options within a spectrum of possibilities, that I will call for present purposes "converging principles" or, to use an expression of Aldo Moro that was kindly suggested to me by Professor Enzo Cannizzaro and that is fitting for a series of lectures delivered at the University of Rome, they can be seen as *convergenze parallele*.

[3] The ambiguous foundations of the investment arbitration were analysed, in particular, by Z. DOUGLAS, *The Hybrid Foundations of Investment Treaty Arbitration*, in *British Yearbook of International Law*, 2004, p. 151 *et seq*.

[4] The first author to have fully articulated this point was G. VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford: Oxford University Press, 2007.

[5] For two overviews of the debate see G. KAUFMANN-KOHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, in *Arbitration International*, 2007, p. 357 *et seq*.; G. GUILLAUME, *The Use of Precedent by International Judges and Arbitrators*, in *Journal of International Dispute Settlement*, 2011, p. 5 *et seq*.

[6] For two overviews of the debate see J. E. VIÑUALES, F. SPOORENBERG, *Conflicting Decisions in International Arbitration*, in *The Law and Practice of International Courts and Tribunals*, 2009, p. 91 *et seq*.; P. MAYER, *Conflicting Decisions in International Commercial Arbitration*, in *Journal of International Dispute Settlement*, 2013, p. 407 *et seq*.

The precise legal nature of these principles is difficult to characterise. I have noted that these approaches claim to be interpretations of the applicable rules but, strictly speaking, the treaties interpreted are in most cases different, although their wording may be to some extent similar. The fact that dozens of different treaties may be at stake and that only a few "interpretations" may be derived from them raises some doubt as to the "interpretative" nature of these common positions. There is, of course, an element of interpretation involved, but this interpretation is greatly influenced by a distillation of previous cases, particularly a distillation operated by authoritative commentary, that sets bounds to the spectrum of approaches available to tribunals. This is, of course, unless the treaty at stake contains unusual clauses or wording. At the same time, such common positions cannot be considered to be, technically, jurisprudential lines. This is not only because there is no doctrine of *stare decisis* in international law (or international investment law) but also because the material from which "lines" would be derived does not even refer to the same law. Finally, such principles cannot be taken as rules agreed by the parties as applicable to their dispute. Although this may be the case with respect to some rules derived from soft-law instruments,[7] or practices,[8] the parties to a dispute have no authority to either create conventional rules applicable to other potential parties or to turn a commonly agreed principle into customary law.[9] The latter point is sometimes forgotten by investment tribunals, who may find it convenient to merely state that both parties agree on the contents of a rule or on the fact that a rule has customary nature. All in all and, in fairness, the converging principles I will be discussing are conceptual positions that can rely on some authority, broadly understood, without necessarily enjoying a clear link to a formal source of law.[10]

The roadmap for the analysis begins with a brief characterisation of the wider context of international investment proceedings (section II). This is intended to emphasise

[7] See e.g. International Bar Association (IBA), Rules on the Taking of Evidence in International Commercial Arbitration, adopted by a resolution of the IBA Council of 29 May 2010.

[8] See e.g. the common use of the so-called "Redfern Schedule" to structure the document production phase in investment procedures.

[9] This point was clearly and strongly emphasised by the International Court of Justice (ICJ) in one of the most important and influential cases in the ICJ's history. See International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), judgment of 27 June 1986, para. 184 ("[t]he Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of international customary law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not itself sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States").

[10] See on this issue my discussion of the "distance" between treaty norms and the detailed rules derived from them by investment tribunals: J.E. Viñuales, *The Sources of International Investment Law*, in S. Besson, J. d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law*, Oxford: Oxford University Press, 2017, pp. 1069 *et seq*.

both the place of the principles discussed in these lectures, as finer-grained but identifiable positions within a limited range of possible understandings of a given norm, and the dimensions that must be taken into account in determining the implications of a given stance. In other terms, this first section discusses why stances are micro drivers of the system and why the bilateral relations between foreign investors and host States must be seen as just one aspect of a wider context. I then address three broad areas where converging principles can be detected, namely in connection with jurisdiction (section III), admissibility (section IV) and the merits of a dispute (section V). These are by no means the only areas relevant for the inquiry but they do offer a wealth of striking illustrations that are of significant practical importance for investment proceedings as such. For each area, I select a limited number of examples that are sufficient, in my view, to convey the general thesis advanced in these lectures regarding the need to focus on stances, as the true micro drivers of the system, and on their implications. I conclude my lectures with some observations on the implications of this thesis for legal scholarship, teaching and practice (section VI). By and large, I have tried to preserve in the written expression of my lectures the style and cadence that characterised their oral delivery. I must therefore ask for the indulgence of the reader for what may strike her/him as a certain *liberté de parole*, which I hold so dearly.

II. The broader context of investment proceedings

Investment arbitration proceedings do not take place in a *vacuum*. They aim to settle a dispute – sometimes only a dimension of the dispute – that may have much deeper roots and that expresses one avenue among many others of reaching a goal that an economic entity has set for itself. This is the broader context that must be taken into account in assessing the implications of different stances, and it can be characterised by reference to three observations.

Firstly, investment disputes only concern one relation, that between a foreign investor and the authorities of a host State, within a wider set of relations potentially involving interactions with populations affected by the investment scheme, different levels of governmental authorities and the authorities of another State (the home State or parties to relevant multilateral instruments). These other relationships are governed primarily by different norms of domestic and international law. It is a truism to note that the relations between the foreign investor and potentially affected individuals or populations are subject to the domestic law of the host State (e.g. tort law) but also, potentially, to that of other States (e.g. if the parent company of the investor is sued before the tribunals of the State where it has its headquarters under the law of that State). It seems also obvious that the relations between the authorities of the host State and the investor are subject to domestic law and, perhaps, to contractual arrangements (that may be subject to the domestic law of host State or that of another State, through a choice-of-law clause). The interactions between the host State authorities and the po-

tentially affected populations are governed both by domestic and international law, particularly by human rights instruments. State authorities have a duty to protect individuals within their territory (or jurisdiction) from deprivation of their human rights by a third party, such as an economic operator. Last but not least, there are other international obligations undertaken by the host State which also have a bearing on the way a State organises its legal framework providing protection not only to foreign investors but also to the individuals in its territory, certain groups or the natural environment. Such other obligations may concern the fight against corruption, labour standards, environmental protection, collective rights, and many others. Thus, all in all, investment schemes often intervene in the context of a wider State-Investor-Population triangle (SIP triangle).[11] International investment law only targets one aspect of this triangle, i.e. the relationship between the foreign investor and the host State. And, in turn, investment arbitration proceedings only address one sub-component of this partial aspect, as further discussed below.

Indeed, investment proceedings are only a segment of the overall relationship between the foreign investor and the host State. When this relationship becomes conflicting, at least three main stages can be distinguished with the process of dispute settlement, moving from the pre-litigation phase (where investment law and lawyers intervene to prepare the dispute but also to assess its prospects, e.g. when a third party is considering the acquisition of the affected entity or providing finance to pursue the claim), to the litigation phase (itself with several components), to the enforcement phase (whether through judicial means or through alternative means). The litigation phase can be conceptually sub-divided into at least four main components, namely the jurisdictional, admissibility, merits and quantum phases, with some additional incidental proceedings, such as interim relief. Moreover, new proceedings can be brought to challenge the award (annulment or set aside) or seek its recognition and enforcement. All these phases are well-known but, given the fact that I will focus only on some of them, it may be useful to recall some basic distinctions: at the jurisdictional phase, a tribunal must answer the question of whether it has the power to hear the dispute; at the admissibility phase, the tribunal must assess whether it should use such power; at the merits phase the tribunal, in the exercise of such power, must make a decision on the claims and arguments advanced by each party. The law applicable to investment proceedings concerns all their phases, although the rules will normally be different for each question addressed by the tribunal, and I will analyse it transversally.

The latter point connects the second observation with the third one, namely that the system of investment arbitration as we understand it today is not the only possible

[11] On the SIP triangle see J.E. Viñuales, *International investment law and natural resource governance*, in K. Kulovesi, E. Morgera (eds), *Research Handbook on International Law and Natural Resources*, Cheltenham: Edward Elgar, 2016, pp. 26-45.

expression of the very legal architecture upon which it rests. This is important to understand why stances are important micro drivers of how the system effectively operates. Over time, the system has been structured around two main concepts: the law and judge of foreign investment.[12] Historically, the initial forms of foreign investment protection relied on the extraterritorial application of the home State's laws as well as on the extraterritorial jurisdiction of its tribunals over disputes involving nationals from capital-exporting countries. This specific expression of the two components of the system progressively gave way to internationalised or international forms of both the law and the judge through the development of mixed commissions and international minimum standards of treatment of aliens. Today, the prevailing understanding emphasises a combination of investment treaties and *ad hoc* investment arbitration tribunals. But even such an understanding leaves significant room for a more integrative – and more accurate – view where "emphasis" is not conflated with a "quasi monopoly" of either investment treaties or investment tribunals. I use the rather strong expression of "quasi monopoly" to highlight that, through a number of apparently innocuous stances or "principles" (e.g. treaty – rather than contract – arbitration, distinction between treaty and contract claims, generous interpretations of arbitration clauses), investment treaties have come to displace domestic, contractual and even customary international law, and investment tribunals have substituted themselves for domestic courts or contractual arbitration *fora*. The stances or principles that have enabled such an idiosyncratic state of affairs are by no means a necessary corollary of the existence of treaties or arbitration institutions/rules. There are alternative competing principles that, on the same legal architecture, would lead to a very different system. And this is all the more striking if one considers that, as I mentioned in the previous section, the legal foundations of all these principles are neither clear nor necessarily solid.

Combining these three contextual observations, my purpose in what follows is to shed light on the current idiosyncratic understanding of investment arbitration by reference to certain key stances or principles relating to the jurisdictional, admissibility and merits phases. In doing so, I hope to show that such understanding results from principles that have no clear legally-grounded priority (or claim to priority) over other possible principles relating to the same question, and that this state of affairs has important consequences for both the operation of investment law and for the wider SIP triangle.

[12] For a concise presentation of this evolution see J.E. VIÑUALES, *L'État face à la protection internationale de l'entreprise: Regards sur le droit international des investissements contemporain*, in A. SUPIOT (ed.), *L'état de l'entreprise dans un monde sans frontières. Perspectives économiques et juridiques*, Paris: Dalloz, 2015, pp. 103-114.

III. The scope of jurisdictional power

The scope of jurisdiction of investment tribunals is conditioned upon the dispute relating to an "investment" in the host State. The term "investment" is misleadingly simple, and it has been the object of much controversy leading to a rather volatile body of jurisprudence. For that very reason, it provides a useful field of inquiry for the identification of different stances or principles that converge towards settled, though parallel, solutions. Rather than merely describing a series of cases and noting their diverging positions, the purpose of this section is to map the conceptual problems that they raise, often implicitly, and the limited set of potential answers that may be given to them. Specifically, I will discuss three series of problems: whether the definition of "investment" is subjective or objective; in the latter case whether it contains a requirement that the transaction contributes to the development of the host State; and whether legality of the investment is a requirement of its existence or of its protection.

III.1. Objective v. subjective definitions of investment

The first question can be introduced by reference to the *Poštová Banka v. Greece* case.[13] In this case, two financial entities, one based in the Slovak Republic and the other in Cyprus, claimed to hold an investment in Greece, in the form of Greek bonds, which had been allegedly treated in breach of the treaties between, respectively, the Slovak Republic and Greece and Cyprus and Greece. The tribunal decided the case on a pragmatic basis reasoning that the Cyprus investor, as a mere shareholder of the Slovak investor, did not have legal rights over the bonds and, as regards the Slovak investor, that the bonds were not encompassed by the definition of investment of the applicable treaty. But for present purposes the interest of the decision lies elsewhere, namely in that the tribunal was prompted by the parties to embark on a mapping exercise of the different positions regarding the definition of investment.[14]

In this mapping exercise, the tribunal identified two positions followed by arbitral tribunals. The first, which can be traced back to the so-called "Salini test" holds that there are some core contents of the definition of investment.[15] The consequences of such contents vary depending on the context. For arbitration proceedings under the aegis of ICSID, the main implication is that unless the core contents are met an ICSID tribunal would have no jurisdiction over the dispute. Other tribunals have extended this implication beyond the ICSID context emphasising the need to look beyond words, even the words used in a bilateral treaty to define the term investment, and concentrate on

[13] ICSID, award of 9 April 2015, case no. ARB/13/8, *Poštová banka, a.s. and Istrokapital s.e. v. Hellenic Republic*.

[14] *Ibid*., paras 351-359.

[15] See ICSID, decision on jurisdiction of 31 July 2001, case no. ARB/00/4, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, para. 52.

the reality of the transaction, which must involve a financial contribution, risk and certain duration.[16] The second position holds that the term investment has whatever meaning the States parties to a treaty intended to give it. Thus, even those transactions that epitomise in common language the opposite of making an investment (e.g. debt by contrast to equity, or a sale of goods by contrast to foreign direct investment)[17] would be an "investment" if included in a relevant provision of a treaty.[18] Depending on the context, this position may be limited to non-ICSID arbitration, which relies only on a treaty, or even to ICSID arbitration under the theory that Article 25 of the ICSID Convention merely mirrors the definition of investment included in the relevant treaty.[19]

Faced with these different solutions, the first impression that one may gather concerns the significant volatility of the investment case law. Yet, the two positions, even with their fluctuations depending on whether or not they cover ICSID and non-ICSID contexts, form important poles of attraction or convergence. The *Poštová Banka* case offers a good illustration of this point. Indeed, in reaching its conclusion, the tribunal noted that: "[t]he rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties must be applied to each treaty in particular, and not seeking to create general categories or classifications of treaties, depending on whether the definition is broad or closed".[20]

The majority of the tribunal later seemed to characterise its own approach of the treaty as following a subjective test,[21] but it added that it would have reached the same conclusion had it applied an objective test under Art. 25 of the ICSID Convention.[22]

In the context of these lectures, the gravity pull of these two positions is not mentioned to reassure the reader as to the innocuous character of theory (as it will become apparent in what follows, the conceptual distinction carries important practical consequences). It is noted to emphasise the need, for commentators but also for practitioners, to focus on analysing the implications of each position, rather than on this or that treaty or this or that case. It is the positions, the poles or principles towards which cases converge, even if parallel, that should be our analytical object. And our task is to identify

[16] See e.g. Permanent Court of Arbitration, award of 26 November 2009, case no. AA280, *Romak S.A. v. The Republic of Uzbekistan*, para. 180, as well as para. 207.

[17] See e.g. ICSID, award of 1 December 2010, case no. ARB/09/11, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, rejecting a claim based on a sale of goods as manifestly without merit under Art. 41, para. 5, of the ICSID Arbitration Rules, paras 41-59, or *Romak v. Uzbekistan*, cit., para. 242.

[18] See e.g. ICSID: award of 8 November 2010, case no. ARB/07/16, *Alpha Projektholding GmbH v. Ukraine*, para. 314; decision on jurisdiction and admissibility of 8 February 2013, case no. ARB/08/9, *Ambiente Ufficio S.P.A. and Others (formerly Giordano Alpi and Others) v. Argentine Republic*, para. 462.

[19] See e.g. ICSID, decision on the application for annulment of 16 April 2009, case no. ARB/05/10, *Malaysian Historical Salvors v. Malaysia*, para. 73.

[20] See *Poštová banka v. Greece*, cit., para. 287.

[21] *Ibid*., para. 360.

[22] *Ibid*., para. 371 (the observations of the tribunal seem to be of general application but the section under which they are offered specifically refers to the ICSID Convention).

them and then to spell out in as much detail as possible their legal and policy implications for the operation of the investment arbitration system, keeping in mind the wider context of the SIP triangle. In the next paragraphs, I provide two illustrations of the implications of siding with one or the other position.

III.2. Contribution to the development of the host State

One significant implication of retaining an objective definition of the term "investment" is that such definition involves stable components. Depending on the components that are (or not) considered to define the core of an investment scheme, many transactions or assets may (or may not) be covered. Obvious examples that may be excluded from a traditional objective definition include loans (or other money claims), bonds or other public securities, intellectual property rights, regulatory authorisations, sales transactions or short-term financial placements. In this section, I discuss one component that received much attention in a stream of cases, namely the contribution to the development of the host State. Although some commentators and tribunals have expressed doubt as to the relevance of this component on grounds of economic liberalism, no one is more ironic than history itself, with its current wave of protectionism and illiberalism in what seemed to be the least exposed quarters. Underpinning the "development" component is the other – often forgotten – objective of investment treaties, namely the promotion of prosperity through the facilitation of investment flows.

This debate can be introduced by reference to the *Malaysian Historical Salvors v. Malaysia* case.[23] The dispute concerned alleged rights derived from a contract for the location and salvage of the cargo of a British vessel that ran aground in 1817 in an area now under Malaysian waters. The sole arbitrator declined jurisdiction on the basis of an objective understanding of the term "investment" in Art. 25 of the ICSID Convention,[24] encompassing not only the usual financial contribution, duration and risk but also the need that the transaction contributes to the development of the host State, derived from the preamble of the ICSID Convention.[25] Reasonable minds may disagree, but the decision of the sole arbitrator was cautious and thoroughly argued. Yet, it was met with great scepticism by a majority of an *Ad Hoc* Committee, which annulled the award for its

[23] See ICSID, award of 17 May 2007, case no. ARB/05/10, *Malaysian Historical Salvors v. Malaysia*.

[24] The sole arbitrator discusses two stances, i.e. the typical characteristics approach and the jurisdictional approach, but both are expressions of an objective, albeit flexible and pragmatic, definition of the term investment. See *ibid*., paras 70-72.

[25] *Ibid*., para. 66 (interestingly, the decision refers here to a case where the reference to the development of the host State was used to reach the conclusion, on the basis of a subjective understanding of the term investment, that a loan constituted an investment because it contributed to the development of the host State), para. 124 (noting that when the other components are superficially met, the contribution to the development of the host country becomes more important), and paras 125-146 (rejecting the existence of an investment on grounds of lack of contribution to development).

reliance on the need for a transaction to contribute to the development of the host State.[26] The position of the majority of the *Ad Hoc* Committee is in my view debatable but, for present purposes, what must be emphasised is that to reach its conclusion the Committee had to turn the definition of investment in the ICSID Convention first into a very broad objective one (limited to the acknowledgement that "investment does not mean sale")[27] and then into a subjective definition, recognising its dependence upon the 1700 investment treaties concluded since the adoption of the ICSID Convention:

> "While it may not have been foreseen at the time of the adoption of the ICSID Convention, when the number of bilateral investment treaties in force were few, since that date some 2800 bilateral, and three important multilateral, treaties have been concluded, which characteristically define investment in broad, inclusive terms such as those illustrated by the above - quoted Article 1 of the Agreement between Malaysia and the United Kingdom. Some 1700 of those treaties are in force, and the multilateral treaties, particularly the Energy Charter Treaty, which are in force, of themselves endow ICSID with an important jurisdictional reach. *It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution*".[28]

Again, reasonable minds may disagree, and one Committee member strongly disagreed, but the point that deserves to be noted is the move from one pole (the objective definition) towards the other pole (the subjective definition) in order to dismiss the importance of the development component. Curiously, the majority seems to assume that it is an unquestionably good thing to expand the scope of jurisdiction under ICSID even beyond the very limits initially envisioned at the time of the adoption of the ICSID Convention. That was the consensus prevailing in investment arbitration circles a decade ago. It is no longer so obvious but that is not the topic of my lecture. For now, it will suffice to emphasise two points. One is that, as I mentioned earlier, the policy – even ideological – cleavage underpinning the debate over the "development" requirement is deep and opposes neoliberalism to developmentalism. The other is that, despite the shifts in perception and the surge in investment cases, the principles towards which the solutions converge remain relatively stable, namely an objective versus a subjective definition.

III.3. Legality of investments

Another implication of retaining an objective or a subjective definition of investment concerns the legality of investments. Some tribunals have considered that the legality

[26] *Ibid.*, paras 62-63, 69, and 71-72.
[27] *Ibid*., para. 72.
[28] *Ibid*., para. 73.

and even the good faith of the investment are a definitional feature, rather than a condition for the protection of investments. Indeed, in *Anderson v. Costa Rica*[29] the tribunal considered that there could be no investment in a transaction that was a hoax (a so-called "Ponzi scheme") and therefore had no legal existence. In a similar vein, the tribunal in *Phoenix v. The Czech Republic* reasoned that the restructuring of an investment scheme for the purpose of gaining protection under the applicable treaty was not merely inadmissible; it meant that there was no "investment" under the treaty.[30] Although at the jurisdictional level the end result of this position may be similar to that of considering illegality as a condition for the protection of an otherwise existing investment, there are potentially important implications of retaining one or the other stance.

These implications can be understood by reference to the widely accepted distinction between initial and subsequent illegality of an investment.[31] This distinction has been used to separate jurisdictional effects (a tribunal has no jurisdiction because, in case of initial illegality, there is no protected investment) from consideration at the merits stage (a tribunal can assert jurisdiction but, in its consideration of the merits, it will take into account the illegality in the operation of the investment). Such a distinction would only be possible if legality is not a definitional component of the term "investment". Indeed, if an asset, transaction or scheme needs to be lawful in order to be an investment, then it is less relevant when it became unlawful. As soon as it became so, there is no longer an investment, which is a pre-condition for a tribunal to exercise jurisdiction. By contrast, if legality is not a definitional component, then different forms of illegality may display different effects in a procedure. Such effects may concern not only jurisdiction, but also admissibility or the merits and, hence, the distinction between initial and subsequent illegality remains fully relevant. An investment that has been made legally but subsequently becomes inconsistent with the laws of the host country (e.g. an intellectual property right that has been declared invalid, a regulated company that has continued operation without renewing a permit or without meeting important safety standards, an extractive industry scheme that has massively polluted the surrounding

[29] See ICSID, award of 10 May 2010, case no. ARB(AF)/07/3, *Alasdair Ross Anderson and others v. Costa Rica*, paras 51-61.

[30] See ICSID, award of 15 April 2009, case no. ARB/06/5, *Phoenix Action, Ltd. v. The Czech Republic*, para. 114.

[31] On this distinction see ICSID: award of 16 August 2007, case no. ARB/03/25, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, para. 345; award of 29 July 2015, case no. ARB/10/15, *Bernhard von Pezold and others v. Republic of Zimbabwe*, para. 420; award of 22 August 2016, case no. ARB(AF)/12/5, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, para. 289 *et seq*.. Permanent Court of Arbitration: final award of 18 July 2014, case no. AA 226, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, paras 1354-1356; final award of 18 July 2014, case no. AA 227, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, paras 1354-1356; final award of 18 July 2014, case no. AA 228, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, paras 1354-1356; award of 15 march 2016, case no. 2012-2, *Copper Mesa Mining Corporation v. Republic of Ecuador*, para. 5.54 *et seq*.

area or bullied the affected populations by means of a private military company) would exist for jurisdictional purposes but the claims may not be admissible (i.e. the tribunal may not use its adjudicative power) or the company's actions may be such that the measures taken by the host State are entirely justified on the merits of the case. Such a wider set of effects only comes into play if legality is not a definitional component but a condition to be taken into account in deciding whether or not to grant protection to an investment and to what extent.

As before, reasonable minds may disagree as to the most appropriate stance but what must be emphasised is the fact that legality has converged towards two parallel positions, one where it is viewed as a definitional component and the other – more frequent – where it is considered as a requirement conditioning the (extent of) protection of an investment. Within the latter position, a number of finer-grained positions can be identified, particularly as regards the laws that must be taken into account in defining legality or the effects of initial illegality (jurisdiction or admissibility). These more specific positions have significant implications from the perspective of the SIP triangle, as they provide different degrees of relevance to laws protecting other interests. Over time, the scope of the laws that must be taken into account to assess the initial (il)legality of an investment has been broadened. One could interpret these developments as a jurisprudential line suggesting the emergence of a general principle under which a range of laws, including not only fundamental prohibitions (e.g. corruption),[32] but also domestic investment laws,[33] as well as other relevant laws (e.g. environmental permits),[34] are relevant for the assessment of initial (il)legality. But it is also possible to interpret this body of cases as pointing to a limited set of parallel solutions, particularly because early stances have been iterated in subsequent cases.[35] Whether different stances are steps in an incremental line or parallel convergences is difficult to decide in a context as volatile as investment treaty arbitration. What can instead be asserted with some confidence is that the range of possible solutions is relatively stable, with three main stances around which cases convergence. As discussed next, there is also some variation as to the consequences to be derived from this initial illegality.

[32] See e.g. ICSID, award of 2 August 2006, case no. ARB/03/26, *Inceysa Vallisoletane, SL v. El Salvador*, paras 252, 257 and 264.

[33] See e.g. ICSID, award of 12 July 2010, case no. ARB/07/20, *Saba Fakes v. Turkey*, para. 119.

[34] See e.g. ICSID, award of 30 March 2015, case no. ARB/11/24, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, paras 372 and 378.

[35] For a subsequent iteration of the approach followed in *Inceysa v. El Salvador*, cit., see Permanent Court of Arbitration, award of 19 September 2013, case no. 2010-5, *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, paras 3.170-3.171. For a subsequent iteration of the approach in *Saba Fakes v. Turkey*, cit., see ICSID, award of 4 October 2013, case no. ARB/10/3, *Metal-Tech Ltd. v. Republic of Uzbekistan*, para. 165.

IV. The uncertain place of admissibility

Conceptually, the difference between considerations of jurisdiction and admissibility is very clear: whereas the former relate to whether a tribunal has the power to adjudicate a dispute, the latter concern the question of whether the tribunal should use this power. Significantly, whether a matter relates to jurisdiction or admissibility has also several practical implications. One commentator notes that the scope of review applicable to a tribunal's decision on the existence of its adjudicative power is different from the one applicable to decisions in the exercise of the tribunal's jurisdiction, including admissibility.[36] It could be added that the burden and standard of proof applicable to jurisdictional and admissibility matters also differs. Whereas the claimant bears the burden of proving the facts and conditions sustaining jurisdiction, the burden of establishing reasons why a tribunal should not use its adjudicative power lies with the respondent, and the standard may for some of those reasons be more demanding.[37] In light of these and other potential differences,[38] characterising an objection as a matter of jurisdiction rather than as one of admissibility is not a purely conceptual exercise. Yet, in practice, tribunals have taken different stances that I will illustrate by reference to two main questions, namely the (il)legality of investments and indirect shareholder claims.

IV.1. Illegality between jurisdiction and admissibility

In the previous section, I referred to the role of (il)legality in assessing whether a tribunal has jurisdiction over a claim. I mentioned that two main positions have been formulated in this regard depending on whether legality is a definitional component of the term investment or a condition for its protection. As noted earlier, in the latter case, the effects of illegality may concern not only jurisdictional matters but also admissibility matters or even the merits of the case. Such a broader palette of possible effects has resulted in an additional spectrum of stances regarding what is essentially the same question, namely that the investment was initially tainted by a violation of the laws of the host State.

There are two main stances that serve as poles of attraction to the solutions envisaged by tribunals. Illegality is most often framed as defeating "consent" and therefore depriving the tribunal of its jurisdictional basis. As discussed in the previous section, there is some variability as to the types of illegality, but the end result is that States have not con-

[36] Z. Douglas, *The International Law of Investment Claims*, Cambridge: Cambridge University Press, 2009, para. 307.

[37] See e.g. Permanent Court of Arbitration, award on jurisdiction and admissibility of 17 December 2015, case no. 2012-12, *Philip Morris Asia Limited v. Commonwealth of Australia*, paras 495, as well as 509 and 536 for an application; ICSID, award of 2 March 2015, case no. ARB/10/13, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, para. 212.

[38] See e.g. ICSID, decision on liability of 29 December 2014, case no. ARB/07/31, *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, para. 149.

sented to provide protection to such assets or schemes. By way of illustration, in *Inceysa v. El Salvador*, this conclusion was reached both in connection with international public policy and, in clearer terms, as regards the prohibition of unlawful enrichment: "In conclusion, the Tribunal considers that because Inceysa's investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. Therefore, this Arbitral Tribunal declares itself incompetent to hear the dispute brought before it".[39]

The underpinning rationale is not that there is no "investment" but that, due to its illegality, States cannot have intended to afford it protection, including through the possibility to bring an investment claim before an arbitral tribunal.

The effects of illegality are, however, not always stated with such clarity. A case at the borderline between jurisdiction and admissibility is *World Duty Free v. Kenya*, where the tribunal considered that a contract secured by means of a bribe paid to the then Kenyan President could not be enforced. The tribunal seems to consider that there is no basis for jurisdiction as the contract is not valid, but it states its conclusions on language reminiscent of inadmissibility:

> "In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal".[40]

The stance taken by the tribunal is made complex by the fact that the instrument on which the claimant relied to assert the jurisdiction of the tribunal was the contract secured by corruption, rather than an overarching investment treaty.

A clearer stance regarding the inadmissibility implications of illegal transactions is provided by the decision in *Churchill Mining and Planet Mining v. Indonesia*. In this case, the tribunal reasoned that a claim based on rights that had been secured by fraud or forgery, even if such acts were attributable to the entity that had transferred these rights to the claimant, were inadmissible.[41] Underpinning this conclusion are some case-specific considerations, including the fact that the Claimants had been negligent in inquiring into the processes used by its local partner as well as, quite surprisingly, in presenting some of the forged documents at stake as evidence in the arbitration pro-

[39] See *Inceysa v. El Salvador*, cit., para. 257.

[40] See ICSID, award of 4 October 2006, case no. ARB/00/7, *World Duty Free Company Limited v. Republic of Kenya*, para. 157.

[41] See ICSID, award of 6 December 2016, case no. ARB/12/14, *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, para. 508.

ceedings. Interestingly, the tribunal expressly referred to the palette of effects that may arise from fraudulent conduct:

> "[t]he legal consequences of fraudulent conduct depend to a large extent on the circumstances of each case, which may include the applicable treaty, the seriousness of the fraud, the role of the disputing parties or third parties in relation to the fraud, the nexus between the fraud and the claims, and the time when the fraud was committed. A review of international cases shows that fraudulent conduct can affect the jurisdiction of the tribunal, or the admissibility of (all or some) claims, or the merits of a dispute".[42]

This statement is correct if one sees, as most tribunals, the (il)legality of the investment not as a definitional component but as condition for its (full) protection. At the same time, the tribunal is implying than a finer-grained inquiry is necessary to understand the implications of fraudulent conduct.

The three decisions discussed in the previous paragraphs do not illustrate three stances, but only two, with *World Duty Free v. Kenya* somewhat in the middle to further highlight that there are two main poles of attraction for the solutions offered by tribunals. If a merits dimension is added, a range of new possibilities arises but only provided that the relevant claim falls under the jurisdiction of a tribunal and is admissible. I have discussed some aspects of this question elsewhere.[43] For present purposes, the main point lies in the level of analysis suggested by these cases as one which is not merely that of a rule-by-rule (too broad) or a case-by-case (too narrow) basis but, instead, one that focuses on possible solutions, parallel stances, that serve as poles of attraction for the case law.

IV.2. Indirect shareholder claims

The question of indirect shareholder claims presents some similarities with that of the characterisation of the term investment. Indeed, for a claim brought by a shareholder of a company which is, in turn, a shareholder of a company constituted in the host State, to be possible, the claimant must qualify as a "foreign investor" holding an "investment" under the terms of the applicable treaty. Aside from the questions arising from the term "investment" itself, which I have discussed to some extent earlier, two additional points relate to whether there is a "foreign investor" under the treaty as well as to whether it is a proper claimant. These three questions (investment, foreign investor, admissibility) have offered three different avenues to address the issue of indirect shareholder claims, with diverging solutions within each avenue.

[42] *Ibid*., para. 494.

[43] See J.E. Viñuales, *Investor Diligence in Investment Arbitration: Sources and Arguments*, in *ICSID Review-Foreign Investment Law Journal*, 2017, p. 346 *et seq*.

A convenient way of organising the discussion is to proceed chronologically, starting with the position under general international law as formulated by the ICJ in the *Barcelona Traction* case.[44] The facts of the case are well-known. Belgium brought an action before the ICJ against Spain in an attempt to exercise diplomatic protection of the Belgian shareholders of a Canadian company acting in Spain, for losses sustained by the company. One of the preliminary objections submitted by Spain was that Belgium lacked *jus standi* to bring a claim on behalf of Belgian interests in a Canadian company and, therefore, the claim was inadmissible. The Court framed the question in admissibility terms inquiring whether the losses allegedly suffered by Belgian shareholders were a result of a breach of rights of which such shareholders (rather than the company itself) were the beneficiaries. Because the company had a separate legal personality and the measures challenged affected the company's rights (and not the shareholders' rights, but merely their interests),[45] Belgium had no *jus standi* to bring a claim. There is some controversy as to whether the ICJ chamber in the *ELSI* case abandoned this stance in favour of the admissibility of shareholder claims.[46] But in a more recent decision, the full court confirmed the stance taken in the *Barcelona Traction* case according to which the legal personality of companies means that a company has "rights over its own property, rights which it alone is capable of protecting".[47] But the ICJ also noted that an exception to this rule – allowing the "protection by substitution" of shareholder for the company – can be introduced by an investment treaty.[48]

The discussion of the *Barcelona Traction* case provides the fall back stance against which the investment case law has framed the question of indirect shareholder claims. Two such framings, each allowing for different stances, can be identified. Both dismiss the relevance of the *Barcelona Traction* stance, but on different grounds. On the one hand, a treaty may assimilate a local company controlled by foreign shareholders to a foreign company. Thus, an otherwise local company could bring a claim to protect its own rights as if it were a foreign investor. On the other hand, the definition of investment is often broad enough to include "shares" in local companies. The "rights" – by contrast to mere interests – of which shareholders are direct beneficiaries are thereby broadened in such a way that a shareholder bringing a claim for measures against the local company is exercising its own rights, not protection (of the company) by substitution. In both cases, questions of admissibility are thus converted (sometimes debatably)

[44] International Court of Justice, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), judgment of 15 February 1970, para. 3.

[45] *Ibid*., para. 44.

[46] International Court of Justice, *Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), judgment of 20 July 1989, para. 15.

[47] International Court of Justice, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), preliminary objections, judgment of 24 May 2007, para. 61.

[48] *Ibid*., para. 88.

into questions of jurisdiction because what a tribunal must assess is whether there is an "investment" by a "foreign investor" under the applicable treaty and potentially the ICSID Convention. Thus, whereas the *Barcelona Traction* stance focuses on admissibility, these two other avenues focus on jurisdiction. Up to now, the situation is relatively simple, although it may raise questions such as those discussed in connection with the definition of investment.

The analysis becomes more complex when the shareholders' claim becomes genuinely indirect. The situation then involves at least three layers, namely the shareholders (nationals of State A) of a company incorporated either in a third State (State B) or in the host State (State C), which is itself a shareholder of a company incorporated in host State. The applicable treaty, including the arbitration clause, is between State A and State C. The equation could be much more complex if there are more than three layers of shareholding, different levels of participation (majority or minority), and several applicable treaties. The three avenues identified in the previous paragraphs arise again, but I would like to focus on two of them, namely the question of whether there is an investment (for jurisdictional purposes) or whether the indirect shareholder claim is admissible.

The first question is whether there is an "investment" under the applicable treaty or potentially the ICSID Convention as well. Investment tribunals have taken two stances in this regard. Some tribunals, relying on either specific wording of the applicable treaty or on a broad interpretation of it, have considered that indirectly held shares amount to an investment.[49] This is problematic because it means that the legal personality of the company in State B is being ignored, even if such corporate screen is useful for other purpose such as tax optimisation or other form of corporate structuring. The "suppression" of this corporate layer can rely on the "economic reality" of the transaction, although the ICJ had expressly discarded such a possibility, except in exceptional circumstances, in the *Barcelona Traction* case. The economic reality of the transaction is thus selectively taken into account. It does indeed exist for, e.g. tax purposes, but it does not exist for investment claims purposes or for the purpose of extending the obligations arising from a contract between the host State and the company to the shareholder. Moreover, selectivity is even clearer if one compares the suppression of the intermediate corporate screen with other questions where disregard of formalities would be

[49] On this question see generally D. Bentolila, *Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration*, in *Trade, Law and Development*, 2010, p. 115 *et seq.*, referring to ICSID: decision on jurisdiction of 3 August 2004, case no. ARB/02/8, *Siemens A.G. v. Argentine Republic*, paras 137-142; decision on jurisdiction of 29 June 1999, case no. ARB/98/4, *Wena Hotels Limited v. Arab Republic of Egypt*, paras 45-46; decision on objections to jurisdiction of 11 May 2005, case no. ARB/02/16, *Sempra Energy International v. Argentine Republic*, para. 90/91; decision on objections to jurisdiction, case no. ARB/03/2, *Camuzzi International S.A. v. Argentine Republic*, para. 63; decision of the tribunal on preliminary objections to jurisdiction, case no. ARB/03/10, *Gas Natural SDG, S.A. v. Argentine Republic*, paras 33-35. UNCITRAL Arbitration Rules, award of 3 September 2001, *Lauder v Czech Republic*, para. 77.

much more warranted, such as the artificial distinction between treaty and contract claims, which in economic reality relate to the very same transaction. Whether disregarding the intermediate corporate screen is an explicit (through a focus on the "economic reality" of the transaction) or an implicit step (by inflating the definition of investment so as to turn any interest into a direct right), this solution greatly facilitates treaty shopping, parallel proceedings and potentially double-recovery. However, some tribunals have applied a more rigorous and, in my view, legally accurate test, stating that that shareholders in State A have no rights on the assets of either the intermediate company in State B or C (which includes the shares in the company in State C) or the end company in State C. This was the reason why the tribunal in the *Poštová Banka* case declined jurisdiction *ratione materiae* to hear the claim of the Cyprus investor, itself a shareholder of the Slovak investor, who had identified as its investment the Greek bonds owned by the Slovak investor.[50] Despite their stark difference of approach, the two stances share the fact that they analyse the "indirectness" of the claim through the prism of jurisdiction, specifically whether there is an investment.

A different way of approaching this question is through the prism of admissibility,[51] as the ICJ has done in its case law. The question would then be whether the claimants (shareholders in State A) are the proper party to bring a claim in light of the object of the claim and, more specifically, of whether they hold rights protected under the applicable treaty or mere interests. Depending on the challenged measures and the affected rights, the proper party to bring the claim may be the company in State C (if considered a "foreign investor" under the treaty or simply through domestic remedies) or the intermediate company in State B or C (if a suitable treaty is applicable). In such a case, a claim brought by the shareholders in State A would simply be inadmissible (as was the claim brought by Belgium on behalf of Belgian shareholders in the Barcelona Traction). This stance would have significant implications not only for the limitation of treaty shopping, parallel proceedings, and potentially double-recovery, but also for the proper role of economic reality in investment proceedings. It does not seem acceptable that for purposes of indirect shareholder suits, the economic reality of a transaction is taken into account (thus facilitating access to investment treaty arbitration) but, when it comes to determining whether treaty and contract claims are essentially the same, the eco-

[50] *Poštová banka v. Greece*, cit., paras 228-247. A variation of this approach, also emphasising a less expansive interpretation of the term investment, is provided by ICSID, award of 2 November 2012, case no. ARB/10/12, *Standard Chartered Bank v. United Republic of Tanzania*, paras 257-270. In this case, the tribunal considered that investment requires an active role: "protection of the UK-Tanzania BIT requires an investment made by, not simply held by, an investor [...] it would be unreasonable to read the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities", para. 270.

[51] See ICSID, decision on annulment of 25 September 2007, case no. ARB/01/08, *CMS Gas Transmission Company v. Argentine Republic*, para. 75, as well as paras 89-97.

nomic reality of the transaction is disregarded (thus further facilitating access to investment treaty arbitration and even limiting the impact of a carefully negotiated contract, often required by a tender process).

As in previous sections, let me add that reasonable minds may and have disagreed on such questions, but my point is different, namely that the analytical level at which such questions should be analysed is given by these parallel solutions. These are the silent micro drivers of a system that has come under so much criticism in the last years. And the analysis of these parallel stances must take into account their systemic effects, which are far from negligible. As I will discuss in the next section, the same reasoning is applicable to stances taken by tribunals in connection with the consideration of the merits of a case.

V. (Over-)Reliance on investment treaties

International lawyers working on and writing about international investment law have tended to rely, perhaps too much, on investment treaties, whether bilateral investment treaties (BITs) or investment chapters in free trade agreements (FTAs). International investment agreements (IIAs) certainly play an important role, as they provide the most frequent basis for investment claims. However, they are far from being the only source of the law applicable to foreign investment disputes, which equally encompasses at the very least domestic law, perhaps contractual arrangements, as well as other customary and treaty-based rules of international law.

Over-reliance upon IIAs is partly the result of some confusion between jurisdiction and applicable law. The fact that an arbitration clause may be limited to claims for breach of the relevant IIA does not mean that the only applicable law is that treaty. This should be a truism for any tribunal. Arbitration clauses may be relevant to determine the scope of the law applicable to the dispute, but they are not decisive. Questions of treaty law or State responsibility, which arise from customary international law, or legal aspects on which international law says little, such as corporate structure or intellectual property rights, are regularly addressed in investment disputes. Even when the treaty contains a clause defining the applicable law as "the treaty and other rules of international law", some questions will necessarily have to rely on domestic law. This is, however, not the issue that I would like to address here.[52] Instead, I would like to focus on the relations between treaty and custom in investment disputes in order to highlight, as before, different stances taken in the jurisprudence and some of their implications.

[52] See J.E. Viñuales, *The Sources*, cit., p. 1086 *et seq*.

V.1. Treaty and custom in investment arbitration

As noted earlier, reference to customary law in investment arbitration is not a particularly controversial question.[53] Tribunals routinely make reference to the customary law of treaties, particularly to the rules on treaty interpretation, or to customary rules on State responsibility. This is rather obvious. What is more difficult to map is the exact operation of such references. Over-reliance upon IIAs as *lex specialis* may obscure the many ways in which customary norms can be articulated with provisions in an IIA: *i*) to interpret such provisions; *ii*) as governing norms superseding treaty provisions (most notably because of the hierarchy of peremptory norms, which are of customary nature); and last but absolutely not least *iii*) as governing norms supplementing treaty provisions for questions not addressed by the latter.

Keeping in mind these three forms of interaction may have significant practical implications, as can be shown by reference to the expression of State sovereignty in foreign investment disputes. The third and often neglected form of interaction between treaty and custom is perhaps the only proper avenue for the operation of customary concepts expressing the idea of sovereignty in an actionable manner. This point was emphasised by the tribunal in *AAPL v Sri Lanka*, which is the very decision that recognised arbitration without privity: "[I]t should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or *by direct reference to certain supplementary rules*, whether of international law character or of domestic law nature".[54]

I do not question the possibility that the wording of an IIA may displace or exclude certain customary norms (which are not of peremptory nature), including certain actionable concepts expressing the idea of sovereignty. But that is only the case when the parties have specifically intended to do so and one would expect an investment tribunal to analyse whether and to what extent a specific treaty provision (or a set of them) excludes partly or entirely an otherwise applicable customary norm. A tribunal must not avoid such a necessarily fine-grained analysis by merely stating that it is applying the treaty, because treaties are "not a self-contained closed legal system" and their application requires resort to supplementary norms.

One of the most frequent examples of such supplementary norms is provided by the customary rules on treaty interpretation and application codified in the 1969 Vienna

[53] This section relies on my previous work on the topic. See J.E. Viñuales, *Customary Law in Investment Regulation*, in *Italian Yearbook of International Law*, 2013/2014, p. 23; J.E. Viñuales, *Sovereignty in Foreign Investment Law*, in Z. Douglas, J. Pauwelyn, J.E. Viñuales (eds), *The Foundations of International Investment Law*, Oxford: Oxford University Press, 2014, pp. 317-362.

[54] *AAPL v. Sri Lanka*, cit., para. 21 (emphasis added).

Convention on the Law of Treaties (VCLT), although the supplementing role has a wider scope. As noted by the tribunal in *Accession Mezzanine v. Hungary*:

> "There are a few essential points to be made in this context. First, the interpretation and application of the BIT is governed by international law, as is any treaty, and the expropriation clause is, obviously, a key part of the BIT. Second, it may not be possible to consider the scope and content of the term 'expropriation' in the BIT without considering customary and general principles of international law, as well as any other sources of international law in this area [...] The BIT in this case, as in almost all cases, has no definition of 'expropriation' within its text, nor does it contain guidelines that would assist the Tribunal in determining whether or not there has been a compensable taking of property. Expropriation has been and is now part of international law, and the change from dispute resolution under the system of diplomatic protection to investor-state arbitration has not modified that. It is true that BITs have become the most reliable source of law in this area, as have the awards of ICSID, other investor-state tribunals acting under the UNCITRAL Arbitration Rules, and other modern-day tribunals, such as the Iran-U.S. Claims Tribunal, state practice, and writings of scholars. But that is not inconsistent with the continuing relevance of customary and general principles of international law, at least as to BIT obligations that are silent as to scope and content, as well as any other sources of international law with respect to expropriation".[55]

This quotation reflects the tendency of tribunals to look at BITs, in fact IIAs, as "the most reliable source of law in this area" but, at the same time, it highlights that even for questions that are addressed in IIAs, such as expropriation, reference to customary law may still be necessary for interpretive purposes. Thus, under this stance, even if the IIA applies as *lex specialis*, that does not mean that customary law on that very specific point becomes irrelevant. It may apply together with the treaty norm in order to clarify the contents of such norm.[56]

A fortiori, when the applicable treaty does not govern the question expressly, the supplementary role of custom should be expected to be much greater. The overall im-

[55] See ICSID, decision on respondents objection under arbitration rule 41, para. 5, of 16 January 2013, case no. ARB/12/3, *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezelo v. Hungary*, paras 67-68 (emphasis added).

[56] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, advisory opinion of 8 July 1996, para. 25 ("The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself").

port of a treaty may still be understood as displacing or excluding custom, but one would expect at the very least this reasoning to be sufficiently spelt out in a tribunal's decision, rather than simply assumed. Yet, as I will discuss next in the light of two examples, there is still significant room for improvement in this area. Tribunals have indeed tended to assume that treaties displace the customary concepts expressing sovereignty or, in other words, even for matters not addressed in the treaty, they have disregarded the possible combined application of treaty and custom (which, as discussed earlier, other tribunals have confidently asserted for customary norms that specifically address the same matter as the applicable treaty provision). Understanding the supplementary role of custom, and its misapplication in the investment context, is important in my view not only because IIAs rarely address the extent of a State's regulatory powers explicitly but also because, when they do so (e.g. through reservations on public emergency or environmental regulatory powers) this is not to be considered as supplanting the customary norms expressing State sovereignty.

V.2. The police powers doctrine

Different understandings of the relations between treaty and custom, with the attendant consequences for the expression of sovereignty in foreign investment disputes, can be found at the roots of parallel stances on the operation of the police powers doctrine. This concept is widely recognised in international (investment) law and it essentially emphasises the duty and power of States to regulate for the public good, even if that has adverse economic consequences for individuals and companies. Given its relevance for the disputes that arise in connection with foreign investment transactions, it has been frequently applied in investment proceedings, sometimes to dispose of a claim.[57] The customary basis of this concept is unanimously recognised in the body of cases that I have just referred to, either explicitly or implicitly (e.g. through a reference to "general international law"). One frequently quoted precedent is the award of the tri-

[57] See e.g. UNCITRAL Arbitration Proceedings, partial award of 13 September 2001, *CME Czech Republic B.V. v. Czech Republic*, para. 603; ICSID, award of 16 December 2002, case no. ARB(AF)/99/1, *Marvin Roy Feldman Karpa v. United Mexican States*, paras 103 and 112; UNCITRAL Arbitration Rules, partial award of 17 March 2006, *Saluka Investments B.V. v. The Czech Republic*, paras 253-265; UNCITRAL Arbitration Rules, award of 24 December 2007, *BG Group Plc. v. Republic of Argentina*, para. 268; UNCITRAL Arbitration Rules, decision on liability of 30 July 2010, *AWG Group Ltd. v. Argentine Republic*, paras 149-150. ICSID: decision on liability of 27 December 2010, case no. ARB/04/01, *Total S.A. v. Argentine Republic*, para. 197; ICSID, award of 7 July 2011, case no. ARB/07/6, *Tza Yap Shum v. Republic of Peru*, para. 145; ICSID, award of 31 October 2011, case no. ARB/03/15, *El Paso Energy International Company v. Argentine Republic*, paras 236-241, as well as para. 243; Permanent Court of Arbitration, award (redacted) of 14 February 2012, *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, paras 569-570, as well as para. 584; ICSID, decision on jurisdiction and liability of 6 June 2012, case no. ARB/04/4, *SAUR International S.A. v. Argentine Republic*, paras 396-401; ICSID, award of 19 December 2013, case no. ARB/10/23, *TECO Guatemala Holdings, LLC v. Republic of* Guatemala, para. 490-493.

bunal in *Saluka v. Czech Republic*, where it is stated that: "the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police powers of States' forms part of customary law today".[58]

This case is of some interest for my discussion not only because it is an oft-cited *locus* of the police powers doctrine, which was effectively applied *in casu*,[59] but also because it illustrates one stance on the interaction between treaty and custom as it relates to the operation of the police powers doctrine. Indeed, the tribunal's reasoning implies that the customary norm could only be applied if it has been incorporated into the applicable treaty:

> "The Tribunal acknowledges that Article 5 of the Treaty [an expropriation clause] in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 *imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order*".[60]

Taken out of context, this statement would be questionable. The application of the police powers doctrine, which is a customary norm, does not depend upon a clause incorporating it into the treaty, unless the treaty otherwise excludes the application of relevant customary law. Indeed, for a directly relevant and widely recognised customary norm not to apply, there must be a *lex specialis* clearly excluding its application. However, the tribunal barely addressed the *lex specialis* question. Moreover, a relevant customary norm may continue to apply to shape the content of the applicable treaty provision, as in the *Accession Mezzanine v. Hungary* case. This is what the *Saluka* tribunal suggested – thereby clarifying its reasoning – when it referred, in the same paragraph, to Art. 31, para. 3, let. c), VCLT: "[i]n interpreting a treaty, account has to be taken of 'any relevant rules of international law applicable in the relations between the parties' – a requirement which the International Court of Justice ('ICJ') has held *includes relevant rules of general customary international law*".[61]

This statement is certainly correct, but it misses four important points, namely *i*) that customary law does not require "incorporation" to be taken into account, *ii*) that it may be taken into account not only for "interpretation" purposes but also *iii*) to govern a situation which is not specifically addressed in the treaty and, above all, *iv*) that there are no legal grounds to assume – without further and specific reasoning to this effect – that a treaty not addressing a given question nevertheless acts as *lex specialis* – and in

[58] *Saluka v. Czech Republic*, cit., para. 262.
[59] *Ibid.*, para. 265.
[60] *Ibid.*, para. 254 (emphasis added).
[61] *Ibid.* (emphasis added).

the very specific form of exclusionary *lex specialis* – with respect to a customary norm that specifically addresses such a question.

This implicit stance on the relations between custom and treaty is far from innocuous because the police powers doctrine is one of the main legal expressions of sovereignty relevant for investment disputes. The stance in *Saluka* on this point can be contrasted with the position of the tribunal in *Chemtura v. Canada*. Relying on the recognition of the doctrine in *Saluka*, the tribunal in *Chemtura* simply stated that the norm applied with the result that the Canadian measure challenged by the investor was a valid exercise of Canada's police powers.[62] There is no discussion, in this context, of whether the applicable treaty incorporates the customary norm or not. The customary norm was deemed applicable and it effectively provided a ground (in addition to the absence of a substantial deprivation) to reject the expropriation claim brought by the investor.

As in previous sections, my purpose in discussing these cases is to emphasise that the analysis should be conducted at the level of these stances or positions as well as focus on their implications for the broader context of international investment proceedings. One major implication is the room left to the customary expression of sovereignty by sometimes implicit and uncritical understandings of the role of treaties or, more specifically, by an over-reliance upon them to the detriment of customary law. In the next section, I will provide another example of this difficulty by reference to two opposing stances followed by tribunals with respect to operation of countermeasures as a circumstance precluding wrongfulness.

V.3. Countermeasures

The availability and operation of countermeasures as a circumstance precluding wrongfulness recognised in customary international law provides another example of the phenomenon illustrated in the previous section. Investment tribunals have taken different stances on this question, with potentially profound implications for international investment law and, more generally, for the SIP triangle. In at least three cases,[63] the respondent State invoked the doctrine of countermeasures, as codified in Art. 22 of the

[62] See e.g. UNCITRAL Arbitration Rules, award of 2 August 2010, *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, para. 266 ("[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation").

[63] See ICSID: award of 21 November 2007, case no. ARB(AF)/04/5, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, paras 116-180; decision on responsibility of 15 January 2008, case no. ARB(AF)/04/1, *Corn Products International Inc. v. United Mexican States,* paras 145-149 as well as paras 153-192; award of 18 September 2009, case no. ARB(AF)/05/2, *Cargill, Incorporated v. United Mexican States*, paras 379-430.

ILC Articles on State Responsibility,[64] to justify a breach of an IIA (chapter 11 of the 1994 North American Free Trade Agreement, hereinafter NAFTA). The three tribunals recognised the customary grounding of the doctrine,[65] but they followed two parallel stances on its applicability, relying in this regard on different understandings of investment protection standards.

In *ADM v. Mexico*, the claimant argued that a tax on certain soft drinks and syrups was in breach of chapter 11 of the NAFTA. As part of its defence, Mexico argued that the measure was a lawful countermeasure arising from a prior breach by the United States, the claimant's home State. The tribunal analysed the relations between treaty and custom in the specific context of whether the NAFTA was a *lex specialis* excluding the customary doctrine of countermeasures. It concluded that such was not the case and, as a result, the doctrine remained applicable:

> "Chapter Eleven neither provides nor specifically prohibits the use of countermeasures. Therefore, the question of whether the countermeasures defence is available to the Respondent is not a question of *lex specialis*, but of customary international law [.] Under customary international law, '…the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure….' (Article 22 of the ILC Articles). Countermeasures may constitute a valid defence against a breach of Chapter Eleven insofar as the Respondent State proves that the measure in question meets each of the conditions required by customary international law, as applied to the facts of the case [.] The only instance in which the NAFTA refers to countermeasures is under Article 2019. Under this provision, non-compliance with a decision rendered in a Chapter Twenty State-to-State arbitration can lead to penalties. In the event of such non-compliance, the complaining State can retaliate by taking countermeasures suspending tariff concessions or other obligations under the treaty. *Outside Article 2019, the NAFTA makes no express provision for countermeasures. Accordingly, the default regime under customary international law applies to the present situation* [.] *The Tribunal therefore agrees with Respondent that countermeasures may serve as a defence under a Chapter Eleven case, as this is a matter not specifically addressed in Chapter Eleven, but valid under customary international law if certain conditions are met*".[66]

The reasoning of the tribunal provides a clear illustration of the supplementary role of customary law with respect to matters that are not specifically regulated by the applicable treaty. Significantly, the tribunal noted that in the context of Art. 2019, the NAFTA contained a *lex specialis* regime that displaced the customary one. But no such regime was

[64] International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/10.

[65] *ADM v. Mexico*, cit., paras 125-126; *Corn Products v. Mexico*, cit., para. 145; *Cargill v. Mexico*, cit., para. 420.

[66] *ADM v. Mexico*, cit., paras 120-123 (emphasis added).

organised by chapter 11 of the NAFTA and, therefore, there was no basis to exclude the default regime of customary international law. *In casu*, the tribunal did not consider that the requirements of the customary doctrine of countermeasures were met. But for present purposes, the main point is that this doctrine was effectively applicable.

This position contrasts with the stance taken by two other tribunals in disputes with similar factual circumstances. In these disputes, the doctrine of countermeasures was deemed to be applicable only to inter-State relations. As chapter 11 of the NAFTA organises a regime of investment protection standards specifically governing the relations between private parties and host States, countermeasures had no role to play in this context. As noted by the tribunal in *Corn Products v. Mexico*:

> "The Tribunal has concluded, however, that the doctrine of countermeasures, devised in the context of relations between States, is not applicable to claims under Chapter XI of the NAFTA. Those claims are brought by investors, not by States. A central purpose of Chapter XI of the NAFTA was to remove such claims from the inter-State plane and to ensure that investors could assert rights directly against a host State. *The Tribunal considers that, in the context of such a claim, there is no room for a defence based upon the alleged wrongdoing not of the claimant but of its State of nationality, which is not a party to the proceedings* [.] *The Tribunal therefore concludes that the investor, such as CPI, has rights of its own under Chapter XI of the NAFTA. As such, it is a third party in any dispute between its own State and another NAFTA Party and a countermeasure taken by that other State against the State of nationality of the investor cannot deprive that investor of its rights. To revert to the two different examples given by the ILC in its Commentary on Article 49(1), this is a case involving the rights of a third party and not merely its interests*. Mexico owed obligations to CPI under Chapter XI of NAFTA which were separate from the obligations it owed to the United States under the NAFTA as a whole. *Even if the doctrine of countermeasures could operate to preclude the wrongfulness of the HFCS tax vis-à-vis the United States (and, for the reasons given below, the Tribunal makes no comment on that question), they cannot do so vis-à-vis CPI".*[67]

The reason given by the tribunal is not, at least explicitly, based on the *lex specialis* principle but on the general inapplicability of the doctrine of countermeasures to relations between private parties and States. But the implications of such a position are far-reaching and, in my view, very questionable. Firstly, it amounts in practice to consider that chapter 11 is a more general type of *lex specialis*, insulating the full set of relations between investors and host States from at least part of general international law.[68] Second-

[67] *Corn Products v. Mexico*, cit., paras 161 and 176 (emphasis added).

[68] In the other decision relating to the same facts, the arbitration tribunal stated that the doctrine of countermeasures could still be opposed to the investor's home State if it sought to exercise diplomatic protection. This is correct but it amounts to considering the entire set of investor-home State relations as a separate field where inter-State customary law would be of selective application. See *Cargill v. Mexico*, cit., para. 424 ("The Tribunal agrees with Respondent that if a State, through diplomatic protection, were to espouse the claims of its nationals damaged by a legitimate countermeasure, then that countermeas-

ly, the tribunal is assuming that investors have rights of their own under an investment treaty. Yet, investment treaties have been the primary example of a synallagmatic treaty, whereby the advantages that one State confers to the investors of another State are contingent on the latter's granting similar advantages to the investors of the former. This point was made as early as in 1970 in the famous paragraph 33 of the *Barcelona Traction* case and reiterated by the Inter-American Court of Human Rights in 2006.[69] Thirdly, the tribunal further states that the "rights" of a third party (the investor) are at stake, not merely its interests. To understand the implications of using this terminology, one must recall our previous discussion of the considerable expansion that such "rights" have received in a strand of the investment jurisprudence relating to shareholder claims.

Stance by stance, whether deliberately or – perhaps more likely – unconsciously, the investment case law has pushed the protection of investors to the very limits of what the system's architecture could ever permit. This point is critical. The balloon has been inflated by the accumulation of expansive – and unconsidered – stances up to a close-to-bursting point. Critique that addresses legitimacy issues without identifying specifically the mechanisms that have to be adjusted to defuse the potential crisis of the system is useful but faces a major problem: what is to be done? This is, in my view, why the level of analysis has to be adjusted to look at stances, rather than mere cases or rules, and their implications. Stances in the investment case law are important (perhaps the most important) micro drivers of the overall dynamics of the system, with the attendant broader implications for the protection of other interests and values.

ure would preclude the wrongfulness of the act that otherwise would have entailed State responsibility and the claims would be denied. In the case of diplomatic espousal, however, the claim is owned by the espousing State and the espousing State is the named party. Moreover, the operative paragraph of the resulting award reciting the decision of the tribunal names the espousing State, and not the national".)

[69] See e.g. *Barcelona Traction,* cit., para. 33 ("When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and *those arising vis-à-vis another State in the field of diplomatic protection*" (emphasis added); Inter-American Court of Human Rights, judgment of 29 March 2006, Series C no. 146, *Sawhoyamaxa indigenous community c. Paraguay*, paras 136, 137 and 140 ("The State has put forth three arguments: [...] 3) that the owner's right 'is protected under a bilateral agreement between Paraguay and Germany[,] which [...] has become part of the law of the land' [...] Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a 'public purpose or interest', which could justify land restitution to indigenous people. Moreover, the Court considers that *the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States*", emphasis added).

VI. Concluding observations

To conclude these lectures, I would like to recall the main point that I have made by reference to some illustrations derived from the investment case law, namely that, as legal scholars, we should focus our efforts on identifying the parallel stances or converging principles that arise from the jurisprudence as well as on understanding, to the best of our abilities, their broader implications. This point has implications for legal scholarship, teaching and practice.

As legal scholars, we carry the main responsibility for looking at the wider body of case law, from investment tribunals but also from other international *fora*, and distilling the essential stances that arise from it. It is only once these stances have been identified that their legal and policy implications can be explored, both for other issues within the investment case law (e.g. the role of "economic reality" which is used, on the one hand, to disregard corporate structures and facilitate indirect shareholder claims while, on the other hand, it is deemed of limited relevance when it comes to distinguishing treaty and contract claims) and for the wider SIP triangle (e.g. the laws deemed to be relevant to assess the initial legality of an investment or investor diligence). If legal scholars do not perform this task, it is highly unlikely that practitioners will. By their very profession, they are expected to argue a specific stance, not to seek objectively what is the state of the law. As for arbitrators, they may to some extent identify stances, but their position is difficult because their role is not one of scholarship, despite the frequent *obiter dicta* one finds in the case law, but one of deciding specific disputes, which are much more influenced by factual and intra-tribunal considerations.

In turn, it is only through the distillation effort conducted by legal scholars that the teaching of international investment law will be made more sensitive to the impact of stances as micro drivers of the system as well as to their implications. Rather than merely discussing a limited set of representative cases advancing different solutions, our teaching could greatly benefit from understanding both the overall import of the case law and its doctrinal and policy implications. It is only by making future academics and practitioners aware of *i*) these stances, *ii*) their impact as micro drivers of the system and *iii*) their implications for other values and interests, that excessive solutions will be corrected or abandoned and the pendulum will swing towards the centre, rather than towards the opposite extreme.

Last but not least, as an arbitrator and practising lawyer, I am aware of the many constraints involved in deciding and arguing a case, but I nevertheless believe that arbitrators should make an effort to consider more critically and fully the implications of the stances they take on specific issues. What may be appropriate in the specific circumstances of one case may also give rise to a range of unintended consequences capable of driving the system off the road or of greatly undermining its legitimacy. Such implications should be anticipated as much as possible and considered in the reasoning leading to a given stance. The stance may remain the same, but more nuance in the reason-

ing may serve as a safeguard against future incoherence or abuse. For such implications to be adequately taken into account by arbitrators, the role of legal scholars is, again, of particular importance. The impact of scholarship may be subject to a diffuse, indirect and perhaps frustrating form of causality, affecting the system through distillation, turned into teaching, turned into increasingly "common" sense, and ultimately on "majority views". But this is not new. As in many other areas, sometimes we must be modest in order to be ambitious.

1. *The Present and Future of* Jus Cogens, in *Gaetano Morelli Lectures Series* Vol. 1 – 2015, Rome: Sapienza Università Editrice, 2015 (www.editricesapienza.it).

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