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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Источники международного права в международных судах и трибуналах

Туллио Тревес

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International Courts and Tribunals and the Sources of International Law

Tullio Treves

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Летняя Школа по международному публичному праву 2018 года
Summer School on Public International Law of 2018

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа – проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

Первая Летняя Школа состоялась в 2018 году. Специальные курсы были посвящены источникам международного права. Их прочитали Сэр Майкл Вуд («Обычное международное право»), Туллио Тревес («Источники международного права в международных судах и трибуналах»), Марсело Коэн («Право договоров»), Бахтияр Тузмухамедов («Международное право в конституционной юрисдикции»), Фрэнк Лэтти («Общие принципы права»). Общий курс международного публичного права прочёл Рейн Мюллерсон.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного Совета Летней Школы – Р.А. Колодкину, Р.А. Мюллерсону, С.М.Пунжину, Л.А.Скотникову, Б.Р.Тузмухамедову – и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

International and Comparative Law Research Center continues to publish the lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning international law, working or aspiring to work in the area, with an opportunity to obtain advanced knowledge of the subject and encouraging participants engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of a general and special courses joined under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The first Summer School was held in 2018. The Special Courses were devoted to the topic "Sources of International Law". The courses were delivered by Sir Michael Wood ("Customary International Law"), Tullio Treves ("International Courts and Tribunals and the Sources of International Law"), Marcelo Kohen ("Law of Treaties"), Bakhtiyar Tuzmukhamedov ("Sources of International Law in Constitutional Jurisdiction"), and Franck Latty ("General Principles of Law"). The General Course on public international law was delivered by Rein Müllerson.

International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Body – Roman Kolodkin, Rein Müllerson, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov, as well as others who helped implement the project, including Gazprombank (JSC) for their financial support for the project.

Туллио Тревес

Почётный профессор Миланского университета. Был судьёй Международного трибунала по морскому праву, президентом его Палаты по спорам, касающимся морского дна, юридическим советником различных государств в международных судах и трибуналах. Консультант ряда правительств и международных организаций. Член Кураториума Гаагской Академии международного права с 2010 года. Преподавал в Академии. Член многих научных обществ, в том числе Института международного права *(Institut de Droit International)*. Автор многочисленных книг и статей по международному праву, в том числе по международным судам и трибуналам.

Tullio Treves

Professor Emeritus of the State University of Milano. He was a judge of the International Tribunal for the Law of the Sea and President of its Seabed Disputes Chamber. He was a counsel of different states in international courts and tribunals. Consultant to various governments and international organizations. Member of the Curatorium of the Hague Academy of International Law since 2010. He taught at the Academy. Member of many learned societies, including *l'Institut de Droit International*. Author of numerous books and articles on international law, including on the international courts and tribunals.

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INTRODUCTION

What are international courts and tribunals?

There is no legal difference between international 'courts' and international 'tribunals'. The legal instruments establishing them may use either term. While the term 'court' conveys a notion of an entity more important than a 'tribunal', this has no legal consequences.

In defining the meaning of 'international courts and tribunals'[1] it seems expedient to start by observing that in this expression the term 'international' has different meanings. So we may say that the instruments establishing these courts and tribunals must be international; that their composition must be international (in the sense that the persons sitting in them must be of different nationalities); that the disputes which are submitted to them must be international; that the applicable law must be international law.

The nature of the parties to the disputes is also relevant. Parties may be States, States and International Organizations, International Organizations, States and private persons.

All these elements are present in various combinations in the entities we call 'international courts and tribunals'. These combinations permit to identify a broad and a narrow notion. The broad notion includes bodies, established before the dispute arises, composed of individuals of different nationalities whose function is to settle disputes by a judgment binding for the parties, which are established by international instruments (treaties, binding resolutions of an international organization) and which apply international law.

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[1] Overviews are in R. Mackenzie, C. P. R. Romano, Y. Shany, P. Sands (eds.), *Manual on International Courts and Tribunals,* 2d ed. (OUP Oxford, 2010), and in K. Alter, *The multiplication of international courts and tribunals after the end of the Cold War,* in C.P. R. Romano, K. J. Alter, Y. Shany, *The Oxford Handbook of International Adjudication* (OUP, Oxford, 2014, 63), as well as the essays in Part II of the same book, entitled 'Orders and Families of International Adjudicative Bodies'.

The narrow notion refers to judicial bodies which, while having all the just mentioned characteristics, have as their specific function the settlement of international disputes, namely disputes between subjects of international law, normally State to State disputes. Relevant distinctions are that between courts and tribunals with a general jurisdiction, and specialized courts and tribunals, and that between universal (potentially open to all States) courts and tribunals and regional ones. The narrow notion includes the International Court of Justice, the only international court with jurisdiction on any kind of dispute between States, a specialized judicial body, the International Tribunal for the Law of the Sea, and also the dispute-settlement mechanism of the WTO. The latter consists, at a lower level, of 'panels' which may be assimilated to arbitral tribunals, and, at an appellate level, of the Appellate Body, which may be assimilated to an international court or tribunal in the narrow meaning of the term. Also Human Rights courts, in the rare cases in which they are called to adjudicate disputes between States, belong, at a regional level, to this category.

Comprised in the broad notion of international courts and tribunals are all adjudicating bodies before which individuals may be parties: Human Rights Courts (including Commissions) when discussing claims by individuals against States, the ad hoc International Criminal Tribunals and the International Criminal Court, the International Sea-bed disputes Chamber of the International Tribunal for the Law of the Sea, when a case involving individuals and other domestic-based entities is submitted to it.

Various phenomena which are certainly interesting in the perspective of the expansion of the law of the settlement of disputes lie, at different distances from the nucleus, at the periphery of whatwe may call the international courts and tribunals nebula.

These include, firstly, international claims commissions.[2] These are bodies set up by international treaties after crises and violence

[2] D.D. Caron, 'International Claims and Compensation Bodies', in C.P. Romano, K. Alter., Y. Shany (eds.), *Oxford Handbook of international Adjudication* (OUP, Oxford, 2014, 279); L. Brilmayer, C. Giorgetti, L. Charlton, 'International Claims Commissions' (Elgar, Celthenham, 2017).

with a definite mandate of providing for reparation of damages of a certain origin. The Iran-USA Tribunal, the UN Compensation Commission and the Eritrea-Ethiopia Claims Commission, are the principal recent examples. These bodies perform judicial functions exercised on the basis of judicial-like procedures. And they have compulsory jurisdiction and adopt binding decisions. Being structured and pre-established arbitration tribunals, they are at the borderline between international tribunals and arbitral tribunals.

Secondly, we may mention the so-called 'mixed' or 'hybrid' international criminal tribunals.[3] These are tribunals established on the basis of an agreement between a State and the United Nations and, to different degrees, are a part of the judicial structure of the State. They include national and internationally designated judges and follow an internationally agreed procedure. While the International Tribunal for Sierra Leone, notwithstanding the presence of local judges on the bench, has stated that it may be assimilated to an international tribunal,[4] this seems more difficult for the Special Chambers for Cambodia which, notwithstanding the presence on the bench of internationally designated judges, is clearly rooted in the domestic legal system.

Thirdly, the so-called 'compliance' or 'non-compliance' mechanisms set up in the framework of multilateral environmental agreements may also be mentioned. These are non-contentious cooperative procedures aimed at preventing disputes from arising, and at helping States parties which do not comply with certain provisions to go back to compliance. Although certain aspects – more or less important depending of the procedure – are similar to judicial

[3] C.P. Romano, A. Nollkaemper, J. E. Kleffner (eds.), 'Internationalized Criminal Courts' (OUP, Oxford, 2004); E. Cimiotta, *I tribunali penali misti* (Cedam, Padova, 2009); C. Ragni, *I tribunali penali internazionalizzati* (Giuffré, Milano, 2012).

[4] SCSL (Appellate Chamber), *Prosecutor* v. *Charles Ghanakay Taylor*, case Nr. SCSL 2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, available at www.rscsl.org, paras. 37-42.

procedures, they undoubtedly lie out of the notion of international courts and tribunals.[5]

A fourth example may be the International Civil Aviation Organization (ICAO) Council when called to settle disputes between member States concerning the application of the Chicago Convention on Air Navigation.[6] While the disputes considered are undoubtedly international, and so is the applicable law, it is difficult to consider the Council an international court or tribunal. The reason lies in the composition of the adjudicating body, which is a political organ composed of State representatives not meeting requirements of independence and of competence in legal matters. However, procedures before the ICAO Council have a linkage to a judicial procedure, as decisions of the ICAO Council may be appealed to the International Court of Justice.

For our purposes we will include in the notion of 'international courts and tribunals' also arbitral tribunals when competent to settle State-to State disputes, and also when competent to settle investor- States disputes. They lack the element of permanence which characterizes international courts and tribunals in general. They are, however, international in their composition and based on international agreements. Especially, they apply international law, so that their relevance from the point of view of the sources of international law is certain.

What are the sources of international law?

According to Article 38 of ICJ Statute, often referred to as a catalogue of the sources of international law:

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[5] T. Treves et al (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague, TMC Asser Press, 2009); in particular, T. Treves, 'The Settlement of Disputes and Non-Compliance Procedures' at pp. 499-518.

[6] *Convention on International Civil Aviation*, Chicago, 7 December 1944 (ICAO Publication Nr.7300/9 of 2006), art. 84.

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, 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;
d. subject to the provisions of Article 59, **judicial decisions** and the **teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.[7]

In recent times, binding rules of international law, the establishment and value of which is based on treaties, have become very important:

- Security Council resolutions under Chapter VII UN Charter, including the so-called 'legislative' resolutions;

- decisions of conferences of States parties to environmental and other treaties;

- at a regional level, UE regulations and directives.

Moreover, 'soft law' rules must be considered. They are not treaties, not customary, not binding rules. Notwithstanding this, they are relevant and require interpretation. They are susceptible to 'hardening'.

A basic distinction must be drawn between: a) the jurisprudence of international courts and tribunals as sources of international law and b) the approach of the jurisprudence of international courts and tribunals to the doctrine of the sources of international law.

[7] Emphasis supplied.

PART I:

The jurisprudence of international courts and tribunals as sources of international law

1. Article 38(1)(d) of the Statute indicates 'judicial decisions' only as 'subsidiary means for the determination of rules of law'.[8] Their importance is, however, far greater.

There is no rule of stare decisis for decisions of international courts and tribunals. Judicial and arbitral decisions are binding only for the parties.

The authority of previous decisions is, however, great.[9] Courts and tribunals tend to rely on their prior judgments, and States and pleaders expect them to do so.

Permanent judicial bodies, and in particular the ICJ, are reluctant to deviate from their previous decisions. Already in 1927 the Permanent Court of International Justice stated in the Mavrommatis case, that it had:

> '...no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound'.[10]

More recently, in the *Application of the Convention for the Prevention and Repression of the Crime of Genocide (Croatia* v. *Serbia*)

[8] This characterization is confirmed in Conclusion 13 adopted on first reading by the International Law Commission in 2016.
[9] V. Roeben, *Le précédent dans la jurisprudence de la Cour internationale*, German YB Int. Law, vol. 32 (1989), 383; M. Shahabuddeen, 'Precedent in the World Court' (CUP, Cambridge, 1996); A. von Bogdandy, I. Ventzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', in C. Romano, K. J. Alter, Y. Shany, *The Oxford Handbook of International Law*, Oxford (Oxford University Press, 2014), p. 503.
[10] *Readaptation of the Mavrommatis Jerusalem concessions* (Jurisdiction), Judgment of 10 October 1927, PCIJ, Series A, No 11, 18.

case, the Court stated twice, in 2008 and in 2015, that:

> '[i]n general the Court does not choose to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions …unless it finds very particular reasons to do so'.[11]

This confirms that there is good reason to expect that the meanings ascertained, and the detail added, by a judgment will be confirmed in future judgments and thus can contribute to the deepening of international law.

The WTO Appellate Body has stated that its reports

> '…create legitimate expectations among WTO members and, therefore, should be taken into account where they are relevant to any dispute'.[12]

A question that could be raised is whether the pronouncements on questions of international law, including general questions on interpretation and responsibility, set out in the hundreds of arbitral awards based on investment protection treaties have the same authority than those of courts and tribunals deciding State to State disputes.

2. The ICJ has insisted that its role is to ascertain the existence of international law rules, not to create them. In the Fisheries jurisdiction judgments of 1974 it stressed that:

> '…the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down'.[13]

[11] *Judgment on Preliminary Objections of 18 November 2008*, ICJ Reports 2008, p. 418, at para. 104, *Judgment of 3 February 2015*, ICJ Reports 2015, para. 125.
[12] *United States – Zeroing in Anti-Dumping Measures Involving Products from* Korea, WT/DS402/R, Appellate Body Report of 18 January 2011, para. 7.6. See the observations of von Bogdandy and Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', in C. Romano, K.J. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), 503 at 509.
[13] *Judgments of 2 February 1974*, ICJ Reports 1974, p. 3, para. 53 at 24-25.

In its advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, although with its usual caution, the Court stated, however, the terms of the broader task it considers it has to perform. In rejecting the argument that to answer the question submitted to, it would be tantamount to engage in legislative activity, the Court, while underlining that that 'it states the existing law and does not legislate', stressed that:

> '...this is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend'.[14]

What the Court does, or, at least, is ready to admit it does, to contribute to the development of international unwritten law may be encompassed under the rubrics of specifying the scope of the law and of taking note of its general trend. In fact, the role performed by the ICJ often goes beyond the mere statement of existing customary law. By stating what is implied in existing rules and extracting general principles from such rules, the ICJ has developed important chapters of international law, such as the law of delimitation of maritime areas and the law of effective nationality, and added density to many other areas of the law.[15] In doing so the Court deploys a relevant amount of creativity.

Ad hoc criminal tribunals were set up with the intention clearly expressed by the UN Secretary General that they would not 'legislate'. However, it is well known that through their view of customary

[14] ICJ Reports 1996, p. 226, para. 18. As regards the International Criminal Tribunal for Former Yugoslavia, C. Greenwood, 'The Development of International Law by the International Criminal Tribunal for Former Yugoslavia' (Max Planck YB UN Law, vol. 2, 1998), 97 at 111.

[15] A. von Bogdandy and I. Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', in C. Romano, K.J. Alter, Y. Shany, *The Oxford Handbook of International Adjudication* (Oxford U. Press, 2014), 503; at 504 they speak of the 'international adjudication's significant role in "thickening" at least some fields and questions of international law'; at 512-516 they state that in the fields of human rights, international criminal law and international economic law, specialized courts have 'played an active role' in shaping the relevant conventions.

international law (see below) they creatively gave the content to international criminal law.[16]

Moreover, international courts and tribunals can assess the existence and contents of customary and other non-written rules, as well as interpret written rules, on the basis of an unparalleled amount of materials, of which they dispose because of the high technical quality of the judges, the Registries, and counsel and advocates as well as of the detailed nature of written and oral pleadings, through which States parties to the dispute present, with the help of experienced counsel, the relevant materials, very often unearthed from archives for the purpose of the case.

[16] B. Bonafé, 'Il diritto non scritto nel sistema della Corte Penale Internazionale', in P: Palchetti (ed.), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo* (Editoriale Scientifica, Napoli, 2016), pp. 161-185.

PART II:

The approach of the jurisprudence of international courts and tribunals to the doctrine of the sources of international law

The ICJ and other tribunals and customary law

1. The judgments of the PCIJ and the ICJ have been constant in stating that a customary rule requires the two elements – of *opinio juris* and of *diuturnitas* (settled practice) – the presence of which is necessary according to most, although not all, scholars and is endorsed by the ILC Draft Articles.

Already in 1929, in the S.S. Lotus case, the PCIJ stated that international law is based on the will of States expressed in conventions or in 'usages generally accepted as expressing principles of law'.[17] The ICJ has developed the two-element theory of customary law especially in the North Sea Continental Shelf judgments, where it states that actions by States

> '...not only must ... amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation'.[18]

Similarly, in the case concerning *Military and paramilitary activities in and against Nicaragua, merits*, the Court stated that:

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[17] PCIJ, Series A/10, p. 18.

[18] Judgment of 20 February 1969, *Federal Republic of Germany/Denmark* and *Federal Republic of Germany/Netherlands*, ICJ Reports 1969, p. 3, at para. 77.

'…for a new customary rule to be formed not only must the acts concerned "amount to settled practice" but they must be accompanied by the *opinio juris sive necessitates*'.[19]

In the *Gulf of Maine* judgment, the Court speaks of:

'…customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas'.[20]

The Court confirmed this approach in the 2012 Judgment in the Germany v. Italy case. It stated that:

'…the existence of a rule of customary international law requires that there be a "settled practice" together with *opinio juris*…'.[21]

2. The Hague Court has not been entirely consistent or clear as to the voluntary or non-voluntary character of international customary law. In the Lotus judgment, while there are indications, such as the passage quoted above,[22] that the 'will of States' is decisive, there are also other passages using language such as 'being conscious of having a duty' or stating that States 'recognized themselves as being obliged'.[23] In the *North Sea Continental Shelf* and in the *Gulf of Maine* judgments the references to the *opinio juris* seem to indicate that what is referred to is more 'belief' than 'consent' or 'will'.

The ICJ has not always followed its declarations of principle. It does not engage in every case in the search, on the basis of international practice, of the proof of the existence of the objective and of the subjective elements of customary rules. For instance,

[19] Judgment of 17 June 1986, *Nicaragua /the United States of America*, ICJ Reports 1986, p. 14, at para. 207.
[20] Judgment of 12 October 1994, *Canada/United States of America*, ICJ Reports 1984, p. 246, at para. 111.
[21] Jurisdictional Immunities of the State (*Germany* v. *Italy*: Greece intervening), *Judgment 2 February 2012*, ICJ Reports, 2012, p. 99, para. 55.
[22] PCIJ, Series A/10 p.18.
[23] *Ibid.,* p. 28.

in the *Nicaragua Judgment on the Merits*, the Court considers as applicable the minimum rules for armed conflicts set out in common Article 3 of the Geneva Conventions of 12 August 1949 as corresponding to 'elementary considerations of humanity',[24] a concept already resorted to in the *Corfu Channel Merits* judgment.[25] In the judgment on the *Frontier Dispute* between Burkina Faso and Mali, the Court bases its view that the *uti possidetis* principle is 'firmly established' and 'general' on the argument that 'it is logically connected with the phenomenon of the obtaining of independence'.[26] In the 2005 judgment on *Armed activities on the territory of the Congo*, the Court states the existence of a number of customary international law rules in the field of humanitarian law supporting such statement with the fact that they are set out in the 1907 Hague regulations.[27] In the same judgment, among other statements of the customary character of certain rules not based on search for practice and *opinio juris*,[28] the Court affirms that the 'principle of permanent sovereignty over natural resources' is 'a principle of customary international law' by referring only to three resolutions (not unanimously adopted) of the UN General Assembly, and notwithstanding the fact that in the case under consideration such affirmation was not necessary, because the principle was held not to be applicable.[29] In the judgment on *the arrest warrant of 11 April 2000*, the Court stated that it had reviewed State practice, without, however, giving examples.[30] This drew criticism in dissenting and≈separate opinions.[31]

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[24] ICJ Reports 1986, pp. 112, 114, at paras. 215 and 218.
[25] Judgment of 9 April 1949, *United Kingdom* v. *Albania*, ICJ Reports 1949, p. 22.
[26] Judgment of 22 December 1986, *Burkina Faso* v. *Mali*, ICJ Reports 1986, p.554; at p. 565, para. 20.
[27] Judgment of 19 December 2005, *Congo Democratic Republic* v. *Uganda*, para. 219, www. icj-cij.org, ILM, vol. 45, 271.
[28] Paras. 161, 162, 213, 214.
[29] Para. 244.
[30] Judgment of 14 February 2002, *Democratic Republic of the Congo* v. *Belgium*, ICJ Reports 2002, p. 3, para. 58; ILM, vol. 41 (2002), 536.
[31] Van der Wyngaert (Dissenting Opinion), para. 12; Higgins, Kooijmans and Buergenthal (joint Separate Opinion), para. 19 ff.

3. The weight of a written text emerges in a case in which the ICJ stated that the first two paragraphs of an article of UNCLOS corresponded to customary law without further justification and later, in another case, referring to the previous judgment, added that the third paragraph of the same article also corresponded to customary law because that article constituted an 'indivisible regime'.

The article in question is Article 121 of UNCLOS which specifies in paragraph 3, that islands which are 'rocks that cannot sustain human habitation or economic life of their own' are entitled only to a territorial sea and a contiguous zone. In *Qatar* v. *Bahrain* the ICJ had stated that paragraph 2 and, less explicitly, paragraph 1 of Article 121 corresponded to a customary rule,[32] leaving open the question of the 'rocks' considered in paragraph 3. In *Nicaragua* v. *Colombia*, having referred to the previous judgment as a basis of its own conclusion that paragraphs 1 and 2 of Article 121 corresponded to customary law, the Court stated:

> 'The Judgment in the *Qatar* v. *Bahrain* case did not specifically address paragraph 3 of Article 121. The Court observes, however, that the entitlement to maritime rights accorded to an island by the provisions of paragraph 2 is expressly limited by reference to the provisions of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long established principle that "islands, regardless of their size, … enjoy the same status, and therefore generate the same maritime rights, as other land territory"(…) and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary international law. The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia

[32] *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar* v. *Bahrain*), Merits (2001), ICJ Reports, paras. 167, 195 as regards art. 121; para. 1 and 185 as regards art.121, para. 2. Only this last paragraph is explicit in stating that the provision of UNCLOS considered reflects customary international law.

and Nicaragua recognize) has the status of customary international law'.[33]

4. Commenting the *Nicaragua* judgment, Theodor Meron observed:

> 'ˊ[W]here a treaty concerns a particular area of law, however, even if it does not bind the parties to the dispute in question, the ICJ has tended to treat the texts of the treaty as a distillation of the customary rule, *eschewing examination of primary materials establishing state practice and opinio juris*'.[34] (Emphasis added)

More recently, Judge Peter Tomka, during his tenure as President, has presented the approach of the Court in similar terms. While recalling that the Court 'ˊhas never abandoned its view, firmly rooted in the wording of the Statute that customary law is "general practice accepted as law", a "settled practice together with *opinio juris*"'ˊ, he stressed that:

> 'ˊHowever, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while *more often it will be sufficient to look at the considered views expressed by States and bodies like the International Law Commission* as to whether a rule of customary international law exists, and what its content is, or *at least to use rules that are clearly formulated in a written expression* as a focal point to frame and guide an inquiry into the material elements of custom'.[35]

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[33] *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), Judgment of 19 November 2012, ICJ Reports 2012, II, p. 674, para. 139.
[34] T. Meron, 'Revival of Customary Humanitarian Law', AJIL, vol. 99 (2005), 817 at 819.
[35] P. Tomka, 'Custom and the International Court of Justice', LPICT, vol. 12 (2013), 195 at 197 (emphasis supplied); also P. Tomka, 'Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification', in L. Lijnzaad and Council of Europe (eds.), *The Judge and International Custom* op. cit., 2.

This statement and the cases mentioned confirm that the ICJ only rarely engages in a full-fledged examination of international practice.[36] It does so, we may observe, mostly in cases when its inquiry reaches the conclusion that the customary rule under discussion does not exist. *The North Sea Continental Shelf*, the *Pedra Branca* case between Malaysia and Singapore,[37] are clear examples.

5. The International Tribunal for crimes committed in the former Yugoslavia, while in statements of principle seems attached to the two-element theory of customary law and to the need to verify their presence in practice, it ends up in adopting an attitude not very different to that of the ICJ. In view of the peculiar nature of practice in military affairs, it relies on written sources.

On the one hand, in a judgment of 2003 the Tribunal states that 'to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*'.[38] On the other hand, the same tribunal in its decision of 1995 on the *Tadic* interlocutory appeal on jurisdiction had stated that 'a word of caution on the law-making process in the law of armed conflict is necessary'. Because accurate information concerning the behaviour of troops in the field 'for the purpose of establishing whether they in fact comply with, or disregard certain standards of behaviour' is largely inaccessible, as the parties withhold it and sometimes misrepresent it through voluntary misinformation, conclusions about State practice in the field of humanitarian law must, in the view of the Tribunal, be based on other sources such as official pronouncements, military manuals

[36] This applies also to the International Criminal Court, as observed by B.I. Bonafé, 'Il diritto non scritto nel sistema della Corte penale Internazionale', in P. Palchetti (ed.) *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, quoted above, pp.173-174, underlining that the written texts the Court refers to include the decisions of the *ad hoc* criminal tribunals and of other international courts and tribunals.

[37] Case concerning Sovereignty over *Pedra Branca/Pulau*, etc., 23 May 2008, ICJ Reports 2008, 12, at para. 149.

[38] Judgment of 16 July 2003, *Prosecutor* v. *Hadzihasanovic*, Decision on Command responsibility, IT-01-47-AR72. See T. Meron, 'Revival of Customary Humanitarian Law', *AJIL*, vol. 99 (2005), 817.

and judicial decisions.[39] 'Heavy reliance on military manuals' was nonetheless seen as a defect of the International Committee for the Red Cross's study on Customary International Humanitarian Law in the official, although 'initial' reaction the United States Government.[40]

6. The International Tribunal for the Law of the Sea, under Article 93 of UNCLOS, may apply, apart from UNCLOS, 'other rules of international law not incompatible with [the] Convention'. In most of the not very frequent cases in which it referred to customary law, it relied on the jurisprudence of the ICJ and, sometimes, referred to the jurisprudence of other international tribunals, and to work of the International Law Commission.

In rare cases it has engaged in an examination of practice.[41] It did so in the *M/V Saiga Nr. 2* case to support its view that 'international law requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'.

Having stated that 'considerations of humanity must apply in the law of the sea, as they do in other areas of international law',[42] it went on as follows:

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[39] *Judgment of 2 October 1995*, IT-94-1-AR72 para. 99. *ILM*, vol.35 (1996), 32. M. Frulli, 'The Contribution of the International Criminal Tribunals to the Development of International Law: the prominence of *opinio juris* and the Moralization of Customary Law', LPICT, vol. 14 (2015), pp. 80-93. In her view, the reliance on military manuals shows that international criminal tribunals rely more on *opinio juris* than on conduct.

[40] Letter by the Legal advisers of the State Department and of the Department of Defence to the President of the International Committee of the Red Cross of 3 November 2006, *ILM*, vol. 46 (2007), p. 515, and, in shortened version, *AJIL*, vol. 101 (2007), p. 638. The Letter criticizes the Study also on other grounds. For further specific criticism, G. Aldrich, 'Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross', *BYIL* (2005), pp. 503-524, and the reply by one of the authors of the Study, J.-M. Henckaerts, 'Customary International Humanitarian Law – A Rejoinder to Judge Aldrich', *BYIL* (2005), pp. 525-532.

[41] For a detailed survey, T. Treves and X. Hinrichs, 'The International Tribunal for the Law of the Sea and Customary International Law', in E. Lijnzad and Coucil of Europe (eds.), *The Judge and International Custom/Le juge et la coutume internationale* (Brill, Nijhoff, Leiden-Boston, 2016), pp. 25-45.

[42] *The M/V "SAIGA" (No. 2)* Case (*Saint Vincent and the Grenadines* v. *Guinea*), Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, at para. 155.

'These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. "I'm Alone"* case [*Canada/United States*, 1935], U.N.R.I.A.A., Vol. III, p. 1609; *The Red Crusader* case [*Commission of Enquiry*, *Denmark – United Kingdom*, 1962], I.L.R.,Vol. 35, p. 485). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks'.[43]

General principles

1. Some of the judgments of the International Court of Justice quoted above uphold the existence of customary rules, without looking into international practice and seeking the existence of *diuturnitas* and *opinio juris*, on a basis different from their correspondence to authoritative written texts.

They invoke moral imperatives, or rely on logical consequences of certain processes. They sometimes refer to these rules as 'principles', such as in the *Frontier dispute* case quoted above as regards *uti possidetis*.

This shows that in the jurisprudence of the ICJ the borderline between general principles and customary rules is uncertain.

[43] *The M/V "SAIGA" (No. 2)* Case *(Saint Vincent and the Grenadines* v. *Guinea),* para. 156.

The existence of certain customary rules is ascertained without any analysis of international practice, and so is ascertained the existence of certain general principles. Whether this kind of general principles are to be subsumed under the 'general principles of law recognized by civilized nations' mentioned in Article 38(1) of the ICJ Statute, or within the general idea of customary rules is an open question.[44] What is important is to stress that the Court ascertains the existence of general rules, which it sometimes calls 'customary' and other times 'general principles', without engaging in the examination of practice.

2. An attempt to distinguish two categories of customary rules, one requiring and the other not requiring a determination of the existence of the two elements was made by the ICJ in the *Gulf of Maine* judgment. The judgment underlines that 'customary international law in fact comprises':

> a set of customary rules presence of which in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas
>
> and
>
> a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community.[45]

The Court would thus seem to distinguish from the 'normal' customary law rules, a category of such rules for which an inquiry in international practice is not required. Whether the latter category coincides with 'general principles' the Court does not say. In the judgments and opinions handed out during the decades elapsed since 1984, the ICJ has never referred to the categorization set out in the *Gulf of Maine* judgment. This notwithstanding, the *Gulf of Maine*

[44] See, with further references, G. Gaja, 'General Principles of Law', in *Max Planck Encyclopedia of Public International Law*, online ed.; H. Thirlway, 'The Sources of Interantional Law' (OUP, Oxford, 2014), Chapter IV.
[45] ICJ Reports 1984, p. 246, at para. 111.

seems an important early judicial indication that 'customary' rules are not all encompassed in the definition of Article 38(1)(b) of the ICJ Statute, and that those not requiring ascertainment on the basis of international practice remain customary rules. It seems debatable whether they should be labelled as 'principles' or 'general principles'.

Whether the rules not corresponding to the definition in the ICJ Statute are to be described as 'norms for ensuring the co-existence and vital co-operation of the members of the international community' may be questioned in light of the successive case law of the Court. This may be a reason why the categorization of *Gulf of Maine* has not been relied upon by the Court.

3. In mentioning 'principles' or 'general principles' or 'general principles of law' directly applicable in international law, the ICJ most often abstains from referring to Article 38(1)(c) of the Statute. A clear example is the characterization given by the Court of res judicata as a 'well established and generally recognized principle of law'[46] or as a 'general principle of law'[47] without any reference to Article 38(1) of the Statute.

Even when Article 38(1)(c) of the Statute is discussed in pleadings and/or deliberations, and a reasonable case for its application is made, the Court avoids any reference to it. This emerges clearly in the *Oil*

[46] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports 1954, 47 at 54.

[47] *Question of the Delimitation of the Continental Shelf between Nicargua and Colombia Beyond 200 Nautical Miles, Preliminary Objections, Nicaragua v. Colombia*, Judgment of 17 March 2016, www.icj-cij.org, para. 58. In their collective dissenting opinion Vice-President Yusuf, Judges Cancado Trinidade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower, ibid., at para. 4, stated: '*Res judicata* is a principle that is found in distinct forms and under different names in every legal system. The principle has been of paramount importance to the operation of legal systems all over the world for centuries'. They made no reference to article 38(1)(c) of the Statute. Similarly, in its Judgment of 23 May 2008, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Reports 2008, 12, at para. 45, the ICJ stated: 'It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact' without any reference to article 38(1)(c).

Platforms judgment[48] which does not utilize, or even discuss, the detailed argument, based on a comparative analysis of domestic laws, developed by judge Simma in his separate opinion in which he concludes that 'the principle of joint and several responsibility common to the jurisdictions I have considered can properly be regarded as a "general principle of law" within the meaning of Article 38(1)(c), of the Court's Statute'.[49]

When it refers to principles present in domestic legal systems to be imported into international law, the Court also abstains from referring to that provision, but with exceptions. In the 1966 Judgment in the *South-West Africa cases* (second phase) the ICJ stated that, although *actio popularis* 'may be known to certain municipal systems of law', this right

> '...is not known to international law as it stands at present, nor is the Court able to regard it as imported from the general principles of law referred to in Article 38(1)(c) of the Statute'.[50]

4. International lawyers who are also specialists of international environmental law often refer to 'principles' or 'general principles' of 'international environmental law'. They concede, however, that the legal status of these principles is uncertain. Philippe Sands argues that:

> '...it is frequently difficult to establish the parameters of the precise international legal status of each general principle or rule... Some general principles or rules reflect customary law, others may reflect emerging legal obligations and yet others may have a less developed legal status'.[51]

[48] *US* v. *Iran*, Judgment on the Merits, ICJ Reports 2003, p. 161.
[49] ICJ Reports 2003, p. 324, paras. 66-75, at 74.
[50] Judgment of 18 July 1966, *Ethiopia v. South Africa; Liberia* v. *South Africa*, ICJ Reports 1966, 6, at para. 88.
[51] P. Sands, 'Principles of International Environmental Law', 2d ed. (Cambridge, 2003), 231 f. Similarly, Y. Tanaka, 'Principles of international marine environmental law', in M. Rayfuse, *Research Handbook on International Marine Environmental Law* (Elgar, Cheltenham, 2015), 31, at 33: 'While some principles can be considered as a rule of customary international law, or an emerging rule of the law, other principles seem to perform as policy guidelines'.

José Juste Ruiz states:

> 'The legal nature of these fundamental principles is not sufficiently clear, as with the term 'principles' texts refer to philosophical or scientific postulates as well as to orientations of a political character, without excluding, in many cases, its use with a more legal or normative meaning'.[52]

International courts and tribunals reflect a similar attitude. They refer to the legal nature of these principles using at the same time the notions of 'principle' and the notion of 'general international law'.

To recall a few examples, in its 1991 Order in the *MOX Plant case*, the International Tribunal for the Law of the Sea stated that:

> 'The duty to cooperate is a *fundamental principle* in the prevention of pollution of the marine environment under Part XII of the Convention [UNCLOS] and *general international law*'.[53]

In its 2005 Award on the *Iron Rhine Railway*, an Arbitral Tribunal stated that the obligation to prevent or to mitigate harm to the environment 'has now become a principle of general international law'.[54]

Similarly, the Inter-American Court of Human Rights in its Advisory Opinion of 15 November 2017 stated that:

> '…the principle of prevention of environmental damage is part of international customary law'.[55]

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[52] J. Juste Ruiz, *Derecho Internacional del Medio Ambiente* (Madrid, 1999), p. 69, (translated from Spanish by the present author).
[53] *The MOX Plant* case (*Ireland* v. *United Kingdom*), provisional measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at para. 82.
[54] Arbitration regarding the *Iron Rhine ('Ijzeren Rhijn') Railway (Belgium* v. *the Netherlands)*, Decision of 24 May 2005, UN RIAA, vol. XXVII, p. 35, at para. 59.
[55] Opinion consultiva OC-23/17 of 15 November 2017, *Medio Ambiente y Derechos Humanos*, available at http://bit.ly/28ddq6f.

In the 2004 Award on the *auditing of accounts* another Arbitral Tribunal stated, as regards the 'polluter-pays' principle, that it did not 'view this principle as being a part of general international law'.[56]

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the International Court of Justice refers to the '... *general obligation* of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control', stating that such obligation '...is now part of the corpus of international law relating to the environment'.[57]

As regards another of the so-called general principles of international environmental law, namely, the obligation to perform an environmental impact assessment, the ICJ and the ITLOS agree in considering it part of international customary law. In the Court's view, environmental impact assessment is

> '...a practice, which in recent years has gained so many acceptances among States, that it may now be considered a requirement under general international law'.[58]

ITLOS follows the Court in its Advisory Opinion of 2011 and expands the scope of the customary rule stating that

> 'The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's

[56] *Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976*, Decision of 12 March 2004, U. N. RIAA, vol. XXV, 267, para. 103.
[57] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 66 at para. 29.
[58] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay*), Judgment of 10 April 2010, ICJ Reports 2010, p. 14, at para. 204, (emphasis supplied). The Court confirms its view in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica*), Judgment of 16 December 2016, www.icj-cij.org, para. 101.

> references to 'shared resources' may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in Article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction"'.[59]

As regards the 'precautionary approach' (or 'principle'), it is well known that while the ICJ and other international tribunals have avoided to take a position as to its legal character and, in particular, as to whether it is the content of a customary international law rule,[60] the ITLOS has come close to accept the latter view. After various provisional measures orders in which it referred to the need of 'prudence and caution',[61] and one case in which, notwithstanding 'scientific uncertainty', it found necessary to take urgent measures to preserve further deterioration of an endangered fish stock.[62] The Tribunal, in its Seabed Disputers Chamber 2011 Advisory Opinion concludes lengthy developments stating *inter alia*:

> 'The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, *this has initiated a trend towards making this approach part of customary international law*'.[63]

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[59] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, 10 at para. 148.

[60] For a review of pertinent cases, T. Treves, 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?', in R. Wolfrum, V. Roeben (eds.), *Developments of International Law in Treaty Making*, (Berlin, Heidelberg etc., 2005), 587, at 615-618.

[61] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan*), provisional measures, Order 27, August 1999, ITLOS Reports 1999, 280, at para. 77.

[62] *The MOX Plant case (Ireland* v. *United Kingdom*), provisional measures, Order of 3 December 2001, ITLOS Reports 2001, 95, at para. 54.

[63] *Advisory Opinion of 1 February 2011* quoted above, para. 135 (emphasis supplied).

Neither the ICJ nor the ITLOS in referring to principles of international environmental law discuss whether they – or some of them – may be considered as general principles of law as mentioned in Article 38 of the ICJ Statute.[64] The ICJ and the ITLOS were in all likelihood aware of the argument set out in scholarly opinion as regards the precautionary principle that:

> 'if the precautionary principle is viewed not as a rule of customary international law but simply as a general principle of law, then its use by national and international courts, and by international organizations is easier to explain'.[65]

Why are international courts and tribunals reluctant to envisage that an appropriate classification could be that of general principles of law as mentioned in Article 38 of the ICJ Statute? In my view, in alluding to general international law (and even more so in referring to the corpus of international law) and not speaking of customary international law, the ICJ avoids engaging in the discussion as to whether these principles are customary international law or general principles of law referred to in Article 38 of its Statute. It would seem to prefer the former classification, but does not exclude the latter altogether, as 'general international law' might encompass it. In so doing it remains close to the notion used by specialists of international environmental law of 'principles' or 'general principles' of international environmental law, while avoiding to concede the existence of 'international environmental law' as a more or less self-contained branch of international law.

[64] It is noteworthy that the Inter-American Court of Human Rights' Advisory Opinion of 15 November 2017 OC-23/17, at http://bit.ly/28ddq6f, in examining most of the 'principles' of international environmental law avoids making explicit statements about their legal nature, with the exception mentioned above of the prevention principle explicitly indicated as belonging to customary law. It prefers to refer to judicial precedents and to provisions of treaties and seems, but only implicitly, to adopt the view that these principles belong to customary international law. The Court also refers, in some cases, to the domestic law of the member States of the Organization of American States, see paras. 157 (environmental impact assessment), 167 (stakeholders participation), 178 (precautionary approach). This could allude to a kind of regional general principles to be imported from domestic law.

[65] P. Birnie, A. Boyle, C. Redgwell, 'International Law and the Environment', 3d ed., (OUP, Oxford, 2009), 162 f.

It may also be surmised that the Court adopts this terminology in order to leave open the discussion about the difference between general principles to be imported into international law from domestic legal systems and more general legal propositions, difficult to distinguish from customary rules, for which the ascertainment of the requirements of general practice and *opinio juris* may be less rigorously pursued.

The attitude of the ITLOS seems to have less complex implications. General principles of law have never been discussed in its case law. Admittedly, the 'other rules' the Tribunal may apply under Article 293 of UNCLOS might encompass 'general principles of law' referred to by Article 38 of the ICJ Statute, and the latter might be included in the 'rules and principles of general international law' applicable, under the Preamble to UNCLOS, to matters not regulated by the Convention. The reference to a 'fundamental principle' under 'general international law' referred to in the *MOX plant case* Order quoted above may have the same implications as the references to general international law by the ICJ. Still, the reference by ITLOS to customary international law and not to 'general international law' as regards both, the rule providing for the obligation to conduct environmental impact assessments and the precautionary principle, would seem to indicate a perhaps unconscious will to stay clear from theoretical discussion and rely on the assumption that in international law binding rules, that are not set out in treaties, must be customary.

5. International investment arbitration is another sector in which reference is made to general principles.[66] International arbitral tribunals resort, more often than the ICJ, to principles imported from domestic law, sometimes even specifying that these are principles as referred to in Article 38(1)(c) of the ICJ Statute. So, for example, in the *Waste management* award the arbitral tribunal stated:

[66] See T. Gazzini, 'General Principles of Law in the Field of Foreign Investment', J. *World Investment & Trade*, vol. 10 (2009), 103-119; S. W. Schill, 'General Principles of Law and International Investment Law', in T. Gazzini, E. De Brabandère (eds.), *International Investment Law, The Sources of Rights and Obligations* (Nijhoff, Leiden-Boston, 2012), 133.

> 'There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice'.[67]

While referring to Article 38(1)(c) of the ICJ Statute this particular award shows some uncertainty about the legal nature of the principle referred to. This occurs also in other awards not referring to Article 38(1)(c) in which we find reference to principles without a clear specification as to whether these principles are seen as belonging to customary international law or as imported from domestic law. Two examples illustrate the point.

The first concerns a case of corruption of public officials in order to obtain authorizations necessary for an investment. An ICSID arbitral tribunal, after examining the concept of 'public policy' (*ordre public*) as a ground for refusing recognition and enforcement of foreign judgments and awards, and stating that, although sometimes called 'international public policy' (*ordre public international*) 'it is in fact no more than domestic public policy', specified that:

> 'The term "international public policy", however, is sometimes used with another meaning signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora'.[68]

The second example concerns a case in which an ICSID tribunal, having stated that an investment 'will not be protected if it has been created in violation of national or international principles of good faith' or by way of 'corruption fraud or deceitful conduct', observes that 'these are general principles that exist independently of specific language in the Treaty'.[69]

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[67] *Waste Management Mexico (II),* ICSID case ARB. (AF)/00/3, *Jurisdiction,* 3 June 2002, para. 39.
[68] *World Duty Free Company Limited* v. *Kenya,* ICSID case Nr, ARB/00/7, Award of 4 October 2006, para. 139.
[69] *Gustav FW Hamester GmbH & Co KG* v. *Ghana*, ICSID case Nr ARB/07/24, Award of 18 June 2010, para. 124. J. E. Vinuales, 'Customary law in investment regulation', *Italian*

Erga omnes obligations – *jus cogens*

1. Half a century of work of international courts and tribunals, of the International Law Commission and of scholarly discussion, as well as, to a more modest extent, State practice, have focussed attention on two categories of international law rules which, as James Crawford has recently stated, 'appear to operate hierarchically, or "vertically" in contrast with the apparent flatness of traditional sources of international law, which seem to create only "horizontal" and bilateral relationships'.[70] These are rules establishing *erga omnes* obligations and peremptory (*jus cogens*) rules.

2. *Erga omnes* and *jus cogens* obligations are theoretically different. The former have to do with the subjective scope of obligations (obligations owed to all States in case of customary *erga omnes* rules, or to all States parties to a multilateral treaty, in this case obligations *erga omnes partes* are mentioned) while the latter have to do with the importance of obligations.[71] There is, nonetheless, a large overlap between the two categories which supports the conclusion that all *jus cogens* obligations are also *erga omnes*, while the reverse is not always true as there may be *erga omnes* obligations which are not set out in *jus cogens* rules.[72]

More important is that, according to the prevailing view, the notion of *erga omnes* obligations is not limited to a structural requirement concerning the parties to which the obligation is owed. It contains also the requirement that these obligations

Yearb. Int. Law, vol. 23 (2013), 23, at 46, argues that, although similar concepts could be encompassed in 'legality clauses' as regards the making of investment, or raised as defences if the illegality arises after the making of the investment, the principles mentioned ('transnational public policy' in the author's terminology) may be useful for rejecting the claim, before reaching the merits if the illegality arose after the making of the investment.

[70] J. Crawford, 'The Course of International Law', op. cit., p. 195.

[71] For a recent statement, see *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, UN doc. A/CN.4/L.682, 13 April 2006, para. 380.

[72] G. Gaja, 'The protection of general interests in the international community', RC, vol.364 (2014), 9, at 55 f.

protect particularly important values. In the words of the Preamble of the Kracow resolution of the *Institut de droit international* concerning *erga omnes* obligations, these are 'the fundamental values of the international community';[73] according to the terminology of Christian Tams, they require a 'threshold of importance', they 'protect values of heightened importance'.[74] These statements may equally apply to rules of *jus cogens*.

3. The notion of *erga omnes* (or *erga omnes partes*) obligations has been put forward by the International Court of Justice. Particularly influential was a well-known passage of the Judgment in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain) (Merits)* in which the Court stated:

> '[A]n essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State. ... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.[75]

The ICJ had already identified this notion, albeit regarding a treaty that may be considered as broadly corresponding to customary law, in the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[76] More recently, the ICJ stated that the principle of self-determination of peoples applies *erga omnes*.[77]

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[73] *Institut de droit International, Annuaire,* Vol. 71, tome II, 287.
[74] *Enforcing Obligations Erga Omnes in International Law* (Cambridge, 2005), 156, 310. In the view of the former *rapporteur* on International responsibility of the ILC, Gaetano Arangio-Ruiz, the characteristics that distinguish *erga omnes* obligations are only structural, *Fourth Report on State Responsibility*, in *ILC Yearbook* (1992), 2(1), p. 1, at paragraph 92.
[75] *Belgium* v. *Spain,* Judgment of 5 February 1970, ICJ Reports 1970, 3, at para. 32.
[76] *Advisory Opinion of 28 May 1951*, ICJ Reports, 15.
[77] *East Timor* Case *(Portugal* v. *Australia) Merits,* Judgment of 30 June 1995, ICJ Reports 1995, 90, para. 29.

The ILC Articles on Responsibility of States for Internationally Wrongful Acts utilizes this notion and gives it an important role in the law of State Responsibility. It borrows from the *Barcelona Traction* judgment in renaming *erga omnes* obligations as obligations – set out both in customary and treaty rules – that are 'owed to the international community as a whole' (Article 48(1)(b)). The Commentary explains that the expression *erga omnes* obligations 'convey less information than the Court's reference to the international community as a whole'. The added 'information' seems to have to do with the abovementioned aspect concerning the values protected by the rules. These rules include those customary rules in whose application all States, or the international community, have an interest, and whose violation creates claims for all States.

4. The importance of the values protected is central in the notion of *jus cogens* or peremptory rules. The notion, although proposed first by scholars, has entered international law with the Vienna Convention on the Law of Treaties of 1969, which refers to customary rules 'from which no derogation is permitted'. According to the Vienna Convention any treaty conflicting with one such rule is null and void (Articles 53 and 64).

The ICJ has followed for a long time the policy to avoid mentioning *jus cogens*. In pursuit of this policy it has sometimes used the notion of *erga omnes* obligations in cases in which it might have been more accurate to speak of *jus cogens*. This is what the ICJ did, in particular, in the *East Timor Case* judgment and the *Israeli Wall* Advisory Opinion.[78] Although in a number of cases the ICJ has come close to referring to *jus cogens*,[79] it seems to have abandoned its policy of not referring to it only in 2006[80] with the *Armed Activities*

[78] *East Timor Case (Portugal* v. *Australia) Merits*, Judgment of 30 June 1995, ICJ Reports 1995, 90, para. 29; Advisory opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136, para. 88.

[79] An accurate review of these cases is in P.M. Dupuy, *L'unité de l'ordre juridique international, Cours général de droit international public* (2000), RC, vol. 297, 9, at 288-294.

[80] *Armed Activities on the Territory of the Congo* (New Application: 2002) *(Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility*, Judgment of 3 February

on the Territory of the Congo (*Democratic Republic of Congo* v. *Rwanda*) case. In this judgment the Court recalls its previous classification of the norm prohibiting genocide as *erga omnes* and adds that 'it is assuredly the case' that this norm is of peremptory character.[81] It then states that:

> '…the mere fact that rights and obligations *erga omnes* or peremptory norms of international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties'.[82]

The Court similarly held in 2015, that the *jus cogens*, or *erga omnes*, character of the rules allegedly breached could not be as such the basis for its jurisdiction.[83] In its 2010 Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence of Kosovo*, the Court referred again to *jus cogens* in recalling that the declarations by the Security Council of the illegality of certain unilateral declarations of independence had been made in connection

> '…with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.[84]

In 2012 the Court referred again to *jus cogens* in its judgment on *the Questions relating to the obligation to Prosecute or Extradite (Belgium* v. *Senegal*). It stated:

2006, ICJ Reports 2006, 6, at paras. 64 and 125. In his separate opinion Judge *ad hoc* Dugard, at paragraphs 3-14, states that: 'this is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*', and reviews the cases in which the Court could have resorted to the notion of *jus cogens*, including those in which it preferred to refer to the notion of *erga omnes* obligations.

[81] *Judgment of 3 February 2006*, ICJ Reports 2006, 6, at para 64; *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 27 February 2007, ICJ Reports 2007, 43, para. 161.

[82] *Judgment of 3 February 2006*, ICJ Reports 2006, p. 6, at para. 125.

[83] *Application of the Convention on the Prevention and Punishment of Genocide (Croatia* v. *Serbia*), Judgment of 3 February 2015, ICJ Reports 2015, at paras. 87-88.

[84] *Advisory Opinion of 22 July 2010, ICJ Reports 2010*, p. 403, at para. 81.

'The prohibition of torture is part of customary law and has become a peremptory norm (*jus cogens*)'.[85]

The ICTY has mentioned the notion of *jus cogens* in a number of cases starting with *Furundzija*,[86] and so have the Inter-American Court of Human Rights[87] and the European Court of Human Rights in the *Al-Adsani* case.[88]

5. The references to *jus cogens* made by the ICJ and also by the criminal and human rights courts and tribunals mentioned above have not led to specific consequences in the operative part of the judgments.[89] Especially the jurisprudence of the ICJ still shows a certain reluctance to utilize the notion of peremptory norms. While, as we have seen, the Court has classified as peremptory some

[85] *Judgment of 20 July 2012*, ICJ Reports 2012, p. 422, at para. 99.
[86] *Trial Chamber, judgment of 10 December 1998*, ILM, vol. 38 (1999), p. 317, at para. 153.
[87] See, among others, Consultative opinion Oc-18/03 of 17 September 2003 (upon request of Mexico), *Undocumented immigrants*, including in *jus cogens* the principles of equality before the law, equal protection and no discrimination, in http://www.corteidh.or.cr/opiniones.cfm; judgment of 27 November 2003, series C N. 103, *Maritza Urrutia* case, http://www.corteidh.or.cr/casos.cfm (torture); Judgment 22 September 2006, *Goiburú* v. *Paraguay*, ibid., (torture and forced disappearances). These decisions are accompanied by detailed concurrent opinions of Judge Cançado Trinidade.
[88] *Judgment of 21 November 2001 (Al-Adsani* v. *United Kingdom*), Series A, No 35763/97 (2001), and *International Law Reports*, vol. 123, 53; The majority opinion holds that the prohibition of torture, even though it is a rule of *jus cogens*, does not entail that State immunity from jurisdiction should not be applicable in cases concerning civil liability for acts of torture. See infra para. 4 for the Dissenting Opinion of Judges Caflisch and Rozakis, joined by other Judges.
[89] On possible consequences of the classification as rules of *jus cogens* of the prohibition of torture, see paras. 154-156 of the *Furundzija* judgment of the ICTY, quoted above. The Inter-American Court of Human Rights has indicated as consequences of violations of *jus cogens* rules the 'imperscriptibility' of the crimes constituting such violations (judgment of 26 September 2006, *Almonacid Arellano* v. *Chile*, http://www.corteidh.or.cr/casos.cfm, paras. 99 and 153) and the responsibility for these violations as an 'aggravated' one: Judgment of 8 July 2004, *Hermanos Gómez Paquiyauri* v. *Perú*, ibid., para 76. The Inter-American Commission on Human Rights, Report no. 62/02, merits, case 12285, *Michael Dominguez* v. *United States*, 22 October 2002, states that there is a rule of *jus cogens* prohibiting States to execute offenders of less than 18 years of age; it adds that persistent objection cannot be opposed to such a rule, but this interesting point does not lead it to any consequence as the Commission observes that the United States (notwithstanding its claim to the contrary) had not persistently objected to the rule (para. 85).

customary international law rules it has not drawn consequences from such classification.

In particular, to my knowledge, in no case has an international court declared a treaty, or a provision thereof, null and void on the basis of Articles 53 or 64 of the Vienna Convention on the Law of Treaties.

We can, nonetheless, recall a case in which, while not declaring the nullity of a treaty, an international court recognized, although *obiter*, consequences to the fact that a treaty was incompatible with *jus cogens*. This is the 1993 *Aloeboetoe* judgment of the Inter-American Court of Human Rights. In this judgment the Court rejects an argument drawn from a 'treaty' of 1762 between the Saramaca Indians and the Netherlands (applicable by succession to Suriname, defendant in the case). The Court stated:

> '*La Corte no considera necesario investigar si dicho convenio es un tratado internacional. Sólo se limita a observar que si así hubiera sido, el tratado seria nulo por ser contrario a reglas de jus cogens superveniens*' ('The Court does not consider it necessary to investigate whether this agreement is an international treaty. It only observes that, if this had been the case, the treaty would be null and void because it would be contrary to *jus cogens* superveniens').[90]

The 'treaty' contained obligations concerning the capture and sale of slaves. The Court concludes that:

> '*Un convenio de esta índole no puede ser invocado ante un tribunal internacional de derechos humanos*' ('A treaty of this nature cannot be invoked before an international human rights tribunal' [para. 57]).[91]

[90] Inter-American Court of Human Rights of 10 September 1993, *Aloeboetoe et al* case, http://www1.umn.edu/humanrts/iachr/C15-esp.html, para. 57. See observations by A. Pietrobon, 'Trattati antichi e jus cogens superveniens', in B. Cortese (ed.), *Studi in onore di Laura Picchio Forlati* (Torino, 2014), 115.

[91] Para. 57 of the Judgment quoted in the preceding note.

6. The most important consequences of the fact that an international law rule establishes obligations *erga omnes* concern standing to claim a violation of such rule. A distinction must be drawn as regards the substantive right to claim a violation, and the standing to claim such right before an international court or tribunal. This distinction is clearly made in the Cracow Resolution adopted by the *Institut de droit international* in 2005. The resolution provides that in case of breach of an *erga omnes* obligation 'all the States to which the obligation is owed', independently of their being specially affected by the breach, may claim cessation of the internationally wrongful act and reparation in the interest of the specially interested State, entity or individual.[92] As regards standing to bring such claim to the ICJ or to another international court or tribunal, the IDI resolution specifies that there must be 'a jurisdictional link' between the State alleged to have committed the breach and the State to which the obligation is owed.[93]

This is consistent with the point made by the ICJ in its 2006 judgment in the *Congo-Rwanda armed activities* case, that:

> 'The mere fact that rights and obligations are *erga omnes* may be at issue in a dispute would not give the court jurisdiction to entertain that dispute'.[94]

The position formulated by the *Institut* on standing in case of violations of *erga omnes* rules has been adopted in 2012 by the International Court of Justice in its judgment on the *Questions on the obligation to prosecute or extradite (Belgium* v. *Senegal*). The Court did not consider necessary to follow Belgium's argument that it had standing to claim violation by Senegal of the Convention against torture as an especially interested party.[95] It stated:

[92] IDI Cracow resolution quoted above, art. 2.
[93] IDI Cracow resolution quoted above, art. 3.
[94] *Armed activities in the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda),* Judgment of 2006, ICJ Reports 2006, para 64.
[95] It is interesting to note that the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, in the Matter of the Arctic Sunrise (Netherlands v. Russian Federation) in its award of 14 August 2015 (www. pca-cpa.org),

> ‘69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with Article 7, paragraph 1, of the Convention, and to bring that failure to an end.
>
> 70. For these reasons, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible’.

The Court did not explicitly address the requirement of the existence of a ‘jurisdictional link’. As it has been observed by Judge Gaja, however:

> ‘One may consider that the Court, when asserting its jurisdiction, at least implicitly acknowledged that jurisdiction existed because the claimant and defendant States were parties to the Convention’.[96]

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adopts a different order of priorities. The Netherlands had put forward as an additional, but not subsidiary, argument that its standing could be based on a violation by the Russian Federation of the freedom of navigation which could be classified as an *erga omnes* rule (para. 180). The Tribunal states that, having found that the Netherlands enjoyed standing under the Convention for breaches of obligations of a bilateral character owed by the Russian Federation to the Netherlands under UNCLOS (see para 168), ‘it is not necessary for the Tribunal also to consider whether the Netherlands enjoys standing *erga omnes* or *erga omnes partes* to invoke the international responsibility of the Russian Federation with respect to its claims (para. 186).

[96] G. Gaja, ‘The protection of general interests’ op. cit., p. 114.

One may wonder whether the position taken by the *Institut* and probably adopted by the Court in the Belgium-Senegal judgment as regard *locus standi* before adjudicating bodies is too absolute. I had the opportunity to observe in 2009:

> 'The sum of the two requirements consisting in the existence of the jurisdictional link and of that a party is owed, without being specially affected, an obligation *erga omnes*, would not seem such as to justify in all cases the move from substantial to procedural law,[97] in other words to support *jus standi* in all cases. It will be for the court seized of the dispute to decide whether the importance of the obligation for the international community (as well as for the State introducing the claim) is such as to make the juridical interest relevant enough to justify the existence of a right to trigger proceedings before an international court or tribunal. To adopt the broader view would open the way to claims whose sole purpose would be to make points of principle, while the party which submits them would incur no real risk'.[98]

7. In the Advisory Opinion on *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* the Seabed Disputes Chamber of ITLOS made – although *obiter* – some remarks as regards who could claim compensation for damages caused by sponsoring States in the International Seabed Area. It alluded to the relevance of the *erga omnes* character of the rules of the UN Convention on the Law of the Sea involved. These remarks touch, inter alia, the question of the role as a possible claimant of an international organization competent *ratione loci* and *ratione materiae*. The Chamber stated:

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[97] This concern seems present in the interventions made during the discussion at the *Institut* in Krakow by T. Franck (*Annuaire*, vol. 71 tome II, p. 91), R. Higgins (ibid., pp. 94, 124), G. Bastid-Burdeau (ibid., p. 95 f).

[98] T. Treves, 'The Settlement of Disputes and Non-Compliance Procedures', in T. Treves, L. Pineschi et al. (eds.), *Non-Compliance Procedures and the Effectiveness of International Environmental Agreements* (TMC Asser Press, The Hague, 2009), 499, at 515 (footnote omitted).

> ‘179. Neither the Convention nor the relevant Regulations… specifies…which subjects may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.
>
> 180. No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in Article 137, paragraph 2, of the Convention, which states that the Authority shall act ‘on behalf’ of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to Article 48 of the ILC Articles on State Responsibility, which provides: “Any State other than an injured State is entitled to invoke the responsibility of another State…if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community”’.[99]

It has been correctly observed by Judge Gaja that the Authority and States parties may not be both entitled to claim compensation, as ‘this would depend on the nature of the damage and on the costs incurred by the Authority or the Claimant State for cleaning up the environmental harm’.[100] The same author develops the position taken by the Seabed Disputes Chamber that the Authority is entitled to claim compensation stating that the Authority should play the principal role in providing an organized form of response, leaving to States parties a subsidiary role.[101]

[99] ITLOS Reports 2011, p. 10 at paras. 179-180.
[100] G. Gaja, ‘The protection of general interests’ op. cit., 181.
[101] *Ibid.*

8. A recent episode seems to confirm that at least one important State holds the view that all States are entitled to claim observance by all other States of *erga omnes* obligations. This is the case of China which has protested against the submission by Japan to the Commission for the Limits of the Continental Shelf of a proposal to use as a base point for determining the outer limit of its continental shelf Oki-no-Tori-Shima, a maritime feature which, in China's view, is a 'rock' according to the meaning of Article 121(3) of UNCLOS, and, as such, is not entitled to a continental shelf. In China's view 'the application of Article 121(3) of the Convention relates to the extent of the International Seabed Area as the common heritage of mankind, relates to the overall interest of the international community, and is an important legal issue of a general nature. To claim continental shelf from the rock of Oki-no Tori will seriously encroach upon the Area as the common heritage of mankind.[102] China also held that the Assembly of the International Seabed Authority should take the opportunity to consider the issue.[103] While this has not happened, no State has held that China was not entitled to raise the issue.

A claim that a delineation of the outer limits of the continental shelf beyond 200 nautical miles beyond the maximum prescribed by Article 76 of UNCLOS would encroach in the common heritage of mankind and so violate the *erga omnes* (or, at least, *erga omnes partes*) obligation to respect the limits of the Area would seem an egregious example of a situation in which the seized court could seriously consider that the claiming party has *locus standi* to protect rights deriving from an *erga omnes* obligation. It might have been preferable to grant to the International Seabed Authority the right to present such claims. A perusal of UNCLOS shows, however, that the Authority has not been granted such right.[104]

[102] Note CML/59/2011 of 3 August 2001 by the Permanent Mission of China to the UN to the UN Secretary-General.
[103] Explanatory note to the proposal of the People's Republic of China for the inclusion of a supplementary item in the agenda of the meeting of States Parties, doc. SPLOS/196 of 22 May 2009.
[104] T. Treves, 'Judicial Action for the Common Heritage', in H. Hestermeyer, N. Matz Lueck,

International courts and tribunals and codification conventions and other codification instruments

1. Article 13(1)(a) of the UN Charter indicates as a subject for studies and recommendations of the General Assembly 'encouraging the progressive development of international law and its codification'. The Statute of the ILC clarifies that 'codification' means 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine', while 'progressive development' means '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 (Article 15).[105]

The distinction has been taken to mean that codification consists in the formulation in written form of existing rules of customary international law, while progressive development consists in formulating in written form rules in areas where customary law is scarce or non-existent. In the early conventions based on drafts of the ILC, States tried to keep to this distinction. So, one of the four Geneva Conventions on the Law of the Sea adopted in 1958 on the basis of a draft of the ILC, that on the High Seas, states in its preamble that it aims at the codification of the relevant rules of international law, while the other three contain no such indication.

Further experience in the codification process has shown that the distinction is difficult to maintain as regards broad areas of the law, and that, even as regards specific provisions, to determine correspondence with customary rules requires an accurate assessment of international practice. Moreover, the very

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A. Siebert-Fohr, S: Voenecky (eds.), *Law of the Sea in Dialogue* (Springer, Heidelberg, etc., 2011), 113, espec. 122-129.

[105] See recently J. Crawford, 'The progressive development of international law: history, theory and practice', in D. Alland, V. Chétail, O. de Frouville, J. E. Vinuales (eds.), *Unité et diversité du droit international, Ecrits en l'Honneur du Professeur Pierre-Marie Dupuy* (Nijhoff, Leiden-Boston, 2014), 3.

fact of expressing a rule in written form requires interpretation of the language used; a problem that does not exist as regards customary rules and introduces a difference between the two, even when pure codification is intended.

The ILC has not insisted in distinguishing in its work between 'codification' and 'progressive development'.

2. The ICJ has been confronted with concrete cases in which it had to determine whether a State, not bound by a codification convention, was bound by a customary rule corresponding to the relevant provision of the convention. Probably keeping in mind Article 38 of the Vienna Convention on the Law of Treaties, that accepts the possibility of 'a treaty becoming binding upon a third State as a customary rule of international law, recognized as such', the ICJ developed the distinction set out in the ILC's Statute by clarifying the impact that 'progressive development and codification' conventions may have on customary international law.

According to the ICJ, a rule

> '…enshrined in a treaty may also exist as a customary rule, either because the treaty ha[s] merely codified the custom, or caused it to "crystallize", or because it ha[s] influenced its subsequent adoption'.[106]

So, in the view of the ICJ, conventional law, especially where resulting from codification activities, may 'codify' customary rules giving them a written form, may 'crystallize' an emerging rule in the sense that the inclusion of such rule in a codification convention adds to the practice the still missing element necessary to consider the emerging rule as customary, and may generate new customary law by constituting an element of practice that contributes

[106] *Nicaragua* judgment on the merits quoted above, ICJ Reports 1986, p. 14, para. 177; and previously *North Sea continental shelf* judgment quoted above, ICJ Reports 1969, p. 3, paras. 63, 68-73.

to the formation of a new customary rule. Of course, a rule in a codification convention may also remain, or become, because of further evolution of customary law, merely conventional.

The distinction drawn by the ICJ may apply also to codification set out in instruments different from treaties in force, such as draft conventions, articles adopted by the ILC, resolutions and other soft law instruments. A similar distinction has been proposed by the *Institut de Droit International* between 'law declaring' and 'law developing' resolutions of International Organizations.

3. In some cases courts and tribunals have considered it possible to resort to the provisional result of the codification process when they became persuaded that such result 'is binding upon all members of the international community, because it embodies or crystallizes a pre-existing or emergent rule of customary international law': so the ICJ in the *Continental Shelf* judgment between Tunisia and Libya, as regards the 'Draft Convention' then under discussion at the Third U.N. Conference on the Law of the Sea;[107] similarly, the arbitral award of 17 July 1986 in the case of *Filleting in the Gulf of St. Lawrence*, Canada/France,[108] as regards the UN Convention on the Law of the Sea, at that time not yet in force. As regards the same convention pending entry into force the ICJ in the *Gulf of Maine* judgment stated that the fact the Law of the Sea Convention was not in force and that 'a number of States d[id] not appear inclined to ratify it' in no way detracted 'from the consensus reached on large parts of the instrument' and that provisions concerning the exclusive economic zone 'even though in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question'.[109]

In other cases, provisional results of codification work have been seen as evidence of customary law without further consideration

[107] *Judgment of 24 February 1982*, ICJ Reports 1982, p. 18 at para. 24 on p. 38.
[108] RGDIP (1986), p. 713, at 748.
[109] *Judgment of 12 October 1984*, ICJ Reports 1984, 246, para. 94.

of practice. So, in the *Gabcikovo-Nagymaros* judgment, the ICJ referred to the Convention on the Law of Non-Navigational Uses of International Watercourses, which had been opened to signature a few months before the judgment, and was far from coming in force,[110] as constituting a 'modern development of international law' extending to non-navigational uses of international watercourses the principle of equality of rights of riparian States, which the PCIJ had proclaimed for navigable uses.[111]

In the same case, the Court stated that the requirements for invoking a state of necessity set out in the Draft Articles on State responsibility adopted on first reading by the ILC in 1996 'reflect customary international law'.[112]

The same Draft Articles adopted on first reading were referred to in different cases that show that prudence in this kind of references is required. In the *M/V Saiga (No 2)* judgment of 1999, ITLOS based its decision on the applicability of the exhaustion of domestic remedies rule, as set out in Article 295 of UNCLOS, which makes the exhaustion of local remedies a prerequisite of compulsory jurisdiction under the Convention only when 'this is required by international law', on a reference to Article 22 of the Draft Articles on State responsibility as adopted in first reading by the ILC.[113]

Faced with a similar situation in the *Virginia G* case, the Tribunal decided in 2014 to 'follow the approach' of the 1999 judgment.[114] In their separate opinion, judges Cot and Kelly observe, however, that

[110] Convention adopted on 21 May 1997, entered in force on 17 August 2014.
[111] *Hungary/Slovakia*, Judgment of 25 September 1997, ICJ Reports 1997, 7, para. 85. See also the reference to the 1997 Convention at para. 147. The PCIJ Judgment referred to is *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment Nr. 16, 1929, PCIJ, Series A, No. 23, p. 27.
[112] *Judgment of 25 September 1997*, ICJ Reports 1997, 7, at para. 52, followed by the International Tribunal for the Law of the Sea in its *MV Saiga No 2* judgment of 1 July 1999, ITLOS Reports 1999, 10, at paras. 133-134.
[113] *Saint Vincent and the Grenadines* v. *Guinea*, Judgment of 1 July 1999, ITLOS Reports 1999, 10, para. 98.
[114] *Panama/Guinea Bissau*, Judgment of 14 April 2014, ITLOS Reports 2014, 4, para. 155.

> '...the finding of the Tribunal in *M/V Saiga (No. 2)* does not reflect the present state of international law on the subject. That decision came at a time when the issue of mixed cases had not been thoroughly examined and the case law of international courts and tribunals had not been correctly assessed in the *M/V Saiga (No 2)*'.[115]

They add that the conclusion reached in Article 22 of the Draft Articles 'was an intermediate assessment at the time' which 'was dropped by the ILC in the final Draft Articles on State Responsibility'. They further observe that 'the ILC re-examined the issue in its Draft Articles on Diplomatic Protection and took a very different position in Article 14 of the draft' and that it was time for ITLOS 'to take a fresh look at the situation and to reassess its position on the issue'.[116] The quoted article of the Draft Articles on Diplomatic Protection, in order to determine whether domestic remedies must be exhausted in a case in which the rights invoked are rights of the national and of the State, provides that the claims must be brought 'preponderantly on the basis of an injury to the national'. The ITLOS judgment also mentions preponderance and states that the rights of the State were preponderant[117] reaching the same conclusions it had reached in the *M/V Saiga (No 2)* judgment. The view of judges Cot and Kelly is the opposite.[118] In its 2016 Judgment on the *M/V Norstar* case, the Tribunal, although referring to the *Virginia G.* judgment, does not engage in the preponderance test and simply states that, as it had concluded that two articles of UNCLOS were 'relevant' (a term the meaning of which the Tribunal does not clarify) to establish

[115] Separate opinion, in ITLOS Reports 2014, 164, at para. 5.
[116] Separate opinion, Cot and Kelly, ITLOS Reports 2014, 164, paras. 7 and 8.
[117] *ITLOS Judgment of 14 April 2014*, para. 157. The preponderance test was also referred to in the arbitral award of 5 September 2016, *in the matter of the Duzgit Integrity*, (Malta v. Sao Tomé and Principe), para.151, available at www.pca.cpa.org. In this case the requirement of exhaustion of local remedies was found not applicable notwithstanding the preponderance of the injuries to individuals, because the main private person concerned had concluded an agreement with Sao Tomé and Principe giving up and waiving any judicial activity for the recovery of damages (paras. 154-155).
[118] Separate opinion, Cot and Kelly, paras. 11-23.

jurisdiction, the claims based on those articles were claims of the State, and that claims for damages to the individuals arose from the alleged injury to the State.[119] In this way the preponderance test and the possibility of applying the exhaustion of local remedies rule set out in Article 295 of the Convention were made practically inapplicable.[120]

4. In certain cases the process of codification yields results even before being completed. This happens when the codification process is particularly lengthy and involves the direct participation of States, and when decisions are taken by consensus following a 'package-deal' approach, as at the Third UN Conference on the Law of the Sea, and, as it happened at that conference, during the process provisional written texts are submitted to elicit the reactions of States. This explains why various examples given above of judicial consideration of provisional results of a codification process as indications of existing customary rules, are taken from the law of the sea, and concern, in particular, the 'negotiating texts' setting out the provisional results of the third UN Conference throughout its decade long development. The attention in the arbitral award on *Filleting in the Gulf of St Lawrence* to the detail of the text (evident in the analysis of its various linguistic versions) shows that, more than the completion of the codification process, in certain cases the presence of a written text is what counts as a basis for determining that a customary rule exists (we might, perhaps, speak of 'written customary law').[121]

[119] *The M/V Norstar (Panama* v. *Italy*), preliminary objections, Judgment of 4 November 2016, at www.itos.org, paras. 267-261.

[120] This point is made in the Declaration of Judge Cot, and in the Dissenting Opinion of Judge ad hoc Treves, paras. 19-20. Judges Wolfrum and Attard in their joint Separate opinion, (para. 50) endorse the approach of the Tribunal even though conceding that 'de facto, it renders the application of Article 295 of the Convention moot in most cases'.

[121] My Hague 1990 lectures *La codification du droit international et la pratique des Etats dans le droit de la mer*, RC, vol. 223, 9, are an attempt to assess in detail the impact of the UN Law of the Sea Convention at a time in which the text had been completed and adopted, but the Convention had not yet entered into force.

5. Sometimes reliance of international courts on drafts prepared by the International Law Commission (but the same could happen for definitive results of the latter's work) is based on questionable interpretations of the drafts. This has happened in two decisions of 2007 of the European Court of Human Rights as regards Article 5 of the Draft Articles on the Responsibility of International Organizations adopted in first reading by the Commission in 2004.

While the provision states that the conduct of an organ or agent of an international organization that is placed at the disposal of another international organization is attributable to the latter 'if the organization exercises effective control over that conduct', the European Court of Human Rights, although quoting the Draft Article, refers to a criterion of 'effective *overall* control' and considers attributable to the United Nations, in the first case, acts of the UN intervention force in Kosovo (KFOR) and of the UN Mission for provisional administration in Kosovo (UNIMIK), and, in the second case, of the High Representative for Bosnia and Herzegovina, even though, in light of the criterion set out by the International Law Commission and explained in its commentary, there were very good arguments to hold that the acts were not attributable to the UN, as its control was not effective enough.[122]

6. International courts and tribunals have often referred to codification conventions or other instruments in order to support, in whole or in part, the assertion that a certain rule belongs to customary international law. As remarked above, in their view the fact that the relevant conventions or other instruments are in force, or even are still in draft form, is not decisive.

[122] See Draft Articles on the Responsibility of International Organizations, in doc. A/59/10, *Report of the International Law Commission, Fifty-sixth session* (2004), 110-115, article 5 and Commentary. The European Court of Human Rights Grand Chamber decisions on admissibility are of 31 May 2007 (*Bahrami* v. *France* and *Saramati* v. *France, Germany and Norway, Rivista diritto internazionale*, 2007, 807) and of 16 October 2007 (*Beric at al*. v. *Bosnia and Herzegovina*) The questions alluded to in the text are at paras. 29-33, 133-143 of the first decision, and at paras. 8-9 and 27-28 of the second one. Detailed arguments showing that the first decision is not consistent with article 5 of the ILC Draft Articles are set out in P. Palchetti, 'Azioni di forze istituite o autorizzate dale Nazioni Unite davanti alla Corte Europea dei diritti dell'uomo: i casi *Bahrami* e *Saramati*', *Rivista di diritto internazionale* (2007), 681-704.

Cases are numerous, and a full listing does not seem necessary. Suffice it to recall, as an example, that the ICJ, followed by other tribunals, including the WTO Appellate Body, and the International Tribunal for the Law of the Sea, has stated that provisions of the Vienna Convention on the Law of Treaties concerning treaty interpretation reflect customary international law. Among others, one may recall the ICJ judgments on the *Territorial dispute* between Libya and Chad;[123] and on preliminary objections in the *Oil Platforms* case;[124] the arbitral award of 14 February 1985 in the Guinea-Guinea Bissau *maritime delimitation case*;[125] the WTO Appellate Body report on *United States-Standards for Reformulated and Conventional Gasoline*.[126] the ITLOS Seabed Disputes Chamber's Advisory Opinion of 1 February 2011 on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*,[127] and the ITLOS Judgment of 14 March 2012 in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Gulf of Bengal* (Bangladesh/Myanmar).[128]

In most cases, as in those just quoted, the reference to a rule in a codification convention is seen as sufficient by the ICJ and by other tribunals to conclude that the rule reflects customary international law.

In the 2005 Judgment on the *Marine Delimitation in the Indian Ocean case* the Court, noting that the customary law of treaties was applicable since neither of the parties to the dispute, Somalia and Kenya, was a party to the Vienna Convention, applied numerous rules for whose content it referred to that convention.[129]

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[123] *Judgment of 13 February 1994*, ICJ Reports 1994, 3, at para. 41.
[124] *Judgment of 12 December 1996*, ICJ Reports 1996, para. 23.
[125] RDI (1985), 595, at para. 41.
[126] 29 April 1996, ILM, vol. 35 (1996), p. 605, at 621.
[127] ITLOS Reports 2011, p.10, at para. 57.
[128] ITLOS Reports 2012, p. 4, at para. 372.
[129] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya*), preliminary objections, Judment of 2 February 2017, ICJ Reports 2017, available at www.icj-cij.org, paras. 42, 45, 63, 89, 91, 99.

In the *Diallo* judgment of 2007 the Court took advantage of the ILC Draft Articles on diplomatic protection to add a remarkable extension of what it had previously held and a clarification of the point that the ILC did not develop in its articles even though it implied it in its Commentary.[130] While stating that customary law is 'reflected' in Article 1 of the above mentioned ILC Draft Articles, the Court broadened and clarified the definition of diplomatic protection contained therein by observing that:

> 'Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standards of the treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights'.[131]

7. In some cases the ICJ and other tribunals have specified certain requirements or introduced cautionary formulations relevant for reaching or not the conclusion that a codification instrument, or a provision thereof, reflects customary international law.

In the *North Sea Continental Shelf* judgment, the ICJ specified that when reservations are permitted as regards a provision in a convention, it can be inferred that such provision is not 'declaratory of previously existing or emergent rules of law'.[132]

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[130] A thorough study of the situation up to the *Diallo* judgment is in E. Milano, 'Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?', *Netherlands Yb. International Law*, vol. 35 (2005), 85-142. In its commentary to the Draft Articles the ILC observes that the traditional situation in which diplomatic protection was based on the fiction that an injury to the national was an injury to the State itself 'today... has changed dramatically. The individual is the subject of primary rules of international law, both under custom and treaty, which protect him at home, against its own Government, and abroad, against foreign Governments' (ILC Report for 2006, A/61/10, para. 50[4]).

[131] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo*), preliminary objections, Judgment of 24 May 2007, ICJ Reports 2007, 582, para. 39.

[132] ICJ Reports 1969, 3 at para. 64.

In discussing when a conventional rule may generate a corresponding rule of customary law, the same judgment states that it should be 'of a fundamentally norm-creating character';[133] and also that 'a very widespread and representative participation to the convention' may suffice, even though 'the number of ratifications and accessions so far secured is, though respectable, hardly sufficient'.[134]

Especially when referring to a group of conventional provisions, the ICJ has stated that the provisions can be considered 'in many respects' as a codification of customary international law. This is a cautionary limiting formulation. It would seem to serve the purpose to reserve for the future a finding that a specific provision included in those considered is not declaratory of customary rules. In fact the ICJ never analyses the 'respects' in which the articles quoted are or are not a codification of customary rules.[135]

This limiting formulation can be found, for instance, in the advisory opinion on *Legal consequences for States of the continued presence of South Africa in Namibia* as regards the conditions for terminating a treaty on account of a breach set out in Article 60 of the Vienna Convention of 1969.[136] In the *Gabcikovo-Nagymaros* judgment the ICJ used the same formulation as regards Articles 60 to 62 of the same convention,[137] while as regards Articles 65 to 67 it was even more prudent, recalling that the parties to the case agreed that these provisions 'if not codifying customary law, at least, generally reflect customary international law'.[138] Such prudence was called for, as it emerges from the already quoted judgment of 3 February 2006 on the case concerning *Armed activities on the territory of the Congo* (new application 2002) in which the Court stated

[133] *Ibid.,* para. 72.
[134] *Ibid.,* para. 73.
[135] See the remarks of Sir Arthur Watts, 'The International Court and the Continuing Customary International Law of Treaties', in N. Ando (ed,) *Liber Amicorum Judge Shigeru Oda* (The Hague, 2002), 251–66, at 263.
[136] *Advisory Opinion of 21 June 1971*, ICJ Reports 1971, 16, para. 94.
[137] ICJ Reports 1997, p. 7, at paras. 46 and 99.
[138] *Ibid.,* para. 109.

without elaboration that the rules contained in Article 66 do not have customary law character.[139]

Even though, as remarked above, the fact that the codification convention is or is not in force, or that it has attracted many or few ratifications, is not decisive as regards the determination of its correspondence to customary law. The fact that certain conventions have obtained 'nearly universal acceptance' may, in certain circumstances, be seen as particularly indicative. The Eritrea-Ethiopia Claims Commission in its partial awards Nos. 4 and 17 of 1 July 2003 on *prisoners of war* stated that the four Geneva Conventions of 1949 'have largely become expression of customary international law' and agreed with the view

> '…that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules to be found in treaties'.
>
> The Commission qualified this statement by adding the following:
>
> 'Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law … the burden of proof shall be on the asserting party'.[140]

Conversely, in some cases, codification conventions that have been very controversial during their negotiation, and have obtained very modest success in terms of ratifications and accessions, have made the ICJ very prudent in referring to them as sets of rules corresponding to customary law. This is the case, in particular, of the convention on the Succession of States in Respect of Treaties of 1978. The Court 'studiously avoided to mention' (to borrow the expression

[139] Para. 125.
[140] ILM vol. 42 (2003), p. 1056, paras. 30-32.

of judge Gilbert Guillaume[141]) in its judgment of 11 July 1996 on the *genocide case, preliminary objections*, the general principle of succession stated therein in case of separation (Article 34).[142] Moreover, it declined to state a view on its impact on customary law in its judgment of 25 September 1997 on the *Gabcickovo-Nagymaros* case.[143]

8. There is no hierarchy between customary and treaty rules. Even though the validity of treaty rules depends on a rule of international customary law (the rule *pacta sunt servanda*), usually in a concrete case treaty rules prevail on customary rules, because of their specialty, as very often treaty rules introduce limitations and exceptions to areas of freedom set out in customary rules.

The assessment of specialty must, nonetheless, be made with caution, and not always the application of the treaty rules excludes that of customary international law. The Iran-United States Claims Tribunal has stated:

> 'As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis,* namely customary international law. This does not mean, however, that the latter is irrelevant... On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and application of its provisions'.[144]

The non-hierarchical relationship between customary and treaty rules entails that the formulation of a rule of customary

[141] G. Guillaume, 'Le juge international et la codification', Société française pour le droit international, Colloque d'Aix-en-Provence, *La codification du droit international* (Paris, 1999), 301-308, at 307; see also T. Treves, *Diritto internazionale, problemi fondamentali* (Milano, 2005), 99-100 and 102.
[142] ICJ Reports 1996, p. 595.
[143] ICJ Reports 1997, 71, para. 123. The Court however stated that article 12 of the Convention concerning localized obligations 'reflects a rule of customary international law' (ibid.).
[144] *Amoco* v. *Iran*, 14 July 1987, ILM, vol. 27 (1988), 1316, para. 112.

law in the written form of a codification convention, or of the UN Charter, even when the treaty rule is very widely ratified, does not eliminate the customary rule, which retains its separate existence. In the *Nicaragua merits* judgment, the ICJ has made this point as regards the rule on non-use of force set out in the UN Charter:

> '...there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that customary international law has no existence of its own'.[145]

The Court went on to elaborate on the reasons why identical customary and treaty norms 'retain a separate existence'. These reasons have to do with possible differences as to applicability, interpretation, and the organs competent to verify implementation.[146]

It may happen that the customary law rule changes under the influence of practice, and that the coincidence between the treaty and the customary rule that existed when the treaty rule was adopted disappears with the passing of time. This was, probably, the case of a number of rules set out in the Geneva Conventions on the Law of the Sea of 1958, whose correspondence to customary rules was overcome by the wave of divergent opinion held by newly independent States, when these Conventions had just entered into force.

In connection with certain rules of the Geneva Conventions on the Law of the Sea, in light of the very rapid evolution of customary international law on the subject, a French court has held that an emerging customary rule may have the effect of abrogating

[145] *Judgment of 27 June 1986*, ICJ Reports 1986, 14, para. 177. In that case the Court could not rely on the UN Charter (by which Nicaragua and the US were bound), because of the US 'Vanderberg' reservation excluding the applicability of multilateral conventions. At the time strong doubts about the real correspondence between the conventional and the customary rules on use of force were expressed by Judge Ago, who voted in favour of the Judgment (Separate Opinion, ICJ Reports 1986, 182-184) and, in even stronger terms, by Judge Jennings, who voted against (Dissenting Opinion, ICJ Reports 1986, 529-536).

[146] Para. 178.

a treaty rule. This point was made as regards the impact of the then new rule of the 12-mile width of the territorial sea.[147] In more general terms, and in the same vein, the arbitral award on the *delimitation of the continental shelf between France and the United Kingdom* held:

> '[T] he Court recognizes ... that a development in customary international law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations'.[148]

International courts and tribunals and treaties

1. The jurisprudence of international courts and tribunals has made a relevant contribution as regards interpretation of treaties. Two aspects seem particularly noteworthy. The first concerns 'systemic' interpretation under Article 31(3)(c) of the Vienna Convention, the second consists in a reconsideration of the 'objectivist' approach adopted in that Convention.

2. International courts and tribunals, including the International Court of Justice, have, over the last couple of decades, started utilizing Article 31(3)(c) of the Vienna Convention, a hitherto almost forgotten rule.[149] Also the International Law Commission paid attention

[147] Court of Appeal of Rennes, 26 March 1979, AFDI (1980), p. 823.
[148] Award of 30 June 1977, France/UK, UNRIAA, vol. 18, p 3, para 47; in similar terms, J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., (2012), p. 33. For some other possible explanations of this phenomenon (tacit consent, fundamental change of circumstances), T. Treves, *Diritto internazionale, problemi fondamentali* quoted above, 248.
[149] In 1999 Ph. Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law', in A. Boyle, D. Freestone (eds.), *International Law and Sustainable Development – Past Achievements and Future Challenges* (Oxford, 1999), 39, at 49-50, could correctly observe that: 'what it actually means in practice is difficult to know, since it appears to have been expressly relied upon only very occasionally in judicial practice. It also seems to have attracted little academic comment. There appears to be a general reluctance to refer to Article 31(3)(c)'.

to this rule in the framework of its project on fragmentation.[150] This rule provides that, in the interpretation of a treaty,

> 'There shall be taken into account, together with the context: ... c) any relevant rules of international law applicable in the relations between the parties'.

This provision has been seen as a tool to enhance a 'systemic' interpretation of international treaties through which treaties to be interpreted can be envisaged in the broader framework of international law.[151]

This approach seems particularly useful from the perspective of international courts and tribunals when they have to decide cases on the basis of particular treaties, which need to be interpreted in connection to a broader set of international law rules. Article 31(3)(c), provides such connection through the rules on the interpretation of treaties that all international courts and tribunals are bound to apply, whether this is specified in the constitutive instrument, as in Article 3(2) of the DSU for the WTO Panels and Appellate Body, or derives from a broader reference to international law, as in Article 293 of the Law of the Sea Convention, or from judicial practice as in the case of the European Court of Human Rights.

The distinction between 'applying' international law rules in force between the parties and taking them 'into account' becomes important, so as the notion of 'relevant' rules of international law. These two notions seem to highlight that the other rules of international law are to be utilized solely for the purposes of interpretation of the treaty provisions under consideration. As a consequence – and the literal formulation of the provision seems to confirm this view – what counts is that the other rules

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[150] *Report of the Study Group* finalized by Martti Koskienniemi, A/CN.4/L 682, paras. 410 - 480.

[151] C. McLachlan, 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention', ICLQ, vol. 54 (2005), 279. D. French, 'Treaty interpretation and the incorporation of extraneous legal rules', ICLQ, vol. 55 (2006), 28.

of international law are in force as between the parties to the treaty to be interpreted and not that, if such other rules are in a multilateral treaty, there is a complete overlap of the parties to the latter treaty and to the treaty to be interpreted. A further question open to discussion is whether it is needed that all the parties to the treaty to be interpreted be bound by the treaty to be utilized under Article 31(3)(c), or whether it is sufficient that so are the parties to the dispute.[152]

As regards what 'take account' means, a WTO Panel report seems helpful:

> '…Article 31(3)(c) mandates a treaty interpreter to take into account other rules of international law … it does not merely give a treaty interpreter the option of doing so. It is true that the obligation is to "take account" of such rules and thus no particular outcome is prescribed. However, Article 31(1) makes clear that the treaty is to be interpreted "in good faith". This, where consideration of all other interpretative elements set out in Article 31 results in more than one permissible interpretation, a treaty interpreter following the instructions of Article 31(3)(c) in good faith would in our view need to settle for the interpretation which is more in accord with other applicable rules of international law'.[153]

Consideration of the obligations applicable between the parties to a treaty may be useful in order to attribute a meaning to undefined terms, to give a dynamic reading to concepts that are by nature evolutionary or linked to scientific progress.

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[152] WTO Panel report of 29 September 2006, *European Communities – Measures affecting the approval and marketing of Biotech products*, DS291, DS292, DS293. Para. 7.68 argues that 'the rules of international law to be taken into account in interpreting the WTO agreements at issue are those which are applicable in the relations between WTO members'. This notwithstanding, at paras. 7.73-75, the Panel embarks in considerations as to whether certain treaties invoked were in force between the parties to the case.
[153] WTO Panel Report on the *Biotech* case quoted above, para. 7.69.

In the *Iron Rhine Railway* arbitration award of 24 May 2005,[154] the Arbitral Tribunal referred to Article 31(3)(c) of the Vienna Convention, in order to apply the intertemporality rule in an evolutionary manner and interpret a treaty of 1839 in light of more recent developments of international law, in particular in the field of the protection of the environment, and of European Law (both parties being members of the European Community).[155]

In the *Oil Platforms* judgment of 2003 the International Court of Justice set itself – probably unnecessarily in light of the decision reached on the question submitted to it – to the task of interpreting Article XX of the 1955 Treaty of amity, economic relations and consular rights between Iran and the United States referring to measures necessary to fulfil the parties' 'obligations for the maintenance and restoration of international peace and security, or necessary to protect essential security interests'. The Court referred to Article 31(3)(c), of the Vienna Convention and stated that it 'could not accept' that the provision of the 1955 Treaty 'was intended to operate wholly independently of the relevant rules of international law on the use of force', and that 'the application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court … by the 1955 Treaty'.[156]

It seems regrettable that the Court mentions 'application' of the rules on the use of force, while Article 31(3)(c), speaks of taking 'into account' the relevant international law rules applicable between the parties. Some clarification would have been welcome. Interpretation and application of the rules are different operations, and to interpret a provision taking into account a given rule is not the same thing as applying such rule.

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[154] *Belgium/The Netherlands*, www.pca-cpa.org.
[155] Paras. 58 ff. and 79 ff.
[156] *Iran* v. *United States*, Judgment of 6 November 2003, ILM, vol. 42 (2003), 1334. at paras. 41-42.

The Court compressed in the same point of the *dispositif*, a statement that the actions of the United States could not be justified as 'necessary measures', if Article XX of the 1955 Treaty was interpreted in light of the rules of international law concerning the use of force, and a statement that these actions were not in breach of Article X, the substantive provision of the Treaty invoked by Iran. It seems that recourse to Article 31(3)(c), although perhaps useful to interpret Article XX of the 1955 Treaty, was unnecessary because the very application of Article XX, stating a cause of justification, was unnecessary, as the wrongful act that supposedly could be justified through this article was determined by the Court not to exist. As judge Higgins states in her separate opinion, the Court 'has invoked the concept of treaty interpretation to displace the applicable law'.[157] Political or 'legitimacy' reasons seem to be behind the decision of the Court, which, through its peculiar *dispositif*, could obtain the favourable vote of 14 out of 15 judges.

In the judgment of 2017 on preliminary objections *in the Maritime Delimitation in the Indian Ocean* case, the ICJ referred to UNCLOS, to which both parties to the case were parties, as containing the 'relevant rules of international law' mentioned in Article 31(3)(c), of the Vienna Convention in order to interpret a Memorandum of Understanding between Kenya and Somalia concerning maritime matters. The Court proceeded to interpret the provision on delimitation in the Memorandum in light of Article 83 of UNCLOS.[158]

In decisions of 2007, the European Court of Human Rights invoked Article 31(3)(c), to interpret the rights under the European Convention as subordinate to decisions taken by the Security Council in the framework of Chapter VII of the Charter, even though it noted that it was 'mindful of the Convention's special Character as a human

[157] ILM, vol. 42 (2003), 1369, at para. 49.
[158] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya*), preliminary objections, Judgment of 2 February 2017, ICJ Reports 2017, available at www.icj-cij.org.

rights treaty'. The subordination was due to that, among the 'other rules of international law' mentioned in Article 31(3)(c), of the Vienna Convention, the Court includes Articles 25 and especially 103 of the UN Charter.[159] As it has been observed, the reference to Article 103 has been pushed too far because this article refers to 'obligations' under the Charter, while, in the cases considered by the *European* Court for Human Rights, the measures taken by the Security Council contained authorizations and not obligations.[160]

3. Systemic interpretation under Article 31(3)(c) of the Vienna Convention is not the only tool utilized in the jurisprudence of international courts and tribunals for justifying evolutionary interpretation. The Court has also resorted to the presumed will of the parties that certain rules or meanings were intended to be part of a treaty, to be inferred from the use of particular references or terms in the text.

In the *Gabcickovo - Nagymaros Project* judgment of 1997, the Court argued from the presence, in a treaty of 1977 in force between the parties, of clauses providing that the parties could by agreement incorporate 'newly developed norms of international environmental law', that

> '[b]y inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan'.[161]

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[159] See the decisions of 31 May 2007 (*Bahrami* v. *France* and *Saramati* v. *France*, *Germany and Norway*), and of 16 October 2007 (*Beric at al.* v. *Bosnia and Herzegovina*). The points mentioned in the text are at paras. 122, 147-152 of the first decision, and at paras. 29 - 30 of the second one.

[160] P. Palchetti, 'Azioni di forze istituite o autorizzate dalle Nazioni Unite' op.cit. (RDI, 2007), at 696-700.

[161] *Judgment of 25 September 1997*, ICJ Reports 1997, p. 7, para. 112.

In the judgment of 2009 on the *Dispute regarding navigational and related rights between Costa Rica and Nicaragua*, in order to interpret the Spanish term 'comercio' in a treaty of 1858, the ICJ stated:

> 'Where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is of "continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning'.[162]

The Court concluded that:

> '...the terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term "comercio", must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning. Thus, even assuming that the notion of "commerce" does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty'.

And that:

> 'Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays. This is the case if the carrier engages in the activity for profit-making purposes'.[163]

4. There are other aspects of the law of interpretation of treaties on which the Vienna Convention has not had the effect of stopping

[162] *Judgment of 13 July 2009*, ICJ Reports 2009, p. 213, at para. 66.
[163] Ibid., paras. 70, 71.

discussions and on which international courts and tribunals have distanced their position from that of the Convention.

It is well known that the Vienna Convention has given its preference to an objective approach to treaty interpretation. It gives priority to the text and context of the treaty in light of its object and purpose, and relegates to the category of 'supplementary means' elements apt to show the true intention of the parties such as preparatory work and the circumstances of conclusion. This approach has enjoyed considerable success in the practice of the International Court of Justice and of other international tribunals.

Courts and tribunals have, however, given more importance than that emerging from the provisions of the Vienna Convention to the consideration of preparatory work and in general the ascertainment of the true intention of parties.

While, according to Article 32 of the Vienna Convention these elements are 'supplementary means of interpretation' to be resorted to 'in order to confirm the meaning resulting from the application of Article 31', or when interpretation according to Article 31 'leaves the meaning ambiguous or obscure', or 'leads to a result which is manifestly absurd or unreasonable', the International Court of Justice's recent practice does not normally utilize preparatory work for the last two purposes mentioned.[164] It routinely looks at preparatory work and other supplementary means in order to obtain confirmation of the interpretation reached, even when Article 31 has brought it to a clear result.[165] It would appear that the Court thus utilizes preparatory work in the least necessary of the cases envisaged by the Vienna Convention.

[164] See the observation by G. Guillaume, 'Methods and Practice of Treaty Interpretation by the International Court of Justice', in G. Sacerdoti, A. Yanovich and J. Bohannes (eds.), *The WTO at Ten, The Contribution of the Dispute Settlement System* (Cambridge, 2006), 465, at 471.

[165] See, for instance, the ICJ judgment of 17 December 2002 on *Sovereignty on Pulau-Ligitan and Pulau-Sipadan islands, Indonesia/Malaysia*, ICJ Reports 2002, 625, *Rivista di diritto internazionale* (2003), 183, para. 53, quoting previous decisions.

5. This attitude may, however, be seen as an indication that the Court envisages interpretation as an integrated operation in which subjective aspects cannot be eliminated, adopting a view that is less 'objectivist' than that apparently emerging from the Vienna Convention.[166] This approach seems to have been endorsed by the International Law Commission in one of its 2016 Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties:

> 'The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in Articles 31 and 32'.[167]

In contrast, the WTO Appellate Body – bound by the WTO Dispute Settlement Understanding Article 3(2) to apply the 'customary rules of interpretation of customary or general international law' – has been very careful in applying Article 32 of the Vienna Convention only when it had not reached a satisfactory interpretation on the basis of Article 31 of the Vienna Convention of 1969.[168] So in the *US-Gambling and betting services* report of 7 April 2005, the Appellate Body states that, as 'a proper interpretation pursuant to the principles codified in Article 31 of the Vienna Convention does not yield a clear meaning', 'it is appropriate to have recourse to the supplemental means of interpretation identified in Article 32 of the Vienna Convention'.[169]

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[166] A recent appraisal of the compromise nature of article 32 of the Vienna Convention is in the commentary to the article by Y. Le Bouthillier 'Article 32', in O. Corten, P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article* (Bruxelles, 2006), 1338, espec. 1347-1350.

[167] Draft Conclusion 2 (5), in UN doc. A/71/10, 120 (ILC 2016 Report).

[168] See the observations by G. Abi-Saab, 'The Appellate Body and treaty interpretation', in G. Sacerdoti, A. Yanovich, J. Bohannes, *The WTO at Ten*, quoted at note 26, 453, at 459. According to Abi-Saab, this approach has the drawback that it does not take into account that 'interpretation remains one integrated operation which uses several tools simultaneously'.

[169] ILM, vol. 44 (2005), 840, at para 197.

A rather curious case is that of the arbitral award of 12 March 2004, Netherlands/France, concerning the *auditing of accounts (apurement des comptes)*.[170] The Arbitral Tribunal resorted to preparatory work after having reached a result that one of the arbitrators qualified as 'unreasonable'.[171] As, however, the results reached in light of preparatory work were the same, the Tribunal confirmed them.

6. As regards preparatory work, the revival of the relevance of this supplementary means of interpretation must be seen in relation to the meaning that is attributed to it. Specific attention to the notion of preparatory work in international judgments and awards is, admittedly, not very abundant.[172] Different trends may be perceived in arbitral practice. In the 1980 arbitral award on the dispute on the *revaluation of the Deutsche Mark*, a restrictive notion is put forward. According to the Arbitral Tribunal, preparatory work only includes written material, excluding oral statements unless incorporated in minutes or reports; only official statements made during the negotiation and accessible data effectively known by all parties count; draft articles, or minutes of meetings to which some of the parties have not been able to accede cannot count as indication of common intent of the parties, unless known by all contracting States at the moment of the conclusion of the treaty.[173] Contrary to this restrictive notion, one may, however, note that in examining the 'legislative history' (a less technical term than 'travaux') of certain treaties, materials not attributable to the parties to the treaty, as those emerging in the work of the international Law Commission, are often referred to.

In awards of ICSID arbitration tribunals and of the WTO Appellate Body a broader notion appears. The moment of the conclusion

[170] In *Rev. générale. dr. int. public* (2004), 777, www.pca-cpa.org. J. Cazala, 'Résultat manifestement absurde ou déraisonnable de l'interprétation dans l'affaire de l' *apurement des comptes* (Pays-Bas c. France)', AFDI, 2004, 624.
[171] Declaration annexed by Judge Guillaume.
[172] For a recent study, L. Sbolci, 'Supplementary means of Interpretation', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (OUP, Oxford, 2011), 145, at 151-156.
[173] *Award of 16 May 1980*, ILM, 1980, vol.19, 1357, at paragraph 34.

of the treaty would seem to have become a watershed identifying a practice much broader than what the words 'preparatory work' would imply, to include previous treaties and disputes. Sometimes this practice is presented as a supplementary means to confirm the results obtained through the general rule of interpretation,[174] sometimes it is presented as 'historical background' in order to ascertain the meaning of terms used.[175]

7. International courts and tribunals have invoked, and adapted, the rules on treaty interpretation set out in the Vienna Convention on the Law of Treaties, in the interpretation of non-treaty instruments. So the ICJ in its Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, states that the rules on interpretation of the Vienna Convention 'may provide guidance' as regards the interpretation of resolutions of the United Nations Security Council.[176]

The Seabed Disputes Chamber of the ITLOS, in interpreting regulations adopted by the International Seabed Authority, refers to the passage of the Kosovo Advisory Opinion just referred to. It expands and makes more specific its content:

> 'The fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation. In the specific case before the Chamber, the analogy

[174] As in the ICSID Award of 21 October 2005, in the A*guas del Tunari* v. *Republic of Bolivia* case.
[175] WTO Appellate Body Reports of 13 July 1998 WT/DS69/AB/R: *EC-Poultry*, paragraph 83 (with the reference to 'historical background'); of 13 October 1999, WT/DS103/AB/R-WT/DS/113/AB/R: *Canada-Dairy* paragraph 139; Panel Report of 10 January 2000: *Korea-Measures affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, DSR, para. 539.
[176] *ICJ Advisory Opinion of 22 July 2010*, ICJ Reports 2010, 403, para. 94.

is strengthened because of the close connection between these texts and the Convention'.[177]

[177] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, 10, at para. 60.

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На английском языке

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