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Is the International Law Commission Taking Regionalism Seriously (Enough)?

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Abstract

Regionalism poses a challenge to the work of the International Law Commission (ILC). The Commission, entrusted by the United Nations General Assembly (UNGA) with the "progressive development of international law and its codification", is tasked with identifying and elaborating universally accepted and acceptable rules of international law. The challenge posed by regionalism lies in its ambivalent role precisely in relation to the mandate of the ILC: on the one hand, a significant share of practice in international law is generated at the regional level. Since regional practice thus constitutes a substantial part of State practice, the ILC cannot avoid taking regional practice into account if it is to identify and develop common rules. On the other hand, regionalism often involves claims for special legal treatment based on the affiliation with a *region*; thus, deviations from precisely those general legal rules which the ILC seeks to codify and develop. The present contribution analyses how the Commission has approached regionalism in its previous work and identifies four approaches. It shows that each of these approaches suffers from shortcomings. At the same time, the current projects on *General principles of law* (GPL) and *Sea-level rise in relation to international law* possibly indicate the emergence of a more fruitful fifth approach. Based on this analysis, the present contribution shows that the practice of the ILC evinces two methodological challenges arising from regional plurality –, *the challenge of equal regional representation* and *the challenge of regional exceptionalism*, – and makes suggestions as to how to address these in the future.

A. Introduction

James Crawford observed in 1997 that the International Law Commission's (ILC) "record reveals not merely an absence of reference to the issues of regionalism but even a deliberate attempt to eschew any such ideas"[1] and that the ILC's contribution in this regard was "one-sided, or even wholly lacking".[2] Two very different projects recently put on the agenda of the ILC, *General principles of law* and *Sea-level rise in relation to international law*, have one aspect in common: both of them illustrate the tension between regionalism and universalism in the work of the Commission. They suggest reviewing the approach taken by the ILC towards regionalism more than twenty years after Crawford's acute remarks.

Regionalism, understood as including claims for special treatment based on the affiliation with a *region*,[3] represents a challenge to the role entrusted to the ILC. Being tasked with the "progressive development of international law and its codification" by the United Nations General Assembly (UNGA),[4] the Commission's function consists in the identification and elaboration of universally accepted and acceptable rules of international law. The challenge posed by regionalism lies in its ambivalent role precisely with respect to that mandate of the ILC: on the one hand, a significant share of practice in international law is generated at the regional level. Long before any universal international organization was established in the late 19th century, States had already set up regional institutions tasked, for example, with regulating navigation on watercourses[5] and concluded a multitude of regional agreements

1 J. Crawford, 'Universalism and Regionalism from the Perspective of the Work of the International Law Commission', in *United Nations* (ed.), *International Law on the Eve of the Twenty-first Century, Views From the International Law Commission* (1997), 99, 113.

2 *Ibid*.

3 See, similarly, *Ibid.*, 102, fn. 18: "In this essay I use the term 'regionalism' in a broad and no doubt inexact sense, to include claims special treatment by reference to (or regulatory systems based on) historical, economic or geographical sub-classifications of States." As indicated by Crawford, *region* is generally understood as designating a group of States which is objectively identifiable by a minimum of geographic cohesion and/or a shared ideology or history.

4 *Charter of the United Nations*, 26 June 1945, Art. 13 (1), 1 UNTS; *Statute of the International Law Commission*, GA Res 174 (II), 21 November 1947, annex, Art. 1(1).

5 The 1815 Central Commission for Navigation on the Rhine has been considered to represent the first regional organization between States in Europe, L. Boisson de Chazournes, *Interactions Between Regional and Universal Organizations – A Legal Perspective* (2017), 29-30.

on a wide range of subject-matters.[6] Since regional practice thus constitutes a substantial part of state practice, the ILC cannot avoid taking regional practice into account if it is to identify and develop common rules. On the other hand, regionalism often entails deviations from those general legal rules which the ILC seeks to codify and to develop. This ambivalence of regionalism poses a challenge for the task entrusted to the ILC.

This challenge needs to be taken seriously if the ILC's output should continue to reflect universally accepted and acceptable rules of international law. The adequate treatment of regional practice by the ILC represents a recurrent issue raised by delegations in the Sixth Committee during their annual discussion of the ILC reports.[7] For example, the cautious stance of Asian delegations with respect to the elaboration of a convention on crimes against humanity, as proposed by the ILC in 2019, has been explained by the region's different approach to international criminal law.[8] In light of these developments, the ILC is – perhaps more than ever – asked to demonstrate that the methodology underlying its output neither neglects or overstates the role of regional practice in general, nor that of certain regions in particular.[9]

6 See, for instance, the dense web of inter-State agreements between American States in the 19th century (on this aspect: A. Álvarez, 'Latin America and International Law', 3 *American Journal of International Law* (1909) 269-352).

7 Delegations in the Sixth Committee have frequently asked the Commission to put greater emphasis on including State practice "from diverse regions" (*e.g.*, on the topic of *Immunity of State Officials, Topical Summary of the Discussion Held in the Sixth Committee*, UN Doc A/CN.4/734, 12 February 2020, para. 16), from "across all regions" (on Sea-level rise, para. 57) and criticized "a bias towards case law from particular regions" (*Topical Summary of the Discussion Held in the Sixth Committee*, UN Docs A/CN.4/713, 26 February 2018, para. 37. (Immunity of State officials). They have also pointed to the insufficient consideration of regional agreements, mechanisms and IOs (*Topical Summary of the Discussion Held in the Sixth Committee* (2015), UN Doc A/CN.4/678, paras 9, 17 and 97). At the same time, delegations have expressed concerns "about relying too heavily on regional practices relating to human rights treaties, as the solutions applicable to those treaties were not necessarily transposable to other treaties" (*Topical Summary of the Discussion Held in the Sixth Committee*, UN Doc A/CN.4/638, 19 January 2011, para. 17 (reservations)) and about "identify[ing] general rules of international law on the expulsion of aliens, since there already existed detailed regional rules on the subject" (*Topical Summary of the Discussion Held in the Sixth Committee*, UN Doc A/CN.4/657, 18 January 2013, para. 4)).

8 M. Takeuchi, 'Asian Perspectives on the International Law Commission's Work on Crimes Against Humanity', 6 *African Journal of International Criminal Justice* (2020) 2, 151-161, in particular at 155, 157 and 159.

9 See for examples of regional *minilateralism*: EU General Data Protection Regulation, OJ 2018 L 127/6. And a critical discussion of its extraterritorial effect and relationship to

To demonstrate these claims, this contribution shows in a first part that in accordance with its mandate the ILC serves as a custodian of universality (B.). Different from the provisions regulating its composition, the Commission's working methods, however, do not explicitly envisage a regionally balanced approach. Therefore, this contribution analyses in a second part the practice of the Commission vis-à-vis regionalism in its work (C.). It identifies five approaches taken by the ILC: the institutional dialogue with its regional counterparts, the exclusion of regional law and institutions from the scope of the respective projects, the tacit and often imbalanced reliance on regional practice, and the treatment of regional law as *lex specialis*. This contribution shows that each of these approaches suffers from shortcomings. It then turns to the current work of the ILC, the project on "General principles of law" and "Sea-level rise in relation to international law" as possibly indicating an emerging fifth approach. Based on the first two parts, the third part shows that the practice of the ILC evinces two methodological challenges arising from regional plurality, the "challenge of equal regional representation" and the "challenge of regional exceptionalism" and makes suggestions as to how to address these in the future (D.) before it concludes (E.).

other rules under international law: Symposium 'The GDPR and International Law', 114 *AJIL Unbound* (2020); the adoption of the conclusion of the Regional Comprehensive Economic Partnership (RCEP) under the auspices of ASEAN in 2020 (criticising its approach to dispute settlement and human rights as "head[ing] for the opposite direction" compared to "the rest of the world": D. Desierto, 'The Regional Comprehensive Economic Partnership (RCEP)'s Chapter 19 Dispute Settlement Procedures', *EJILTalk!*, 16 November 2021, available at https://www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/ (last visited 1 December 2021)); see for examples of regional contestation: the controversy about the scope of immunity *ratione personae* between the International Criminal Court and the African Union illustrated by the adoption of Article 46A *Bis* of the Malabo Protocol by AU member States in 2014 (on this: D. Tladi, 'Article 46A *Bis*: Beyond the Rhetoric', in CJ Jalloh *et al.* (eds), *The African Court of Justice and Human and Peoples' Rights in Context. Development and Challenges* (2019), 850–865; G. Werle & M. Vormbaum, 'African States, the African Union, and the International Criminal Court: A Continuing Story', 60 *German Yearbook of International Law* (2017) 17–42). See on the role of regional approaches and their relationship to claims of universality: A. Koagne Zouapet, 'Regional Approaches to International Law (RAIL): Rise or Decline of International Law?', KFG Working Paper Series 2021/05, No. 46, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3804733 (last visited 1 December 2021).

B. The ILC as a Custodian of Universality?

The ILC finds itself in a unique position to serve as a custodian of universality in international law. Its mandate for the codification and progressive development of international law has met with support across all regions (I.) to which the entrenchment of regional plurality in the composition of the Commission contributed significantly (II.). Yet, the way pursuant to which the working methods of the ILC should address issues of regionalism is less clear (III.).

I. The Mandate of the ILC

Established in 1947 as a subsidiary organ to the UNGA,[10] the ILC has not been set up to make binding recommendations or determinations on the content of universally applicable rules of international law. However, it is the only international expert body that has been entrusted with the task of identifying and proposing common rules of international law by all UN-member States. While it is true that the UN possessed only a third of the number of its current members in 1947 when the ILC was mandated with the "progressive development of international law and its codification", the ILC's mandate met with enthusiastic support by the newly independent States which were successively admitted to the UN in the following years.[11] Over the last seventy decades, this mandate of the ILC to identify and propose common rules of international law across all fields and regions has been repeatedly affirmed by States from all regions and never been seriously called into question.

II. Regional Representation in the Composition of the Commission

This universal acceptance of the ILC's mandate to codify and progressively develop international law across all regions is rooted, in part, in the regionally representative composition of its members.[12] According to Article 8 of its Statute,

10 Crawford, *supra* note 1, 102, fn. 18.

11 See *e.g.* A. Krueger, *Die Bindung der Dritten Welt an das Postkoloniale Völkerrecht* (2018), 135-144 for further references.

12 See Secretariat of the International Law Commission, 'Introduction' in United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future (2021)*, 34: "In other words, the membership of the Commission, representative of the five regional groups of States and their widely diverse cultures and traditions, including legal traditions, is essential to the authority and respect that the Commission needs to carry out its mandate."

"in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured".[13] In order to reflect the expanding membership of the UN, the number of members have been increased several times, from the original 15 members to 34 members today.[14] Furthermore, the *gentlemen's agreements* which had previously determined the allocation of seats among regional groups were replaced by a fixed distribution of seats to ensure equitable regional representation in 1981.[15] Anthea Roberts argued in 2017 that the nationality alone does not necessarily indicate that the respective persons have been trained and socialized in the respective national – regional – environment.[16] Yet, it must not be forgotten that the candidates are nominated within their respective regional groups and that it can thus be presumed that they are considered to represent the legal approach of that region. Nevertheless, the findings by Roberts still illustrate that the equitable regional composition of the ILC may not be sufficient to ensure the representation of regional plurality in the work of the Commission.

III. Regional Representation in the Working Methods of the Commission

Article 8 is limited to the composition of the ILC. It does not extend to its working methods. Instead, as Crawford observed in 1997, "[i]n conformity with its Statute and mandate, the Commission has worked entirely on the assumption of universalism"[17]. This observation appears to be in a certain tension with the claim made by the ILC Secretariat in 2018 on the occasion of the seventieth anniversary commemoration of the Commission. According to the Secretariat "[r]egional representation infuses every aspect of the working methods of the Commission"[18]. At closer inspection, however, the Secretariat mainly referred to the regional rotation of offices within the Commission, notably the positions in

13 GA Res 174 (II), UN Doc A/RES/174(II), 21 November 1947.

14 GA Res 1103 (XI), UN Doc A/RES/1103(XI), 18 December 1956 (increase to 21); GA Res 1647 (XVI), UN Doc A/RES/1647(XVI), 6 November 1961 (increase to 25); UNGA Res 36/ 39, UN Doc A/RES/36/39, 18 November 1981 (increase to 34).

15 *Ibid*. See also: Secretariat of the International Law Commission, *supra* note 12, 229.

16 Instead, she observes that "students are more likely to move from peripheral and semiperipheral states toward core states, and from non-Western states to Western ones, than the other way around": A. Roberts, *Is international law International?* (2017), 53-54.

17 Crawford, *supra* note 1, 113.

18 Secretariat of the International Law Commission, *supra* note 12, 37.

the Bureau and the appointment of Special Rapporteurs.[19] While these practices are an important way to enhance the consideration of different approaches, it still does not guarantee the reflection of regional plurality in the substance of the Commission's output.

But is it necessary to explicitly address issues of regionalism in order to reflect regional plurality in the Commission's work? In other words, does the lack of references to regionalism automatically mean that the ILC does not take regional plurality seriously?

Writing almost 20 years after Crawford's observation, Mathias Forteau made a strong case against this latter assumption. Forteau understands the working methods of the ILC as a rather positive blueprint for the use of "comparative international law" in practice which successfully reconciles political and cultural – regional – plurality with the need for general rules.[20] He specifically describes two different ways in which the Commission deals with normative divergence: for one, Forteau mentions three "accommodating tools" which the Commission has employed to overcome divergences, *i.e.* "recourse to linguistic tools", "drafting of general rules" and "providing for normative flexibility".[21] Yet, in cases of a *pronounced* divergence or inconsistency in State practice, Forteau observes, secondly, that the ILC either refrains from codification or progressive development, or codifies by relying on what it perceives to reflect the majority of State practice, or progressively developes international law "by expressing a normative preference for one state practice or *opinio juris* over another".[22] Does regionalism, in light of this analysis, require a special treatment in the working methods of the ILC? Forteau himself does not seem to be of this view arguing that the

> "analysis of the Commission's practice and experience since 1945 reveals that real different approaches to existing rules of international law are quite exceptional. State practice can vary or be inconsistent; this is the normal life of international law. On the

19 *Ibid*., see further M. Kamto, 'The Working Methods of the International Law Commission' in United Nations (ed.), Seventy Years of the International Law Commission: *Drawing a Balance for the Future (2021)*, 198-214 at 207 on the importance of appointing Special Rapporteurs from different regions.

20 M. Forteau, 'Comparative International Law Within, Not Against, International Law: Lessons From the International Law Commission', 109 *American Journal of International Law* (2015), 498-513, 500-501 ['Within, not Against International Law'].

21 *Ibid*., 508-513.

22 *Ibid*., 507-508.

> other hand, the Commission does not frequently face, in its day-to-day work, cultural, 'civilizational', or political opposition on what international law is or should be."[23]

Does the approach sketched by Forteau indeed fully capture the methodological challenge posed by regionalism or, alternatively, is what he describes as the ILC's approach merely symptomatic of the "deliberate attempt to eschew any such idea [of regionalism]"?

C. The ILC and Regionalism: Five Approaches

To answer this question, we need to *zoom in* on the way in which the ILC has dealt with normative plurality arising specifically from regionalism.[24]

So far, the ILC has adopted five distinct approaches towards regionalism in its work since 1947. Each of them is marked by the attempt to reconcile the role of the ILC as a custodian of universality, on the one hand, with the consideration of regional plurality on the other.

I. Dialogue: Regional Institutions as Interlocutors

The ILC seeks to integrate the views of regional bodies through its institutional cooperation with regional institutions.

1. Exchange With Regional Law Commissions

As envisaged in Article 26 (4) of its Statute, the ILC cooperates and holds regular consultations with regional law commissions, such as the Asian

[23] *Ibid*., 507.

[24] The following analysis includes all the different forms of output by the ILC without distinguishing in greater detail between draft articles, conclusions, principles, guidelines, and the reports of study groups. See on the distinction between these various types of output and the differences in working methods: Kamto, *supra* note 19, 199, who observes that the Commission itself did not "devote much discussion on the issue [the author: the differences in working methods], even after the introduction of new products in its practice, like guidelines, principles, conclusions and reports of study groups"; see further S. Murase, Concluding Remarks on the Working Methods, in United Nations (ed.), Seventy Years of the International Law Commission: *Drawing a Balance for the Future* (2021), 221 for a criticism of the establishment of study groups.

African Legal Consultative Organization (AALCO),[25] the AU Commission of International Law (AUCIL),[26] the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI)[27] and the Inter-American Juridical Committee (IAJC).[28] In this regard, the ILC explicitly encourages States to participate in such regional efforts of codification and progressive development.[29] One example of a particularly productive cooperation has been the exchanges between the ILC and an AALCO Informal Expert Group on the topic of customary international law, notably from 2014 to 2016.[30]

2. Comments by Regional Organizations on the Work of the ILC

Furthermore, the Commission frequently calls upon IOs to submit comments on certain topics.[31] In particular, the project on "Responsibility of

25 'Statutes of the Asian-African Legal Consultative Organization' (2004), available at https://www.aalco.int/STATUTES.pdf (last visited: 12 December 2021), preceded by 'Statutes of the Asian-African Legal Consultative Committee', 1 *Asian Yearbook of International Law* (1991), text as in force with effect from 12 January 1987.

26 *Statute of the African Union Commission on International Law*, EX.CL/478 (XIV), 4 February 2009.

27 Established under Article 17 of the Statute of the Council of Europe by a decision of the Committee of Ministers in 1991, preceded by the Committee of Experts on Public International Law (CJ-DI) (from 1982 to 1990), see M. Requena & M. Wood, 'Committee of Legal Advisers on Public International Law (CAHDI)', MPEPIL 2017, para. 3. The rules of procedure of the Committee are governed by Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working method (adopted by the Committee of Ministers of the Council of Europe on 9 November 2011).

28 *Statutes of the Inter-American Juridical Committee*, OEA/Ser. Q/I rev.2, 5 June 2007; *Charter of Organization of American States*, 13 December 1951, Article 53 lit d, 1609 UNTS 119, 3.

29 Memorandum by the Secretariat, *Identification of Customary International Law Ways and Means for Making the Evidence of Customary International Law More Readily Available*, UN Doc A/CN.4/710/Rev.1, 14 February 2019, para. 120.

30 See for an overview of these exchanges: S. Yee, 'AALCO Informal Expert Group's Comments on the ILC Project on "Identification of Customary International Law": A Brief Follow-up', 17 *Chinese Journal of International Law* (2018), 187–194 and M. Wood, 'The Present Position Within the ILC on the Topic "Identification of Customary International Law": in Partial Response to Sienho Yee, Report on the ILC Project on "Identification of Customary International Law"', 15 *Chinese Journal of International Law* (2016), 3–15.

31 IOs have submitted comments regarding, inter alia, the regime of the high seas (ILC, 'Comments by Inter-Governmental Organizations' (1956), UN Doc A/CN.4/100), the representation of States in their relations with international organizations (ILC,

international organizations for internationally wrongful acts", concluded in 2011, attracted comments by regional IOs, including the Council of Europe, the European Union (EU), North Atlantic Treaty Organization (NATO), the Organisation for Economic Co-operation and Development (OECD) and the Organization for Security and Co-operation in Europe (OSCE).[32] In addition, regional IOs have commented on ILC projects in the 6th Committee of the UNGA.[33]

'Observations of […] the Secretariat of the United Nations, the Specialized Agencies and the IAEA on the Draft Articles on Representatives of States to International Organizations' (1971) UN Doc A/CN.4/239 and Add.1–3 and UN Doc A/CN.4/240 and Add.1–7), the most-favoured-nation clause (ILC, 'Observations of […] the Secretariats of the United Nations, the Specialized Agencies and the International Atomic Energy Agency on the Draft Articles on Representatives of States to International Organizations' (1978), UN Doc A/CN/4/308, Add.1, Add.1/Corr.1 and Add.2), treaties concluded between States and international organizations or between two or more international organizations (ILC, 'Comments and Observations of Governments and Principal International Organizations' (1981), UN Doc A/CN.4/339 and Add.1–8 and (1982), UN Doc A/CN.4/350, Add.1–6, Add.6 /Corr.1 and Add.7–11), the international liability for injurious consequences arising out of acts not prohibited by international law (ILC, 'Replies Received (from International Organizations)' (1984), UN Doc A/CN.4/378), crimes against the peace and security of mankind (ILC, 'Observations of Member States and Intergovernmental Organizations' (1985), UN Doc A/CN.4/392 and Add.1–2), the law of transboundary aquifers or 'shared natural resources' (ILC, 'Comments and Observations Received from Governments and Relevant Intergovernmental Organizations' (1005), UN Doc A/CN.4/555 and Add.1), the effect of armed conflicts on treaties (ILC, 'Comments and Observations Received from International Organizations' (2008), UN Doc A/CN.4/592 and Add.1), the responsibility of international organizations (with comments consistently submitted between 2004 and 2011: ILC, 'Comments and Observations Received from International Organizations', UN Doc A/CN.4/545, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582, A/CN.4/593 and Add.1, A/CN.4/609, A/CN.4/637 and Add.1), the protection of persons in the event of disasters (ILC (2016), UN Doc A/CN.4/696 + Add.1), subsequent agreements and subsequent practice in relation to the interpretation of treaties (in in 2015 and 2016: available at https://legal.un.org/ilc/guide/1_11.shtml (last visited 5 April 2022), crimes against humanity (ILC, (2019), UN Doc A/CN.4/726 + Add.1 + Add.2), provisional application of treaties (ILC (2020), UN Doc A/CN.4/737) and Sea-level rise (2021 and 2022), available at https://legal.un.org/ilc/guide/8_9.shtml (last visited 5 April 2022).

32 See, *Comments and Observations Received from International Organizations*, UN Doc A/CN.4/637 and Add. 1, 14 and 17 February 2011.

33 See also the statements made by Bahamas on behalf of CARICOM, by El Salvador on behalf of CELAC, by the Council of Europe and by the EU in the Sixth Committee in 2018, available at https://www.un.org/en/ga/sixth/73/ilc.shtml (last visited 5 April 2022).

3. Assessment

The exchanges between the ILC and regional institutions are the classic example mentioned in scholarship for the way in which the ILC seeks to reconcile its universal mandate with the consideration of regional plurality.[34] These exchanges undoubtedly improve the Commission's capacity to consider regional practice in its various projects. The intense exchanges between the Commission and AALCO on the topic of CIL are a particularly positive example. However, it is also interesting to note that in his reply to Sienho Yee, Rapporteur of the AALCO on that topic, Special Rapporteur Sir Michael Wood felt the need to caution with respect to the regional aspect that

> "The AALCO Comments, and similar input from regional bodies such as the AU Commission on International Law (AUCIL), are welcome because they reflect serious input from a number of States or regional experts. As I see it they are welcome more because they may be seen as reflecting, to some degree at least, the views of a considerable number of States, rather than because they necessarily reflect a particular regional view on the matter. Regional views may be important, but on a topic like the identification of customary international law they must surely be seen as a contribution to a universal view of the matter".[35]

Beyond the example of the AALCO-ILC exchanges on CIL, the actual impact of the institutional cooperation remains unclear. Moreover, as the consultations between the AUCIL and the ILC of 2012 demonstrate, the relationship between regional law commissions, regional IOs and the ILC is not free from controversy due to partly overlapping mandates.[36] This is also due to the fact that the ILC-Statute is silent on the role played by the views of regional law commissions in the ILC's own work. Instead, it is left to the discretion of the Commission to what extent it considers them. Finally, there has been an imbalance between Western and non-Western regional IOs in commenting on the ILC's projects until very recently. This bears the risk that existing distortions

34 See extensively on this: B. G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977), 178-184.

35 Wood, 'The Present Position Within the ILC', *supra* note 30, 5.

36 See *Summary Records of the Visit by Representatives of the African Union Commission on International Law at the ILC*, UN Doc A/CN.4/SR.3146, 17 July 2012; see also Forteau, 'Within, not Against, International Law', *supra* note 20, 503.

of the international legal order to the detriment of non-Western States are only exacerbated.[37]

II. Exclusion: Regional Practice as a *Misfit*?

Turning from the institutional approach to the ways in which the ILC dealt with regional plurality in the substance of its projects, we can observe that, particularly in its early projects, the ILC either excluded regional IOs and regional international law from the scope of its work or avoided engaging with more idiosyncratic regional rules.

1. Explicit Exclusion of Regional Elements From the Scope of the Project

Regional IOs were excluded from the scope of what would become the 1975 *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* after "considerable controversy among the members of the Commission".[38] Notably, the opposing camps pointed to the great practical relevance of the practice of regional IOs, but drew opposing conclusions from it. Some members feared that the exclusion would lead to a "serious gap in the draft articles".[39] Others, including the Special Rapporteur, acknowledged that "the experience of [regional IOs] could be taken into account in the study",[40] yet expressed the concern that their practice was "so

37 See also Hassouna, 'Presentation', in United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future (2021)*, 102: "Moreover, the commenting States do not reflect the diverse views held by Member States, and the African and Asian perspectives are particularly underrepresented. Despite continuous calls by Commission members for States to submit comments on a given topic, comments from under-represented States remain disproportionately low. This has resulted in the absence of their perspectives in the process of formulating universal rules of international law."; the AALCO initiative and the role played by non-Western regional institutions in the project on Sea-level rise may signal a change, see below.

38 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, *Yearbook of the International Law Commission* (1967), Vol II, 138 para. 31, not yet in force.

39 *Yearbook of the International Law Commission* (1968), Vol II, 195 para. 26 [*YBILC 1968*].

40 *Ibid*. See also second report by Special Rapporteur, *Ibid*., 148, para. 94(a): "[r]egional organizations would not be excluded from the actual study; their valuable experience would have to be drawn upon".

diverse that uniform rules applicable to all of them could hardly be formulated" and "that they should therefore be free to develop their own rules".[41]

A further example concerns the draft of what would eventually become Article 53 of the 1969 *Vienna Convention on the Law of Treaties* VCLT. The Chairman of the Drafting Committee clarified that

> "The Drafting Committee had also meant to make it clear that the article was concerned with universal international law; that was why the title referred to general international law, to the exclusion of regional international law […]".[42]

2. Avoidance of Specific Regional Rules

In later projects, the ILC avoided pronouncing upon specific regional rules within the scope of the topic. For instance, in its 2006 commentaries on *Diplomatic protection*, it clarified that draft Article 14 "does not take cognizance of the 'Calvo clause' […] [whose] validity […] has been vigorously disputed", but which was still "viewed as a regional custom in Latin America".[43]

3. Assessment

These examples illustrate that the methodological challenge posed by regionalism has occasionally divided the ILC to such an extent that it even refrained from taking a stance on it. While such an approach may sometimes be the only way to achieve overall consensus on a topic, it can hardly be claimed that it has been satisfactory. The ILC itself acknowledged the great practical relevance of these – unaddressed – regional aspects. Furthermore, the controversial nature of regional law still influenced the drafting of several provisions of the VCLT, notably of what became Article 48 VCLT.[44] Finally, the Commission's approach to Article 53 VCLT postponed a debate which only would re-emerge fifty years

41 *YBILC 1968*, *supra* note 39, 195 para. 26.

42 *Yearbook of the International Law Commission* (1963), Vol I, 214 para. 72 [*YBILC 1963*].

43 *Draft Articles on Diplomatic Protection with commentaries, Yearbook of the International Law Commission* (2006), Vol. II Part 2, Article 14, 45 para. 8, leaving open the question of its reconcilability with general international law.

44 See *e.g.*, the debate in the ILC in 1963 on whether the false assumption that a norm under regional law also binds a third party (*YBILC 1963*, *supra* note 42, 44-45 with Yasseen and Rosenne arguing that regional law resembled domestic law and should thus be treated as an error of fact, while Waldock argued that an error about regional law should be treated as an error of law).

later. In the debate on the project "Peremptory norms of general international law (*jus cogens*)" held in 2019, the ILC was divided on whether *regional jus cogens* existed or not.[45] Yet, as a result of these divisions – which equally showed in the 6th Committee – the ILC once more decided that "norms of a […] regional character are also excluded from the scope of the topic".[46]

III. Reliance: Regional Practice as a *Hidden Champion*?

As the post WWII era saw a continuous institutionalization of inter-State relations at the regional level, the Commission increasingly relied on regional practice in several of its projects without, however, specifically designating the respective practice as *regional* or indeed explaining the legal value it attributed to such – geographically or otherwise – limited practice.

1. Implicit Recognition of Regional Practice as a Structural Element in International Law

Regional IOs or agreements have, firstly, played a prominent role in the 1994 draft articles on the *Non-navigational uses of international watercourses*,[47]

45 In his fourth report, the Special Rapporteur on jus cogens rejects the idea of 'regional jus cogens': Special Rapporteur on Jus Cogens, UN Doc A/CN.4/727, 31 January 2019, 11–20; see also the debate within the ILC during its seventy-first session in 2019: Summary record, UN Doc A/CN.4/SR.3459, 8 May 2019; UN Doc A/CN.4/SR.3460, 9 May 2019; UN Doc A/CN.4/SR.3461, 10 May 2019; UN Doc A/CN.4/SR.3462, 11 May 2019; UN Doc A/CN.4/SR.3463, 15 May 2019.

46 ILC, 'Report on the Work of the Seventy-First Session, Chapter V Peremptory Norms of General International Law (Jus Cogens)' (2019), UN Doc A/74/10, p. 148.

47 See also L. Boisson de Chazournes, 'Freshwater and International Law: The Interplay Between Universal, Regional and Basin Perspectives', *The United Nations World Water Assessment Programme—Insight* (2009), 4-5: "Reading the reports of the ILC's special rapporteurs on the Law of International Watercourses for Uses other than Navigation, the large quantity of regional and local practice cited for supporting universal principles is impressive. Indeed, the ILC's work illustrates that principles of international law adopted at the universal level are based on either state practice and agreements concerning individual river basins, or on agreements of regional scope" [Footnotes omitted by the author].

the 2008 draft articles on *Transboundary aquifers*[48] and the 2014 draft articles on *Expulsion of aliens*.[49]

A strong, but largely uncommented, reliance on regional practice underlies, secondly, topics specifically addressing the law of IOs, such as the draft preparing the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986 VCLT)[50] and the 2011 *Articles on the responsibility of international organizations* (ARIO).[51] In 2018, the ILC adopted the controversial Conclusion 4 (2) in its work on *Identification of customary international law* according to which "in certain cases" the practice of IOs as such contributes to the formation of a customary rule. The corresponding commentary drew principally on practice of regional IOs to give examples for such "certain cases".[52]

Finally, regional practice also played an important role in projects without a specific *regional* or at least *institutional* nexus, such as the 2006 *Draft articles on diplomatic protection*[53] and the 2011 *Guide to practice on reservations to treaties*.[54]

48 See the commentary on draft article 7 (General obligation to cooperate), *ILC Report 2008*, UN Doc A/63/10, 5 May – 6 June and 7 July – 8 August 2008, chap. IV, p. 31: "Europe has a long tradition of international river Commissions […] In other parts of the world, it is also expected that comparable regional organizations will play a role in promoting the establishment of similar joint mechanisms [Footnotes omitted by the author]".

49 See the various references in *ILC Report 2014*, UN Doc A/69/10, 5 May – 6 June and 7 July – 8 August 2014, chap. IV, paras 35–45.

50 Commentary on draft article 18, *ILC Report 1982*, UN Doc A/37/10, 3 May – 23 July 1982, p. 33, para. 5 citing prominently an example involving the European Economic Community.

51 Commentary on draft article 7 (attribution based on effective control), *ILC Report 2011*, UN Doc A/66/10, 26 April – 3 June and 4 July – 2 August 2011, chap. V, citing the ECHR jurisprudence, pp. 90-92. See also the commentaries on draft article 45 (admissibility of claims), pp. 140-141; draft article 48 (Responsibility of an international organization and one or more States or international organizations), p. 144; and draft article 52 (countermeasures), pp. 152-153; citing prominently examples from the EU.

52 *ILC Report 2018*, UN Doc A/73/10, 30 April – 1 June and 2 July – 10 August 2018, chap. V, paras 53–66 and 131 fn 695.

53 See commentaries on draft article 8, *ILC Report 2006*, UN Docs A/61/10, 1 May – 9 June and 3 July - 11 August 2006, chap. IV, pp. 36-38, on the definition of *refugee* referring to regional practice from Europe, Africa and Latin-America.

54 *ILC Guide to Practice on Reservations to Treaties, Report of the International Law Commission*, (2011) UN Doc A/66/10/Add. 1, Guideline 2.6.4 Objections formulated jointly, pp. 252-253 („In the context of regional organizations, and in particular the Council of Europe, member States endeavour to coordinate and harmonize, to the extent possible, their reactions and objections to reservations.") and Guideline 4.5.3 Status of

2. Assessment

In contrast to the technique of exclusion,[55] this approach takes the practical relevance of regional practice into account. It met with general support with regard to those projects in which regional institutions play a prominent role (*e.g.* with respect to shared natural resources). However, considering regional practice without providing further explanations for doing so carries the risk that certain outcomes of the ILC's work are perceived as being regionally imbalanced. The project on *Expulsion of aliens* notably attracted criticism by States from both within and outside Europe.[56] In reaction to this criticism, Special Rapporteur Maurice Kamto in his final report of 2014 point[ed] out the following: "regional law is part of international law and cannot be set aside, especially since the International Law Commission has always referred to it in its work"[57].

IV. Fragmentation: Regional Law as *Lex Specialis*

Given the increasingly prominent role of regional practice in its work, the ILC was eventually confronted with the question of how to classify regional law.

1. The 2006 Fragmentation Report

An ILC Study Group chaired by Martti Koskenniemi addressed this question in its 2006 *Fragmentation report* and distinguished between three meanings of regionalism: regionalism as "a set of approaches and methods for examining international law", as "a technique for international law-making"

the author of an invalid reservation in relation to the treaty, pp. 524-542 (relying heavily on the case law of the European Court of Human Rights and the Inter-American Court of Human Rights).

55 See C.II.

56 On the one hand: Denmark (on behalf of the Nordic countries), UN Doc A/C.6/67/SR.18, 4 December 2012, para. 45: "remained unconvinced of the usefulness of the Commission's efforts to identify general rules of international law on the expulsion of aliens, since it was an area of law covered by detailed regional rules"; on the other: UN Doc A/C.6/65/SR.25, 1 December 2010, para. 7 (United States of America): "the ILC should not seek to codify new rights or to import concepts from such regional bodies as the European Commission".

57 *9th Report of the Special Rapporteur on Expulsion of Aliens*, UN Doc A/CN.4/670, 25 March 2014, 7. The final commentaries cite practice from the various regions pointing out where differences persist, *e.g.* on the issue of a prohibition of discrimination based on sexual orientation (*YBILC 1963*, *supra* note 42, commentary on draft article 14, p. 38: "differences remain and in certain regions the practice varies").

and as "the pursuit of geographical exceptions to universal international law rules".[58] The report focused on the third meaning and expressed an inclination that regionalism was "no different from […] *lex specialis*".[59] Even though these findings met with support among ILC members, it was also noted that "some [members] still felt that this was not all that could be said about it".[60] Yet, the approach of treating regional law as *lex specialis* was followed in two recent projects.

2. The 2011 Articles on the Responsibility of International Organizations

The first concerns Article 64 of the 2011 ARIO providing for a *lex specialis* provision according to which the articles contained in ARIO

> "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility […] are governed by special rules of international law".[61]

As the commentary illustrates, this article was primarily inserted to accommodate the EU's repeatedly expressed doubts on whether the ILC's approach to responsibility of IOs would do justice to the EU's *sui generis* nature.[62]

3. The 2018 Conclusions on the Identification of Customary International Law

The Commission also followed the "lex specialis approach" when adopting Conclusion 16 on *Particular customary international law* in its 2018 *Conclusions on the identification of customary international law*. According to Conclusion

58 *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006, 102-112 paras 195-217.

59 *Ibid*, 112 para. 216.

60 *ILC Report 2005, Yearbook of the International Law Commission* (2005), Vol. II, Part 2, 85 para. 461.

61 *ILC Report 2011*, *supra* note 51, 102.

62 *Ibid*., 102-104 illustrates that the commentary on Article 64 is tailored to the special case of the EU. See further the comments by the European Commission in 2011 (A/CN.4/637), 167-168.

16, *particular customary international law* encompasses "regional, local or other" rules which, according to the commentary, apply "only among a limited number of States".[63] Yet, in the overwhelming majority of cases cited in the commentary, "particular customary international law" was identified on the basis of its regional or local character. Particular custom without an element of territorial cohesion was referred to as a theoretical possibility.[64]

4. Assessment

Classifying regional law as just a variant of *lex specialis* has met with a considerable amount of support,[65] but also with a non-negligible amount of criticism by scholars and practitioners.[66] Sean Murphy, for instance, criticized in 2013 that "the Report arguably fails to pay sufficient heed to fragmentation in the form of regionalism, viewing it as simply an example of a possible *lex specialis*, and thereby denying regionalism's rich cultural content".[67] Similarly, Christopher Borgen lamented that "The ILC Study Group downplayed the role of geographic regionalism".[68] Only recently, in 2020, James Thuo Gathii attacked the Fragmentation report from yet another angle pointing to its overwhelming reliance on regional practice from Europe while largely ignoring practice from Africa and Asia.[69] The risk of being accused of regional imbalances is similarly present in those cases in which a *lex specialis* provision is inserted and tailored to accommodate one very particular regional IO. Still, the "*lex specialis*

63 *ILC Report 2018*, *supra* note 52, conclusion 16, 154 para. 1.

64 *Ibid*.

65 See, *e.g.*, M. Wood, 'A European Vision of International Law: For What Purpose?' 1 *Select Proceedings of the European Society of International Law* (2006), 152ff; M Forteau, 'Regional International Law', MPEPIL 2006, para. 22.

66 See also C. Landauer, 'Regionalism, Geography, and the International Legal Imagination', 11 *Chicago Journal of International Law* (2011), 560-561 "regionalism…is defined as only another flavour of fragmentation" and 570-571 at 571: "The Koskenniemi study is another case of regionalism being emptied of real, local regional content."; see also into this direction J. Finke, 'Regime-collisions: Tensions between treaties (and how to solve them)', in C. J. Tams, A. Tzanakopoulos & A. Zimmermann (eds), *Research Handbook on the Law of Treaties* (2014), 427ff.

67 S. D. Murphy, 'Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project' 27 *Temple International and Comparative Law Journal* (2013), 293, 302-303.

68 C. J. Borgen, 'Treaty Conflicts and Systemic Fragmentation', in D.B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd ed. (2020), 436.

69 J. T. Gathii, 'The Promise of International Law: A Third World View' (25 June 2020), available at https://digitalcommons.wcl.american.edu/auilr/vol36/iss3/1/ (last visited 12 December 2021), 385.

approach" to regionalism persists in the work of the Commission. Conclusion 16 of the ILC's Conclusions on CIL is a recent example in this regard. Although the commentary on CIL acknowledges that non-regional particular custom has remained a "theoretical possibility",[70] Conclusion 16 equated regional law with this "theoretical" non-regional custom. This approach was criticized by some States in the 6th Committee in 2018.[71] Given that States invoke forms of "regional" custom in practice, in particular, before international courts and tribunals, the ILC might have missed an opportunity to provide guidance in this regard.[72] For these reasons, the approach of understanding regional law as *lex specialis* does not entirely resolve the challenge arising from regional plurality.

V. A Fifth Approach in the Making?

In recent years, the Commission seems to have started accentuating the normative role of regional practice in at least some of its projects instead of *eschewing* it. In its 2001 *Articles on State responsibility* (ARSIWA), the Commission stated that the existence of "collective obligations" in Art. 48 ARSIWA was indicated, *inter alia*, if the obligations in question concerned the environment, human rights or environment *of a region*.[73] The respective commentaries on the 2018 conclusions on the *Identification of customary international law* and *Subsequent agreements and subsequent practice in relation to interpretation of treaties* point specifically to the case law of regional courts as a subsidiary means for the identification of customary international law and as a supplementary

70 Wood, 'The Present Position Within the ILC', *supra* note 30, 5.

71 *Topical Summary of the Debate in the 6th Committee, Prepared by the Secretariat*, UN Doc A/CN.4/724, 12 February 2019, para. 136.

72 See *e.g.* in recent case law: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, 21 April 2022*, paras 53, 202, 213-214 and 220; *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022*, para. 169; IACtHR, *Advisory Opinion OC-25/18 of 30 May 2018*, paras 157-163. See further: G.R. Bandeira Galindo, 'Particular customary international law and the International Law Commission: Mapping presences and absences' *QIL, Zoom-in 86* (2021) 3-21, 20: "the role of regionalism in particular customary international law was not fully developed in the ILC's Conclusions on Identification of Customary International Law".

73 See, *e.g.*, commentaries on Article 48 2001 ARSIWA, *ILC Report 2001*, UN Doc A/56/10, 23 April – 1 June and 2 July – 10 August 2001, Chapter IV, 126: "They might concern, for example, the environment or security of a region (*e.g.* a regional nuclear-free-zone treaty or a regional system for the protection of human rights)" [Italics by the author].

means of treaty interpretation under Article 32 VCLT.[74] However, in none of these projects did the ILC explain this prominent role of regional practice.

Two projects put on the current agenda of the ILC in 2018 promise to trigger a more substantial debate in the future: *General principles of law* and *Sea-level rise in relation to international law*. Both illustrate that the issue of regionalism emerges at two different normative levels: on the one hand, regional practice plays a prominent role in the identification of universally shared rules. On the other hand, both projects face the question on whether regional exceptions from common rules exist.

1. General Principles of Law

The two reports by Special Rapporteur Marcelo Vázquez-Bermúdez on *General principles of law* refer to regional elements for the purpose of identifying (universally shared) general principles of law (a.) as well as to the controversial existence of general principles of law with a regional scope of application (b.).

a. The Role of Regional Practice for the Identification of General Principles of Law

The second report on *General principles of law* of 2020 attributes an important role to regional practice when identifying a general principle of law. Two examples from the 2020 report shall be briefly addressed to illustrate this claim.

For one, regional practice plays a crucial role in assessing whether a principle is common to the *principal legal systems of the world*. The Special Rapporteur proposes in Draft Conclusion 5 (2) that: "The comparative analysis must be wide and representative, including different legal families and regions of the world."[75] The report elaborates on this proposal by emphasizing that "the criterion that different regions of the world should also be reflected in the comparative analysis must, in the view of the Special Rapporteur, in any

[74] *ILC Report 2018*, *supra* note 52, conclusion 13, 150, para. 4, on decisions of regional courts as subsidiary means for the determination of rules of customary international law, *ILC Report 2018*, *supra* note 52, conclusion 12, 97 para. 14, regional agreements as supplementary means of interpretation within Article 32 VCLT.

[75] Special Rapporteur on General Priciples of Law, *Second Report on General Principles of Law*, UN Doc A/CN.4/741, 9 April 2020, 35, para. 112, see also 16 para. 53: "Furthermore, the criterion that different regions of the world should also be reflected in the comparative analysis must, in the view of the Special Rapporteur, in any event be taken into account".

event be taken into account".[76] In order to substantiate this proposition, three arguments play a particularly prominent role in the report's line of argument: firstly, the report points to the practice of international and domestic courts and tribunals.[77] Secondly, the Special Rapporteur quotes and builds upon the 2018 report by an ILA study group on *The use of domestic law principles in the development of international law*, according to which

> "[I]t is also not enough to "identify" a general principle among the main legal systems if there is not enough geographical representation, e.g., a general principle shared by Civil Law countries in Europe should also be identified in other Civil Law countries located in different geographical areas and belonging to different civilizations".[78]

And finally, the report specifically borrows the terminology of "principal legal systems of the world" contained in the provisions on composition in the ILC-Statute (Article 8) as well as in the ICJ-Statute (Article 9) "to convey the idea that the comparative analysis must be wide and representative, covering different legal families and regions of the world".[79]

Furthermore, though much more implicit, the report indicates that, in certain cases, the practice of regional integration organizations can be considered "as such" when conducting the comparative analysis.[80] The report mentions practice concerning the European Union as the sole example of an IO which has been included in the comparative analysis of various domestic legal systems in the case law of courts and tribunals.[81]

76 *Ibid*., para. 53.

77 *Ibid*., see, in particular, examples mentioned in paras 28-34.

78 International Law Association, 'Report of the Study Group on the use of Domestic Law Principles in the Development of International Law' in M. Brus & A. Kunzelmann (eds), *Report of the Seventy-Eighth Conference, Sydney* (2018), 1170–1242, at para. 214 quoted at 60 para. 51 of the report.

79 Special Rapporteur on General Principles of Law, *supra* note 75, para. 54.

80 *Ibid*., 22, para. 72: "when an international organization (such as the European Union) is conferred the power to issue rules that are binding on their Member States and directly applicable in the legal systems of the latter, those rules may be taken into account when carrying out the comparative analysis".

81 See, *e.g. Ibid*., 11 fn. 67 where the report cites the Memorial of Timor-Leste of 28 April 2014, *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia), Order of 11 June 2015, ICJ Rep 2015, p. 572, where the EU was included.

During the debate within the Commission in 2021, ILC members welcomed the Special Rapporteur's emphasis on the role of regional practice.[82] Eventually, the reference to "legal families" was even deleted by the ILC Drafting Committee whereas the reference to "regions" was retained. In her statement, the Chair of the Drafting Committee explained that:

> "The Committee concluded that it was important to expressly refer to different regions of the world in the draft conclusion itself to ensure that they were covered in the analysis. The reference to 'legal families', originally proposed, was not retained because the expression 'wide and representative, including the different regions of the world' was considered to be sufficient".[83]

Draft Conclusion 5 (2), as provisionally adopted by the Drafting Committee, now reads: "The comparative analysis must be wide and representative, including the different regions of the world."[84]

b. General Principles of Law With a Regional Scope of Application?

A much more controversial aspect concerns a question which has been briefly raised in the *First Report on General Principle of Law* of 2019: the existence of general principles of law with a regional scope of application. As already mentioned above, a structurally similar question had already been debated with regard to *regional* custom in the context of the 2018 *Conclusions on Customary international law* as well as *regional jus cogens* in the debate on *Peremptory Norms*

[82] See, *e.g.*, ILC, 'Summary Records [of the Discussion of the Second Report in Plenary]' (12 to 21 July 2021): Forteau (UN Doc A/CN.4/SR.3538, p. 10, highlighting the role of regional IOs); Jalloh (UN doc A/CN.4/SR.3539, pp. 4-5); Nguyen (ibid pp. 7-8); Saboia (UN Doc A/CN.4/SR.3541, p. 3); Lehto (*ibid* p. 4); Cissé (*ibid* pp. 10-11); Oral (UN Doc A/CN.4/SR.3542, p. 10); Grossman Guiloff (*ibid* p. 15); Ruda Santolaria (UN Doc A/CN.4/SR.3543, p. 3); Escobar Hernández (*ibid* p. 8).

[83] See ILC, 'Report of the Drafting Committee' (2021) UN Doc. A/CN.4/L.955/Add.1. See also statement of the Chair of the drafting committee: (ILC, 'Statement of the Chair of the Drafting Committee' (3 August 2021), available at: https://legal.un.org/ilc/documentation/english/statements/2021_dc_chair_statement_gpl.pdf, pp. 10-11).

[84] *ILC, 'Report on the work of the seventy-second session (2021)'*, UN Doc A/76/10, para. 172: "At its 3557th meeting, on 3 August 2021, the Commission considered the report of the Drafting Committee (A/CN.4/L.955 and Add.1) on draft conclusions 1 (in French and Spanish), 2, 4 and 5, provisionally adopted by the Committee at the present session. At the same meeting, the Commission provisionally adopted draft conclusions 1, 2 and 4 (see sect. C.1 below), and took note of draft conclusion 5.".

of General International Law in 2019 – leading to very different approaches respectively (the absorption of *regional* custom in the conclusion on *particular customary international law* on the one hand, and the decision not to address regional *jus cogens* at all, on the other).

While the 2018 ILA Report on *The Use of Domestic Legal Principles for the Development of International Law* rather light-heartedly claims that "[s]imilar to the existence of regional customary law, the possibility exists of the existence of regional general principles derived from the domestic laws of a specific region",[85] the overall picture emerging from the ILC plenary debate and the exchanges in the 6th Committee suggests a more cautious approach.[86] Based on the debates, we can identify two opposing positions concerning the question whether Article 38 (1) lit. c ICJ-Statute encompasses general principles of law with a regional scope of application. A number of skeptical ILC members and delegations relied essentially on three arguments which, in their view, suggested not including regional GPL in the scope of Articel 38(1) lit. c.[87] Firstly, they pointed to the word *general* and argued that this was to be understood as *universal*.[88] Secondly, some found the expression *recognized by civilized nations* to require recognition by *all States*.[89] Thirdly, the lack of examples also argued against a recognition of GPL under Article 38 (1) lit. c.[90]

Other members and delegations, however, indicated a certain openness towards such a broader understanding of Article 38 (1) lit. c.[91] Mirroring

85 *Report of the International Law Association Study Group*, *supra* note 78, para. 216.

86 See also on the debate: MC De Andrade, 'Regional Principles of Law in the Works of the International Law Commission', *QIL, Zoom-in 86* (2021) 23-46.

87 ILC, 'Summary Records' (2019), UN Doc A/CN.4/SR.3489, p. 13 (Hmoud); p. 15 (Murphy); UN Doc A/CN.4/SR.3491, p. 9 (Aurescu); UN Doc A/CN.4/SR.3492, p. 8 (Oral, wo, however, stated that "she was prepared to be persuaded otherwise by the Special Rapporteur's future work".). See the statements of the following delegations made at the 6th Committee in 2019: UNGA, 'Summary Records' (6 November 2019), UN Doc A/C.6/74/SR.32, para. 5 (The Philippines), para. 16 (UK), para. 43 (Chile), para. 106 (Czech Republic); UNGA, 'Summary Records' (6 November 2019), UN Doc A/C.6/74/SR.33, para. 26 (US).

88 Hmoud, Aurescu and Oral; with Hmoud and Oral referring to the North Sea Continental Shelf quote (*ibid*). Czech Republic; Philippines; UK; US (*ibid*.).

89 Hmoud, *supra* note 87.

90 Hmoud, *ibid*.

91 ILC, 'Summary Records', UN Doc A/CN.4/SR.3491, pp. 12-13 (Nguyen); p. 17 (Reinisch); UN Doc A/CN.4/SR.3492, p. 4 (Argüello Gómez); p. 12 (Ruda Santolaria). See the statements made at the 6th Committee in 2019: UNGA, 'Summary Records' (6 November 2019), UN Doc A/C.6/74/SR.32, para. 55 (Micronesia). France (Déclaration de la République Française (5 November 2019), 6th Committee of the UNGA, available

the three arguments, they argued, firstly, that the term *general* must not be understood to exclude regional GPL,[92] and, secondly, to the structural similarity to Article 38 (1) lit. b and the recognition of regional custom.[93] Finally, they cited examples for regional GPL, notably the concept of *uti possidetis*.[94] An interesting understanding of GPL was expressed by August Reinisch who remarked that "for a true regional general principle of law to exist" it would need to be applicable between States of a particular region outside the context of regional organizations".[95]

So far, the Commission has either excluded regional variants of sources from the scope of the project (regional *jus cogens*) or treated them as a mere sub-form of *lex specialis* (regional custom). It remains to be seen how the Commission will deal with the controversial existence of general principles of law with a regional scope of application – whether it will follow one of the approaches described above or adopt a third one and recognize such a regional variant under Article 38 (1) lit. c ICJ-Statute.[96]

2. Sea-level Rise in Relation to International Law

As regards the project on *Sea-level rise in relation to international law*, the role of regional practice plays a prominent role in the work of the ILC Study Group as illustrated by the *First issues paper on sea-level rise in relation to international law* prepared by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group (hereinafter: "first issues paper" or "paper").[97]

at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/france_3.pdf (last visited 5 April 2022), pp. 2-3). Mexico and Spain expressed an ambiguous attitude (Intervención de México (6 November 2019), 6th Committee of the UNGA, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/mexico_3.pdf, p. 6; Intervención de España (6 November 2019), 6th Committee of the UNGA, available at: https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/spain_3.pdf (last visited 5 April 2022), p. 1).

92 Nguyen, *ibid*.; Ruda Santolaria, *ibid*.

93 Argüello Gómez, *supra* note 91; Reinisch, *supra* note 91; Micronesia, *supra* note 91.

94 Uti possidetis: Nguyen, *supra* note 91; Ruda Santolaria, *supra* note 91; See, however, sceptical Reinisch, *supra* note 91, pp. 17 and 19.

95 Reinisch, *supra* note 91, p. 17.

96 *ILC Report 2021*, *supra* note 84, para. 220 (summarizing the debate on the future programme of work): "The view was also expressed that the issue of general principles of law of a regional character, and whether the concept of universality of general principles would be inconsistent with such principles, should also be addressed.".

97 While the *first issues paper* covers the implications of sea-level rise for the rules relating to the law of the Sea (ILC, 'First Issues Paper by Bogdan Aurescu and Nilüfer Oral (72nd Session of the ILC (2020)'), UN Doc A/CN.4/740, 28 February 2020) ['First Issues Paper

a. The Impact of Regional Practice on the Universal Regime on the Law of the Sea

The question at the core of the *first issues paper* is to what extent the practice of only a limited group of States and IOs (mainly from regions particularly affected by a climate change induced rise of the sea level) can affect the rules contained in the 1982 Convention on the Law of the Sea (UNCLOS).

This concerns, in particular, the rules relating to the baselines and outer limits of the maritime spaces that are measured from the baselines. According to Article 5 UNCLOS, "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast[…]". Traditionally, the term low-water line has been interpreted by the majority of States and commentators as being *ambulatory* or *floating*, *i.e.* as moving if the land recedes.[98] Has this understanding of baselines as being *ambulatory* changed, or is it at least possible to discern a *trend* moving into this direction?

The *first issues paper* cautiously argues in favour of a trend towards a solution based on fixed baselines and/or the preservation of maritime zones by relying extensively *and* explicitly on "regional State practice" and "the practice of regional organizations" stemming mostly from the Asia-Pacific region.[99] This

on Sea-level rise in Relation to International Law'], the *Second issues paper* on sea-level rise in relation to international law, which was discussed in 2022, focusses on the subtopics of statehood and the protection of persons affected by sea-level rise (ILC, 'Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria (73rd session of the ILC (2022))', UN Doc A/CN.4/752, 19 April 2022). The 2022 Report by the Study Group summarizing the debate on the *Second issues paper* among ILC members indicates that the special role of regional practice from small island States in the Pacific was acknowledged. However, it was also emphasized that the Commission should not overlook the comments, needs and practice of States and international organizations, especially in Africa, Asia and Latin America and the Caribbean (ILC, 'Report of the Study Group on Sea-Level Rise in Relation to International Law'), UN Doc A/CN.4/L.972, 15 July 2022, pp. 6-7, paras 23 and para. 33 ['Report of the Study Group on Sea-Level Rise'].

98 ILC, 'First Issues Paper on Sea-level rise in Relation to International Law', *supra* note 97, p. 28 para. 78.

99 *Ibid.*, paras 102 ("The practice of regional organizations is also relevant to State practice; it indicates the same trend evidenced above.") and 104 lit. g ("As evidenced by the submissions by Member States to the Commission in response to the request included in chapter III of its 2019 annual report, the statements of the delegations of Member States before the Sixth Committee, and the official declarations of regional bodies, there is a body of State practice under development regarding the preservation of baselines and of outer limits of maritime zones measured from the baselines.") and para. 104 lit. h.

raises two methodological questions which are implicitly addressed in the paper: first, how can the practice of only some States change the interpretation of a universal multilateral treaty? The paper emphasizes that Sea-level rise does not affect States uniformly.[100] While making it clear that the paper neither intends to deviate from the "two-element-approach" for the identification of custom nor claims that these conditions are met, the paper seems to express a certain inclination to attribute a significant weight to that regional practice as that of "specially affected States" when it considers it

> "worth mentioning that, after analysing some of the declarations of regional bodies mentioned above, the Committee on International Law and Sea Level Rise, in its final report to the 2018 Sydney Conference of the International Law Association, concluded that: 'there is at least prima facie evidence of the development of a regional State practice in the Pacific islands … The Pacific Island States would of course be among those "States whose interests are specially affected', a significant attribute regarding the establishment of a general practice in the formation of a new rule of customary international law[…]"[101]

However, even if "Sea-level rise is not uniform, as it varies regionally",[102] a second problem stems from the fact that the practice originates mainly from the Asia-Pacific region. The paper addresses this issue in its observations by explaining that

> "Information on such State practice was available to the Co-Chairs of the Study Group for the Pacific, Asian (mainly South-East Asian) and (to some extent) North American regions, alongside some indicating a similar trend for the Caribbean. Unfortunately, there were no submissions received by the Commission from Africa or Latin America, although the effects of sea-level rise also affect these regions. A very limited number of submissions from European

100 *Ibid*., para. 31.

101 *Ibid*., para. 103 quoting 'Final Report of the Committee on Baselines Under the International Law of the Sea', in International Law Association, Report of the Seventy-fifth Conference, Held in Sofia, August 2012, vol. 75 (2012), p. 887.

102 ILC, 'First Issues Paper on Sea-level rise in Relation to International Law', *supra* note 97, 'First Issues Paper by Aurescu and Oral', *supra* note 97, para. 31.

> States indicate that their national legislation provides for the obligation or possibility to apply an ambulatory baselines system; at the same time, the absence, for the time being, of submissions from these regions does not necessarily imply the lack of similar State practice".[103]

In light of the lack of submissions from Africa, one of the Co-Chairs, Yacouba Cissé, analysed

> "the legislative, constitutional and conventional practice of 38 African coastal States, as well as relevant judicial decisions rendered by international courts, in order to assess whether coastal States were supportive of ambulatory or fixed maritime limits".[104]

In his presentation before the Commission, he concluded that there

> "was no generalized African practice since the geography of the coasts varied, such that the justification for the use of baselines, tide (high or low), ambulatory or permanent lines was dependent on the general configuration of the coasts".[105]

In his view, however, "the application of principles of public international law in the African context could favour fixed baselines or permanent maritime boundaries".[106]

In the course of the debate that took place within the Commission in 2021, the Study Group also stated that its future work would, *inter alia*, include an examination of customary international law "of a regional scope" as well as of regional agreements. The Study Group further intends "to extend its study of State practice and *opinio juris* to regions for which scarce, if any, information had been made available, including Asia, Europe and Latin America".[107] It remains to be seen to what extent the Commission will consider such information and

103 *Ibid.*, para. 104 lit. h.
104 *ILC Report* (2021), *supra* note 84, p. 167 para. 259.
105 *Ibid.*, p. 167 para. 260.
106 *Ibid.*, p. 167 para. 261.
107 *Ibid.*, p. 176 para. 294.

how much weight it will attribute to the respective regional practice when consolidating the *first issue paper* in 2023.[108]

b. Exceptions From UNCLOS Based on Regional Custom?

Given the absence of a general practice regarding the preservation of baselines and of outer limits of maritime zones measured from the baselines, the *first issues paper* further addresses the possibility that regional practice may evolve into a "particular or regional customary rule" in its "observations of preliminary nature". Before examining whether the requirements set out in Conclusion 16 of the ILC Conclusions on CIL are met,[109] the *first issues paper* explains the difference between a regional and a particular rule of customary international law in this respect thereby recognizing the distinct role of regional law.[110] Applying the requirements contained in Conclusions 4 – 8 and 16, the *first issues paper* then expresses the view that the objective element of custom is sufficiently present when arguing that

> "for the material element of the custom, it can be concluded that – at least for the Pacific and South-East Asia regions – there is State practice (supported by practice of international organizations) … [which] is widespread and representative among the States of these regions, as well as consistent. It is more and more frequent".[111]

As for the subjective element, however, the paper finds that

> "the existence of the *opinio juris* is not yet that evident, although the general reliance of the conduct of the respective States in their

108 ILC, 'Report of the Study Group on Sea-Level Rise', *supra* note 97, p. 18, para. 83.

109 ILC, 'First Issues Paper on Sea-Level Rise in Relation to International Law', *supra* note 97, para. 104 lit. i. and reiterated at 55 para. 141 for the preservation of effected maritime delimitations and of maritime boundaries.

110 *Ibid*., fn. 229 on the distinction between a regional and a particular customary rule in this regard by stating that: "The character of the potential customary rule depends on the availability of the evidence of State practice: it can stay regional if confined (only) to the Pacific and South-East Asia, or, if confirmed for other regions as well and depending on the number of States involved, it can be general or particular (including 'thematic' – meaning that it is linked to the specific issue of sea-level rise and it applies among a limited number of States)."

111 *Ibid*. Footnotes have been omitted from the text.

> practice (as mentioned) on the grounds of legal stability and security is an indication in that sense. In order for a definitive conclusion to be possible, more submissions by Member States to the Commission in response to the request included in chapter III of its 2019 annual report are needed".[112]

Eventually, the *first issues paper* makes clear that "it is early to draw, at this stage, a definitive conclusion on the emergence of a particular or regional customary rule (or even of a general customary rule)".[113]

3. Assessment

Both projects demonstrate an unprecedented engagement with the role of regional practice in the work of the ILC: in contrast to previous projects, they do not merely *secretly* rely on regional practice or treat it as just another form of *lex specialis*. Instead, they give a normative explanation for the weight which they accord to the regional practice. Furthermore, they recognize the difference between regional practice and other forms of particularism – while the work on general principles of law emphasizes the distinct and indispensable role of *regional representation* when assessing the generality of a principle,[114] the project on Sea-level rise explicitly explained the difference between a regional and a particular

112 *Ibid*. Footnotes have been omitted from the text.

113 *Ibid*.

114 It should be noted that the role of regional representation in the assessment of the universally shared character of a norm has also been taken up during the second reading of the draft conclusions on *Peremptory norms of general international law* (*jus cogens*) in 2022. The Commission decided, upon proposal by the Special Rapporteur, to modify the formulation contained in draft conclusion 7 (2) by adding "and representative" ("Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law…") (ILC, 'Peremptory Norms of General International Law (Jus Cogens): Texts of the Draft Conclusions and Annex Adopted by the Drafting Committee on Second Reading', UN Doc A/CN.4/L.967, p. 2; ILC, 'Fifth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur', UN Doc A/CN.4/747, p. 34 para. 96). This change responds to comments by States and ILC members who criticized that the original formulation would not ensure equal representation "across regions, legal systems and cultures" (see Fifth report on jus cogens, *ibid*., pp. 29-34 (notably Singapore), paras 85-96; see, *e.g.* ILC, 'Summary Records', UN Doc A/CN.4/SR.3567, 22 April 2022, p. 4 (Nguyen); p. 6 (Reinisch); p. 9 (Oral); ILC Summary Records, UN Doc A/CN.4/SR.3568, 22 April 2022, p. 9 (Vázquéz-Bermúdez); p. 10 (Ruda Santolaria)).

customary rule for the purpose of that project. At the same time, these two projects illustrate once again that the Commission's equitable consideration of regional plurality also depends on the cooperation and contribution by regional organization and States.

D. Regionalism and the ILC: A Continuing Methodological Challenge

Each of the five approaches described suffers from certain shortcomings. These shortcomings are rooted in two methodological challenges which arise from regionalism, and which may require a further refinement of any *comparative international law approach*.

I. The Challenge of Equal Regional Representation

On the one hand, regional plurality puts pressure on any proposal for codification or progressive development to specifically justify that the alleged *universal* rules indeed include regional practice equally and without any imbalance to the detriment of one or more other regions ("challenge of equal regional representation"). This challenge notably arises in those two situations mentioned by Forteau in which the ILC codifies or makes a proposal for the progressive development of international law despite a pronounced divergence or inconsistency in State practice. The projects on *Fragmentation*, *Expulsion of aliens* and *Immunity of State officials*, for instance, have been criticized for their over-reliance on regional practice from the European context.

II. The Challenge of Regional Exceptionalism

On the other hand, we also encounter the countervailing tendency emanating from regionalism, the "challenge of regional exceptionalism". Divergences in State practice are often not only rooted in different domestic legal systems or policy approaches. In some cases, these divergences are deliberately entrenched in regional rules and institutions. These rules and institutions often prescribe a different legal relationship between States within the respective region and between those States and States outside that region. Consequently, States sometimes rely on regional rules and institutions to exempt themselves from a universal legal obligation.

While in some cases *regional exceptionalism* merely pertains to the substance of rules,[115] it sometimes transcends to the level of *meta-rules*, claiming, for instance, a higher normative status of a specific regional rule or the existence of different methods of treaty interpretation at the regional level. Accordingly, these regional rules test the limits of accommodation through the *drafting of general rules* and through *providing for normative flexibility* which feature prominently in the *comparative international law* approach sketched by Forteau. Thus, the challenge of *regional exceptionalism* tends to undermine the identification and development of universally shared rules: any proposal by the Commission in this regard risks being perceived as either too rigid, directly challenging the respective regional rule or institution, or as too lenient, yielding to and even legitimizing regional fragmentation.

III. Responses to the Methodological Challenge of Regionalism: Possible Ways Forward

Two steps promise to better respond to the methodological challenge posed by regionalism. They involve, on the one hand, the ILC, but also, on the other, its regional counterparts, regional IOs and States.

Firstly, the Commission should continue the approach which it seems to have adopted in its recent projects on *General principles of law* and *Sea-level rise* and explain the role it attributes to regional law and practice based on secondary rules of international law, *i.e.*, the rules on sources and interpretation. As Danae Azaria has pointed out on the occasion of the seventieth anniversary of the ILC:

> "Consistent 'adherence' to such secondary rules is an important basis on which the Commission's work is and will be relied upon. This is because adherence to such methodology operates as a restraint on the Commission's discretion: it anchors its output in State practice, opinio juris and international jurisprudence, rather than on mere policy preferences of the Commission's members.[116]"

[115] As illustrated by the regional claim on adopting fixed baselines ('First Issues Paper on Sea-Level Rise in Relation to International Law', *supra* note 97) as well as by the "Calvo Clause" in the project on diplomatic protection (Draft Articles on Diplomatic Protection, *supra* note 43).

[116] D. Azaria, 'The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making', in United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future (2021)*, *supra* note 12, 175.

Secondary rules on sources and interpretation are – according to a traditional understanding – reflected in Article 38 (1) of the ICJ-Statute and the VCLT. They provide a common point of reference for determining the conditions under which a certain regional exception is permissible. Furthermore, they help to justify the prominent reliance on the practice of a specific region in some projects. For example, the First Issues Paper on Sea-level rise has explained the reliance on the regional practice in the Asian-Pacific region by drawing on the ILC's previous work on regional customary international law. In other projects, secondary rules underline the relevance of drawing on a wide range of regions. Notably, the project on *General principles of law* highlights the crucial role of drawing on a diversity of regional practice when assessing whether a principle is common to the *principal legal systems of the world*.

Yet, as has also been illustrated by the debates on the two projects on *General principles of law* and *Sea-level rise*, many aspects relating to the way in which secondary rules may integrate regional law and practice remain open and controversial. These include the impact of subsequent regional agreements and subsequent regional practice on universal treaties, such as UNCLOS or even the UNCH. It is also not clear to what extent a regional group of States may shape customary international law as *specially affected States* or when acting through a regional integration organization. Having excluded *regional jus cogens* from the scope of the topic on peremptory norms, the question of how to deal with regional law that claims a higher normative status vis-à-vis other rules of international law in the future remains unsettled. Similarly, it is still open how the Commission will treat allegedly distinct regional sources of law (*general principles of EU law*) and different approaches to treaty interpretation adopted by regional judicial bodies. These questions play an important role for determining the limits of regional exceptionalism and deserve further scrutiny.

Secondly, it must be noted that overcoming the *challenge of equal regional representation* does not merely depend on the ILC, but also – crucially – on the availability of practice and cooperation from all regions. Certain imbalances to the detriment of some regions that have occurred in the past have also been rooted in a less active participation of some regional IOs and States as compared to others.[117] For instance, Alhagi B.M. Marong has noted a significant lack of

[117] See also Hassouna, *supra* note 37; E. Petrič, 'Presentation', Secretariat of the International Law Commission, *supra* note 12, 68: "Not to mention that often there are no reactions at all, or just a few from some regional groups or specific continents, and that many reactions are poorly elaborated, inconcrete and superficial".

engagement by African delegations with the project on a draft convention on crimes against humanity during the debates in the Sixth Committee.[118] However, the challenge of equal regional representation can only be overcome by a joint effort undertaken by the Commission, its regional counterparts, regional IOs, and States in the 6th Committee.

E. Conclusion

The analysis of ILC practice suggests that Crawford's observation of a "deliberate attempt to eschew"[119] the idea of regionalism made in 1997 does not fully capture the picture anymore. Over the past two decades, five distinct ways of dealing with the methodological challenge of regionalism crystallized, most likely reinforced by the ever-increasing regional juridification after the end of the Cold War. Each of these approaches tries to reconcile the practical relevance of regional practice with the need for a commonly shared legal approach at the universal level.

Nevertheless, given the respective shortcomings of these approaches, it seems precipitous to stop here. Two interrelated issues prove to be a continuing methodological challenge for the ILC and may inspire a refinement of any *comparative international law* approach. On a substantive level, the ILC is not only expected to propose common rules. States expect the ILC to demonstrate that these rules neither unduly stress nor suppress a specific regional approach ("challenge of equal regional representation"). At the same time, the work of the ILC is frequently confronted with the insistence on regional exceptions from universal rules based on claims of a distinct regional identity and regulatory autonomy ("challenge of regional exceptionalism"). This contribution has suggested two steps which might help to address these challenges: firstly, the adherence to, explanation based on, and further exploration of secondary rules when dealing with regional law and practice by the ILC, and, secondly, the increased engagement and input by regional IOs and States in the Sixth Committee.

The work of the ILC over the past two decades has taken regionalism increasingly more seriously. Whether the Commission is taking regionalism seriously enough remains to be seen.

118 A. B. M. Marong, 'The ILC Draft Articles on Crimes Against Humanity. An African Perspective', 6 *African Journal of International Criminal Justice* (2020) 2, 93-124, at 98-99.

119 Crawford, *supra* note 1, 113.