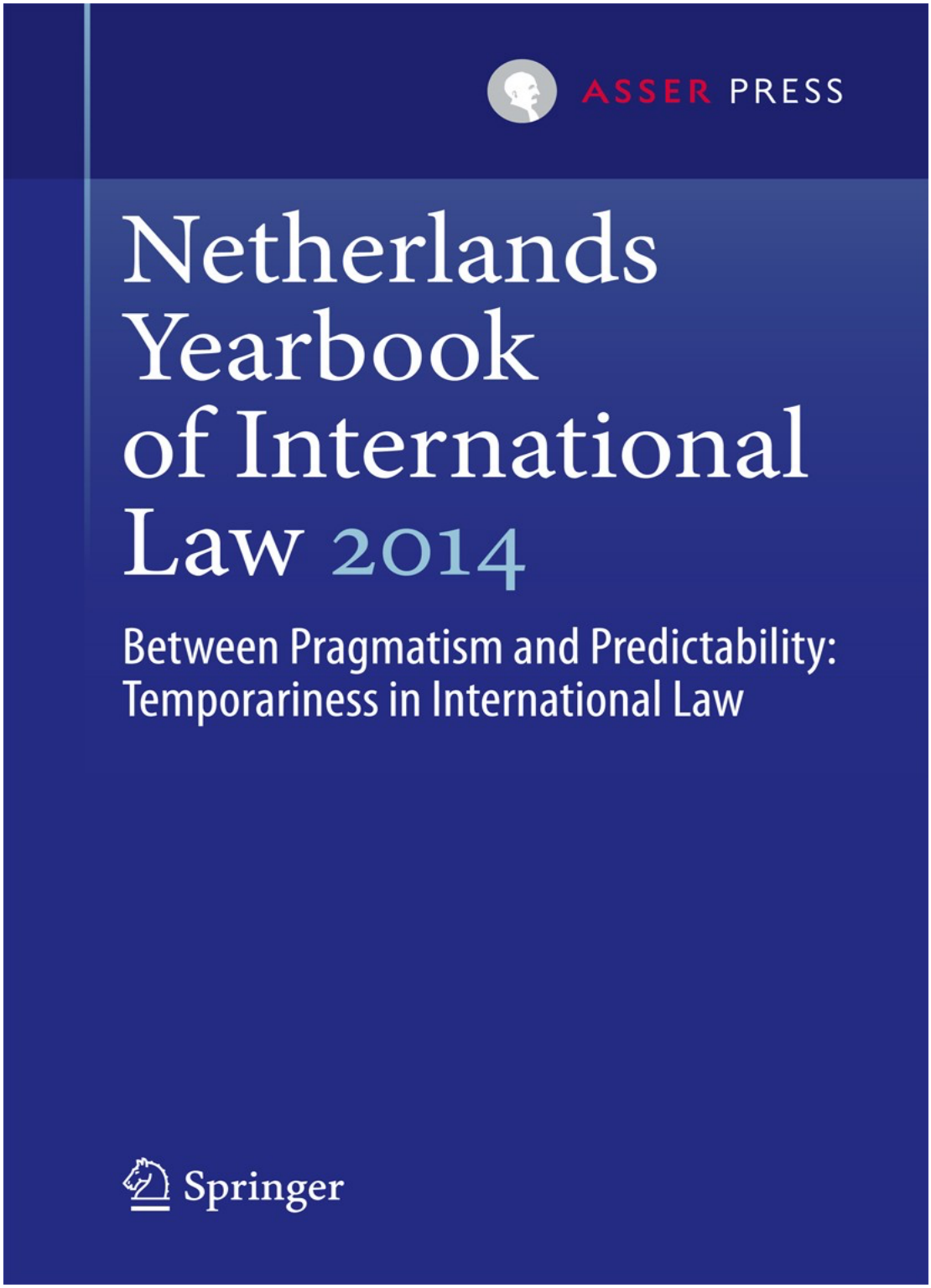

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Chapter 5
International Law and Time: A Reflection of the Temporal Attitudes of International Lawyers Through Three Paradigms

Christian Djeffal

Abstract What is the relation between law and time? How do international lawyers conceive law in time? This chapter aims to answer the question of how international law is situated in time in a paradigmatic fashion. Looking at social time—the common perception of time in society as opposed to individual or astronomical time—the law is an institution defining time but also relying on a temporal conception. The chapter establishes three basic paradigms of how international law has been situated temporally: the paradigm of atemporality, depicting law as eternal and unchangeable; the paradigm of temporality, defining law as ascertainable but changeable; and the paradigm of fluxus, defining the law as necessarily changing, unsteady and moving. The chapter shows how the understanding of international lawyers shifted from the paradigm of atemporality to the paradigm of temporality. It reviews the treatises of international legal scholars and the notion of peace in peace treaties from the 17th to the 20th century. The chapter then goes on to discuss whether there has been a second paradigm shift from the paradigm of atemporality to the paradigm of fluxus. For this purpose three cases are explored: the evolutive interpretation of the notion of security, the changing customary law on state immunities and the principle of sustainable development. The chapter concludes with the outlook of transcending the paradigmatic approach with a cubistic look at the relationship between law and time.

Keywords International law in time · Temporality · Natural law · Positivism · Realism · Evolutive interpretation

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5.1 International Law in Time: The Familiar Stranger

Time is a 'familiar stranger'.[1] This paradox was expressed by St. Augustine as follows: 'What then is time? If no one asks me, I know; if I want to explain it to a questioner, I do not know.'[2] The interesting point is that the understanding of time and representations of time are part of our daily routine. However, time is still a mystery and many questions in relation to it are far from being solved. One important way of structuring our understanding of time is the distinction between astronomical time, i.e., the time ascertainable through methods from natural sciences—personal time, i.e., the time as it is perceived by individuals—and social time, i.e., the time as it is conceived in society.[3] Our understanding of time is, at the same time, evolving. Concerning individual time, the perception of a human being changes during her/his lifetime. With regard to astronomical time, the theory of relativity has shown that time is not a stable value but subject to the speed with which a body travels.[4] The fact that social time varies is evident from the fact that cultures sometimes have specific concepts of time[5] or their own calendar.[6] There are ongoing debates about the nature and the concept of time in physics, literature,

[1] This is the title of Fraser 1987.

[2] Augustinus, *Confessiones*, Lib XI, XIV, (17). For the translation, see Augustine 2006, at 242. The Latin original reads: 'quid est ergo tempus? si nemo ex me quaerat, scio; si quaerenti explicare velim, nescio.'

[3] For this distinction, see Sorokin and Merton 1937.

[4] For an explanation, see Russel 1926.

[5] So, for example, in ancient Greek, there were concepts of *chronos* and *kairos*, one denoting time as enduring while the other designating something like the right point in time. See Smith 1969.

[6] See, for example, the different calendars in China or many Islamic countries. A very famous switch of calendar systems was made by the catholic church replacing the Julian calendar by the Gregorian calendar according to Aloysius Lilius' plans. For the evolution of calendars, see Kinnebrock 2014, at 37–39.

sociology, psychology and in particular in philosophy.[7] The same applies in the field of jurisprudence. Lawyers and legal scholars frequently have to deal with temporal questions: there are questions of temporal applicability, dates, deadlines, time periods; legal principles like frustration, delay and *estoppel* can directly depend upon certain periods of time. Irrespective of the great importance of time, the general question of how the law is situated in time has rarely been addressed.[8]

In society, there is a need for agreed time standards. An agreed time standard is explicitly or implicitly based upon a concept of time. This chapter argues that the concept of law is based on temporal assumptions particularly concerning the changeability of the law. Like the conception of time, the concepts of law and in particular international law in time have varied. This chapter summarises those conceptions as three paradigms, namely the paradigm of atemporality, under which law is seen as eternal and unchangeable, the paradigm of temporality, under which law is seen as changeable but generally stable and the paradigm of fluxus under which law is seen as an unstable set of decisions. The chapter shows in an exemplary fashion how the temporal concepts of international law have shifted from the paradigm of atemporality to the paradigm of temporality and it discusses whether there might be a third shift to the paradigm of fluxus with the help of three case studies, each relating to a specific question concerning the different formal sources of international law, i.e. international treaties, customary international law and general principles.

Law is related to time in several ways: it relies on a conception of social time and also enforces it. In many jurisdictions, the time system is regulated by law. Paragraph 4 of the German Code on Measurement Units and Measurement of Time provides that '[l]egal time is the middle European time'. The concept of legal time means that whenever German law refers to time, middle European time and the underlying Coordinated Universal Time are to be applied. This Coordinated Universal Time is currently regulated in the form of a recommendation of the International Telecommunications Union (ITU).[9] The international standards of time are never absolute, and there is a constant effort to improve them.[10]

The concept of law is also based on a certain temporal understanding. This is evident in relation to the question whether law or its most important norms can ever change. Time has often been associated with change.[11] Change is important for the measurement of time, which is true for every timekeeper from the sundial to the atomic clock. The question of the law in time is also the question

[7] For an interdisciplinary bibliography, see Das 1990.

[8] One rare example is Husserl 1955. In his great treatment of time and law, Günther Winkler also expresses an obvious lack of reflection of international law and time. Winkler 1995.

[9] Recommendation ITU-R TF.460–6.

[10] Currently, discussions are going on as to whether leap seconds are to be abolished as they could threaten computer systems. See McMillan 2015.

[11] See, for example, the following quote: 'It is a commonplace that time, not space, is the dimension of change.' Le Poidevin and MacBeath 1993, at 1.

whether and how law is subject to change. This question is part of the temporality of the law. Like the concept of time, the temporality of law, and of international law in particular, has never been defined in an absolute manner but only by relying on workable concepts. Workable concepts are agreed collective assumptions of time, which are necessary for all parts of society. A concept of time underlies the concept of law. These underlying concepts shall be referred to as paradigms, which are taken to be assumptions common to all relevant (legal) actors.[12] As Thomas Kuhn has shown, such paradigms underlie scientific discourse even in the natural sciences.[13] Whether ideas, claims and propositions are to be conceived as true and acceptable is often dependent upon the prevailing paradigms. In cases of competition, a shift of paradigms might occur, which results in a scientific revolution leading to a different view of the very same matter. The present contribution aims to apply this approach to temporal paradigms in international law.

5.2 Paradigm Shifts

As a hypothesis, three temporal paradigms are laid out. They will be called atemporality, temporality and fluxus. They describe the basic stances that international lawyers can take in relation to the temporal dimension of international law. The paradigm of atemporality represents the idea that international law is eternal and unchangeable. Under this paradigm, international law is totally independent and separate from and not affected by time. The paradigm of temporality expresses the stance that international law is ascertainable and changeable but that it also endures for a fixed and specified amount of time. It endures for a certain time, mostly until it is changed. The paradigm of fluxus is based on the idea that international law is necessarily unsteady, moving and changing. Those paradigms can be traced in the scholarly reflection of international law as well as in international legal practice. The creation of international law as we know it coincided with a shift from atemporality to temporality. As of now, the temporal paradigm is competing with fluxus, but it is not clear which paradigm will prevail. Before engaging with this question, we will revisit the first paradigm shift from the paradigm of atemporality to the paradigm of temporality that is called the temporalisation of international law.

[12] The use of the word ‘paradigm’ can be misleading as even Kuhn, who coined the phrase in this context, did not use the term consistently and later even dropped it. This is why this term is used only in one of the many potential meanings.

[13] Kuhn 1996.

5.2.1 The Temporalisation of International Law

5.2.1.1 Scholarly Approaches

The concept of *ius gentium* has evolved substantially over time.[14] Cicero's definitions are considered to be the earliest available systematic definitions of this term, the Latin equivalent to the term law of nations.[15] Cicero did not generally restrict *ius gentium* to a class of actors or just to the relations of different peoples. His conception came very close to natural law and was basically the law attaching to human nature applying between individuals as well as peoples. This also had significant temporal consequences. In the discourse in *de republica*, Cicero laid down a concept of the *lex aeterna* entailing a particular temporal vision:

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting … It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times …[16]

This is a definition of the *lex aeterna*, establishing the basic idea that there is an eternal and unchangeable law. This law was binding upon all nations, thus the concept of *lex aeterna* encompasses the concept of international law. On another occasion, Cicero explicitly associated the *ius gentium* with natural law and described it as being applicable among all nations.[17]

The same thought can be found in the great codification of Roman law, the *Corpus Iuris Civilis*. In its definition of *ius gentium*, it focused on the laws in existence in all jurisdictions.[18] Later in the text, the temporality of at least a part of the *ius gentium* was explicitly addressed:

> Now, natural laws, which are followed by all nations alike, deriving from divine providence, remain always constant and immutable: but those which each state establishes for itself are liable to frequent change whether by the tacit consent of the people or by subsequent legislation.[19]

This part of the tekst opposes a universal *lex aeterna* with the law in specific nations that is subject to change. The idea of the *lex aeterna* was explicitly relied upon by Augustine and Thomas Aquinas; the defining feature of *ius gentium* was that it was directly deduced from natural law.[20]

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[14] For a conceptual analysis of the term, see Steiger 1992; Djeffal 2013.

[15] For a general treatment of the notion of *ius gentium* see Kaser 1993, at 14–20.

[16] Cicero, *De Republica*, III, 33. Translated by Grewe 1995, at 173.

[17] Cicero, *De Officiis* 3, 17, 69.

[18] *Codex Iustianus*, I, 2, 1; translation by Grewe 1995, at 169.

[19] Ibid., I, 2, 11; translation by Grewe 1995, at 172.

[20] Thomas Aquinas, *Summa theologica*, Book I, at 95 a. 4 co. For an interpretation of this section, see Schilling 1919, at 18–29. See also Grewe 2000, at 85–86.

They reinforced the general idea that natural law was valid irrespective of place and time and no human law could conflict with it and remain valid.[21] This could be considered the peak of the paradigm of atemporality in international law.

Authors like Suárez, Grotius, Wolff and Vattel contributed to a shift from this atemporal paradigm towards temporality. This temporalisation[22] of international law coincided with what is frequently referred to as the creation of classical international law. It was succinctly being seen as positive and not exclusively natural law. It is interesting that the first modern authors of international law explicitly addressed the temporality of law in general and of international law in particular. With his treatise *de lege*, Francisco Suárez laid down a general jurisprudence that also included some revolutionary thoughts about international law. He distinguished between divine and human law and explained that human law was temporal whereas divine law was eternal.[23] A great achievement of Suárez was to situate the law of nations in a completely new way by setting it apart from natural law. He compared natural law and the law of nations in their spatial and temporal dimension and arrived at common as well as distinctive features. Spatially, natural law and the law of nations were both universal in the sense that they applied to all nations. Regarding their temporality, natural law was unchangeable and eternal while the law of nations was subject to changes like all human law.[24] So while there was an eternal law, Suárez regarded the law of nations as human and therefore, temporal, and changeable.

Hugo Grotius upheld the idea that there was a law of nature that 'is unchangeable,–even in the sense that it cannot be changed by God'.[25] Even though he remained in the tradition of the *lex aeterna*, he allowed for several exceptions: despite its perpetuity, the conditions of its operations were subject to change. So, in a different setting, the law of nature was to be interpreted differently. Yet, international law belonged to the category of human law, which Grotius explicitly distinguished from natural law.[26] Citing *Dio Chrysostom*, he observed that the law of nations 'is the creation of time and custom'.[27] The law of nations was created in time, it was changeable and it was human. International law was not eternal but temporal in that it could change over time.

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[21] See the summary by Grewe 2000, at 85.

[22] The term 'temporalisation' is borrowed from Koselleck 1997. He used this term to exemplify the basic tenants of conceptual history.

[23] Suárez 1944 [1612], at 172 (Book II, Chapter IV, 8).

[24] Suárez grounded this observation in the fact that natural law was directly derived from the good and evil nature of things while the law of nations was not necessarily attached to such categories. It 'does not forbid evil acts on the ground that they are evil, but renders [certain] acts evil by prohibiting them.' Ibid., at 342 (Book II Chapter XIX 2).

[25] Grotius 1925, at 40 (Book I, Chap I, X, 5).

[26] Ibid., at 44 (Book I, Chap I, XIV, 1–2).

[27] Ibid.

A very categorical and explicit treatment of the problems of temporality can be found with Christian Wolff in his treatise *Jus Gentium Methodo Scientifica Pertractum*. He developed a categorisation of the law of nations based on its sources. He denoted the category of the law of nations that also belonged to natural law as the 'necessary law of nations', and defined as 'law of nature applied to nations'.[28] The defining characteristic of the necessary law of nations was that it is immutable, which he explicitly derived from the immutability of the law of nations.[29] The 'voluntary law of nations', forming the second category, could be directly deduced from the necessary law of nations.[30] It provided for the general legal institutions and principles allowing for the operation of the legal system. The voluntary law rests on the assumed consent of all nations. The third category is the 'stipulative law of nations' resting on the express consent and the customary law of nations that stems from the implied consent of nations. The stipulative and customary law of nations were changeable and, therefore, temporal. So, Wolff provided for a gradual system distinguishing between natural and positive law. This refined system of the categories and sources of the law of nations allowed a permanent and perpetual foundation combined with durable but also changeable elements that comes very close to the current doctrine of sources. The category of voluntary law stands between natural and positive law. It is derived from natural law by an assumed consensus between all states and provides the basis for positive international law. All in all, Wolff combined atemporal and temporal notions are combined in his system.

Emer de Vattel followed the exposition of his teacher and relied on the same categories and explicitly stated that states could not change the necessary law of nature.[31] Even though he rendered the voluntary law of nations much more concrete by using the society of states as the basis of state sovereignty and the freedom of states resulting from it,[32] Vattel clearly emphasised that states were bound by the necessary law of nations just as individuals and that this law was immutable just as natural law.[33]

The scholars who have been reviewed so far partly departed from the paradigm of atemporality and included temporal elements. They based positive international law on an eternal and unchangeable core. Christian Wolff provided for a general categorisation with temporal as well as atemporal elements. The eternal *nucleus* left in his conception of international law was questioned by positivists who

[28] Wolff 1934, at 4 (Book 1 Prolegomena para 4).

[29] Ibid., at 10 (Book 1 Prolegomena para 5).

[30] Ibid., at 17–18 (Book 1 Prolegomena para 22).

[31] Vattel 1995 [1916], at 49–57 (Preliminaries, paras 1–57).

[32] Wolff stressed the collective of states much more, which he described as *civitas maxima*. Wolff 1934, at 11.

[33] Vattel 1995 [1916], at 50–51 (Preliminaries, paras 8–9).

furthered conceptions solely based on the paradigm of temporality.[34] Johan Wolfgang Textor, for example, departed from a strict separation of *ius gentium* and natural law. While he thought that they had a common ground in natural reason, he emphasised that they

> differ[ed], however, in the manner of their development; for the Law of Nature issues direct from Natural Reason, whereas the Law of Nations issues through the medium of international usage, upon which the varying conditions and relations of human life have exercised a preeminent influence.[35]

The positive approach was also translated into the temporal construction of the law of nations: as it was based upon the usage of states, the later usage would replace and override the former so that the law of nations could develop and change.[36]

Richard Zouche founded the law of nature and the law of nations in right reason but separated them as to their sources[37]: the law of nature was derived by the right conclusion from the first principles of nature, while the law of nations rested on the consent of states. He interestingly observed that right reason could reveal itself in the long-standing and universal agreement of nations. Right reason was, however, in Zouche's thinking not a necessary condition for the validity of a norm of international law. To use his own words,

> besides common customs, anything upon which single nations agree with other single nations, for example by compacts, conventions and treaties, must also be deemed to be law between nations, since the solemn promise of a state establishes law, and whole peoples, no less than single persons, are bound by their own consent.[38]

The positivist tradition in international law[39] could clearly be considered as the ruling paradigm at the beginning of the 19th century.[40] Together with this shift towards a positivist view of international law came its temporalisation. The temporalisation in international legal scholarship happened gradually. While Christian Wolff developed a system including an unchanging part of the law that he framed

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[34] For an overview of the positivistic scholarship in international law, see Nussbaum 1958, at 164–185.

[35] Textor 1916 [1680], at 4 (Chapter 1, para 11).

[36] Ibid., at 5 (Chapter 1, para 15). It is very interesting that natural law rather indirectly breaks into his line of argument when he states that '[t]his is especially so in view of the frequent mutations of human life, in which Right Reason finds the justification of dictating now one and now another law to States.' Ibid. As previously stated, right reason was in Textor's conception the common basis for the law of nature and the law of nations. It has to be acknowledged that the quoted passage restricts right reason to a general justification for changes and not the element triggering change.

[37] Zouche 1916 [1650], at 1 (Part 1, Sect. 1, para 1).

[38] Ibid., at 1 (Part 1, Sect. 1, para 1).

[39] For the purposes of the present inquiry, it does not seem to be necessary to look at the scholars denying the legal nature of international law such as Austin and Spinoza. If international law is not considered as law, no issue of its temporality can arise.

[40] Grewe 2000, at 502.

necessary law, other authors such as Johann Wolfgang Textor separated the law of nations categorically from natural law and established that the law of nations was temporal and changeable.

5.2.1.2 Practice of Peace Treaties: The Temporalisation of Eternal Peace

This general shift from atemporality to temporality can also be shown in state practice. One good point of reference in that regard is the notion of peace in peace treaties. It is obvious from the very name of a peace treaty that the *telos* of such a treaty is peace. From the classical authors mentioned above, there was also a clear understanding that there were generally two sets or—to use a rather modern term—regimes of international law: the law of war and the law of peace. Many books have relied on this as the most fundamental distinction and it is telling that we find this in the title of Grotius' most famous book *De jure belli ac pacis*. From this we can conclude that the notion of peace was central for scholars of international law, but it was also essential to practice:

Peace treaties have been concluded throughout human history. Yet, they have entailed different notions of peace: a normative vision of perpetual or eternal peace or a rather factual vision defining peace as the absence of violence which could be broken at any time if it conflicted with the *raison d'état*. There is evidence that the notion of peace in peace treaties was being temporalised in the sense that it moved away from the idea of general and eternal peace to a rather temporal notion of peace functioning as a factual description. The difference between the two notions is very well expressed in Immanuel Kant's famous *Perpetual Peace*, which he wrote in the form of an international treaty accompanied by a commentary. The project was aimed at outlining the requirements of a general and perpetual peace, and he began by setting out six articles that should immediately be observed, which he called preliminary articles. The first of those is that no peace treaty ought to be concluded with a hidden reservation for future war.[41] In this section, Kant interestingly argued that the very term perpetual peace ought to be regarded as a pleonasm since an unperpetual peace ought to be regarded merely as a cessation of hostilities and not as peace as such. From this it can be inferred that in his definition the perpetuity was a necessary criterion for the very notion of peace. A mental reservation as to the perpetuity of peace was enough for Kant to void the peace treaty. At the end of this article, Kant remarked that if one were thinking in terms of *raison d'état*, his idea would seem rather remote and pedantic. So Kant himself admitted that his idea would not appeal to realists. Such a mind frame opposed to Kant's could be found with Carl von Clausewitz, who argued that the reasons for peace were that states either satisfied their interest for which they had started the war or ceded hostilities to wait for a

[41] Kant 1796, first preliminary article.

better opportunity.[42] The Clausewitzian vision of war was instrumental; the pursued object justified breaches of the peace.[43] This means in turn that the end of a war is by no means absolute, but is seen by the conquered state as a 'passing evil' that can be changed later.[44]

The historian Jörg Fisch conducted a study on peace treaties throughout history.[45] His quantitative analysis shows that peace treaties were steadily concluded for an unlimited period of time, but that the notion of peace changed from a qualitative and more precisely temporal point of view: it became less important and more relative. Some examples will illustrate his observations. The importance of the eternal concept of peace is particularly obvious when it is included in the name of the treaty such as in the case of the Eternal Peace of 1686 between Russia and Poland. The importance of eternal and perpetual peace derived from the preambles to the treaties but also from general or specific provisions in the treaties. This can be very well shown by looking at the Peace of Treaty of Osnabrück (*Instrumentum Pacis Osnabrugensis*), which is one of the two treaties representing the Westphalian Peace ending the Thirty Years War.[46] The preamble to this treaty tells the story of the peace process and how the parties decided to negotiate on a universal peace (*de pace universali*), which in that context meant a peace including all parties to the conflict. Article I of the treaty set out a general obligation of keeping the peace and clearly emphasised the temporal dimension of peace as perpetual.[47] The same article stipulates that the treaty ought to further utility, honour and advantages for all parties in order to achieve a true peace. The basis of the perpetual peace is enshrined in Article II, which grants a general and perpetual amnesty. Another interesting feature is enshrined in Article XVII of the treaty stipulating in its second section that the treaty ought to be perpetually enshrined in the constitution of the Holy Roman Empire (*perpetua lex et pragmatica imperii sanctio*) that was to be implemented on the next occasion as constitutional law and that ought to be recognised by all relevant actors within the Holy Empire for all times (*tanquam regula quam perpetuo sequantur*). This is very interesting since the treaty did not only foresee its own perpetuity but also the perpetuity of the implementation into the constitution of the Holy Roman Empire. This matched with a general trend from the Westphalian Peace to the 19th century: the perpetuity of the notion of peace was accompanied by the explicit perpetuity of provisions of the treaty enshrining the peace as well as this treaty as a whole. Even when the Westphalian

[42] See von Clausewitz 1832–1834, Chapters 1 and 13.

[43] Ibid., Chapters 1 and 2.

[44] Ibid., Chapters 1 and 9.

[45] Fisch 1979, at 333. In line with the methodological limitations as set out above, the present study shall be confined in its historical sections to the relations between European states, which leaves the Sublime Port, China and colonial relations out of the picture.

[46] On the temporality of peace in the peace treaties of Westphalia, see Duchhardt 2004, at 49. For a general description, see Fassbender 2012b.

[47] The phrase used in Latin reads '*pax sit christiana, universalis, perpetua*'.

Peace was violated in the Franco-Dutch War of 1672–78, the Peace Treaty of Nijmingen between the Emperor and France stipulated not only a 'Christian, Universal, True and Sincere Peace' but extended this also temporally to their 'heirs and successors'.[48] In Article II, the parties also founded their agreement in the Treaty of Muenster and, therefore, reinstalled the Westphalian Peace.

This development can be contrasted with developments in the 19th century during which perpetual peace was generally included in the treaties, while the context indicated that eternal peace was not really envisaged. This can be interpreted as a shift as the term 'eternal' has a religious connotation and is also even extensive in that it extends time without beginning or end whereas perpetual can have the meaning of extending without end into the future but not into the past. As an example for such a treaty, one could look at the Peace Treaty Concerning the Termination of the Crimean War of 1856/Paris.[49] It included in Article I the general reference to perpetual peace, extending the obligation to 'heirs and successors … in perpetuity'. Other than the Treaty of Osnabrück, the amnesty clause in Article II contained no perpetual reference. Article VIII provided for an obligation of allowing mediation before resorting to the use of force. This provision was aimed at preserving peace, yet, the fact that it made the use of force only dependent upon compliance with a formal requirement also indicated that the treaty at least envisaged further hostilities. This might be considered a realistic and open provision. It embraced peace, but it generally accepted the possibility of future wars, which cannot be reconciled with a general obligation to keep the peace. In the Prusso-Austrian Peace Treaty of 1866, the only perpetual reference is again the prolongation of the treaty 'to heirs and successors … henceforth and forever' in Article I; apart from this, no other reference to perpetual peace was included. These two treaties exemplify the diminished importance of the notion of peace in peace treaties. Another trend substantiating the finding of a change in the notion of peace is that mutual guarantees of peace vanished, instead unilateral guarantees of peace were made subject to the condition of the fulfilment of obligations in the treaty such as the payment of reparations.[50]

Another good example is the Congress of Berlin of 1878 which led to the Treaty of Berlin 1878. When the Russian representative, Gortschakow, asked for a guarantee by all parties to the treaty to enforce it also with forceful means, Bismarck, acting as a mediator at this conference, stepped in. He explained that he did not believe that there was a formula that could save Europe and protect it with absolute certainty from repeating the incidents that stirred it up.[51] The Congress could only do what men do and which was subject to the ups and downs of history. Therefore, Bismarck discarded the idea that a general and lasting peace could be created and secured.

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[48] Grewe 1988, at 205.

[49] Reprinted in Grewe 1992, at 19.

[50] Steiger 2004, at 91.

[51] Geiss 1979, at 151.

As commentators have pointed out, the commitment to perpetual peace diminished substantially.[52] This is another indication that the relationship was temporalised in the sense that peace was limited temporally to the next use of force. The notion of peace temporalised. It moved from a Kantian idea of perpetual peace to a limited peace as envisaged by Clausewitz. The temporalisation of peace as fleshed out here reinforces the general shift that was pointed out before from atemporality to temporality.

5.2.2 The Flexibilisation of International Legal Time?

Under the paradigm of fluxus the law is seen as necessarily developing and moving. The question that is asked in this chapter is whether fluxus has become the main paradigm in international legal scholarship and practice. Whereas atemporality regards the law as unchangeable and temporality sees it as steady for a limited duration, the notion of fluxus emphasises that there is not even limited steadiness.[53] Under the paradigm of fluxus, law is viewed as unsteady and continuously changing. In support of this contention it could be argued that there is an increasing trend towards such abrupt changes. To give one example concerning the continental shelf, two authors have observed that important general norms of international law such as the law of territory can change from one day to another.[54] There are different ways to explain this general observation: either by sticking to temporality and explaining the new perception by a circumstantial acceleration in law and society, or by rethinking the relationship between law and time in order to adjust it to the constant changes in the law. The latter would result in claiming the paradigm of fluxus.

Sticking to temporality, one could contend that law still endures for a limited amount of time, but due to internal and external necessities, changes just happen more frequently. This can be explained with new legal mechanisms and procedures that facilitate norm creation in international law, such as mechanisms for producing the secondary law of international organisations. But there might also be external triggers for such a development. In sociology, a continuing trend towards social acceleration has been identified which is triggered by societal, technological and personal developments.[55] This acceleration in some parts of society would then require other areas, such as law, to react in an ever quicker manner to the new challenges.

Yet, it would also be possible to replace the paradigm of temporality and its underlying assumptions with another temporal concept of international law that is more in tune with its frequently occurring changes. An influential theory

[52] Neff 2005, at 177; Fisch 1979, at 366–367. For an account that peace clauses were much briefer but still contained a reference to a normative vision of peace, see Steiger 2004, at 82.

[53] This is again an ideal-typical definition aimed at clearly bringing out the important features of the general paradigm in its purest form.

[54] Crawford and Viles 1994.

[55] For an overview, see Rosa 2003.

emphasised that international law ought to be viewed rather as a process than a system of rules.[56] This stream of international legal thinking was inspired by American legal realism as well as similar views in international relations.[57] The major shift was to focus on decisions of legal actors rather than on rules.[58] Rosalyn Higgins, for instance, defined international law as a 'continuing process of authoritative decisions.'[59] For her, rules 'are just past decisions' and not abstract and general entities from which certain results are to be deduced.[60] International legal process scholarship then either just empirically described the decisions taken by international legal actors or complemented them with a normative value framework that ought to guide the policy decisions of the actors. Irrespective of whether a normative approach is pursued, the construction of international law as a process has serious consequences for its temporal construction. If there is no preconceived rule having a separate existence and no essence, it would also be hard to attribute a general duration to any rule. When a competent person has to decide, this can be done in line with previous decisions or by departing from them. The decision-maker has the choice. This is the first challenge to the paradigm temporality. Another problem is that there might be patterns of behaviour but those can change and they are never exactly the same either.[61] A decision might be situated in very similar circumstances as compared to previous decisions. But they are never exactly the same. This means that by necessity the law is changing. Seeing law as a process, every legal decision is at least a possibility to alter previous decisions. What is more, no decision occurs in exactly the same circumstances, which is why every decision entails something new. From this point of view, abstract and enduring rules are an *ex post facto* construction that does not really capture what the law is about. Decisions, however, only occur at certain points in time. They are singular acts instead of general enduring rules.

To see international law as a process means that the concept of temporality can no longer be upheld. In current international legal discourse, this is, however, far from agreed. The paradigms of temporality and fluxus currently compete. The three case studies that follow aim at testing the potential of the competing paradigms to explain norms in time and to point to the possible consequences of employing one paradigm or the other. Every case study highlights one particular problem in the field of the three accepted formal sources of international law and will illustrate how questions of temporality play out in international law and where international law stands now in relation to the competing paradigms. Concerning

[56] General overviews of scholarly discourse can be found in O'Connell 1999; Koh 1997. For a recent attempt stressing the rules rather than the process, see d'Aspremont 2011.

[57] Falk 1995, at 1991.

[58] McDougal 1956, at 55.

[59] Higgins 1968, at 58–59.

[60] Higgins 1994, at 3.

[61] McDougal 1956, at 63.

the law of treaties, the first case study will briefly explain evolutive interpretations of the notion of peace and security in the United Nations Charter (Sect. 5.3.1). In the field of customary international law, we will look at the role of domestic courts creating exceptions to state immunity (Sect. 5.3.2). Regarding the general principles, we will look at the principle of sustainable development and its impact as a material international legal principle.

5.2.2.1 Evolutive Interpretation of the Notion of Security

To bring out the temporal implications of static and evolutive interpretations, we will focus on one of the most important terms in international law: security. The rise of the notion of security can be very well observed in the inter-war years between 1918 and 1945. In this period, security entered the academic discourse, the discipline of security studies was invented.[62] The League of Nations International Committee of Intellectual Cooperation organised a two-year collective research effort resulting in the 7th and 8th International Studies Conference on the topic 'collective security'. There were contributions by the leading international lawyers of the time, such as Hersch Lauterpacht, René Cassin and Georges Scelle.[63]

One indicator for the increased importance of the term 'security' can be derived from a content analysis determining the frequency of its use in the Charter. While the term 'security' is mentioned only once in the preamble to the Covenant of the League of Nations, it is mentioned 143 times in the Charter of the United Nations (UN Charter) and could be considered as the substantial concept[64] that is the most frequently used in the Charter.[65] The importance of security in the UN Charter rests not only on quantitative observations; the Preamble mentions peace and security as an end: the first purpose mentioned in Article 1(1) UN Charter is to maintain international peace and security. Articles 39, 42 and 43 empower the Security Council to take forceful measures to maintain or restore international peace and security. The fact that the main organ of the United Nations vested with the greatest legal powers is itself called the Security Council as opposed to the 'Peace Council' or the like again reinforces the central importance of security in the Charter. Yet, the notion of security has evolved substantially over time. All of those changes occurred after the end of the cold war.

Traditionally, security was conceived as the security of states. In 1994, the United Nations Development Programme released a Human Development report that included, amongst other things, the new concept of human security. One of its

62 McDonald and Brollowski 2012, para 7.

63 Bourquin 1936.

64 By this, I mean words apart from auxiliary words like 'or' 'the' or 'and'.

65 Actually, eight words are used more frequently, those are 'the' 'of' 'and' 'to' 'in' 'shall' 'article' and 'council'. The phrase 'security' is either used in the context of 'peace and security' or regarding the 'Security Council', save for Article 83(3) UN Charter.

defining features was to shift from a state-centric notion of security to a notion of security that focused on people.[66] This understanding has been underlying other developments in the notion of security as well. While security was originally constructed internationally with a focus on cross-border action,[67] it was later claimed that it transcended the international and also relates to national and transnational actions. It is not only about cross-border actions from states but also from non-state actors such as terrorists: the Security Council has recently stipulated that 'terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security'.[68] Another important trend is that the threats that security protects against have proliferated. In 1992, Secretary-General Boutros Boutros Ghali redefined security as follows:

> The concept of peace is easy to grasp; that of international security is more complex, for a pattern of contradictions has arisen here as well. … Technological advances are altering the nature and the expectation of life all over the globe. The revolution in communications has united the world in awareness, in aspiration and in greater solidarity against injustice. But progress also brings new risks for stability: ecological damage, disruption of family and community life, greater intrusion into the lives and rights of individuals.[69]

The Report of the High-Level Panel on Threats, Challenges and Change that was summoned by the Secretary-General also looked towards poverty, infectious diseases and environmental degradation and transnational organised crime.[70]

In summary, security has substantially evolved from an international outlook focusing on physical violence between states on a large scale to national and transnational dangers for human beings involving many threats that must have seemed rather remote to the drafters of the Charter. Can this remarkable evolutive interpretation be explained by the paradigm of temporality or does it rather point to fluxus? To answer this question, we have to look at how the relevant actors construct this evolutive interpretation. The Secretary-General Boutros Boutros Ghali stressed that the United Nations, being 'a gathering of sovereign states', depended on the 'common ground' that the states accepted among themselves.[71] He then went on to observe a 'changing context' in which he situated the new meaning of security.[72] This line of argumentation can be seen even more clearly in the High-Level Panel Report: after describing the new security threats mentioned above, the Panel stated that the 'central challenge for the twenty-first century is to fashion a

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[66] United Nations Development Programme, Human development report, 1994, at 22–23.

[67] Report of the High-Level Panel on Threats, Challenges, and Change, A more secure world. Our shared responsibility, 2004, at 1 and 9.

[68] UNSC Res. 2119, 17 December 2013.

[69] Quoted by McDonald and Brollowski 2012, § 10.

[70] Report of the High-Level Panel on Threats, Challenges, and Change, A more secure world. Our shared responsibility, 2004, at 24–27.

[71] UN Secretary-General, An agenda for peace. Preventive diplomacy, peace-making and peace-keeping, A/47/277–S/24111, 31 January 1992, para 2.

[72] Ibid., para 8 ff.

new and broader understanding, bringing together all these strands, of what collective security means.'[73] The way in which such a new understanding is to be fashioned has been described as 'a new security consensus'.[74] The Panel did not make any efforts to link its findings to the drafters of the Charter,[75] but looked for a new consensus in the face of changed circumstances. Those circumstances are described in the most dramatic fashion speaking about 'Different worlds: 1945 and 2005'.[76] The impact of these changes had to be fully understood, while they indicated a 'fundamentally different security climate'.[77]

How is such a development possible under general international law? Such questions are frequently formulated as a choice between static and dynamic interpretation. They arise when the meaning of a provision in a treaty is changed through interpretation. Evolutive interpretation has attracted a great deal of attention[78] since there is a trend towards evolutive interpretation in international law.[79] Under international law, questions of stasis and evolution are to be determined according to the rule of interpretation as enshrined in the Vienna Convention on the Law of Treaties (VCLT), in particular Articles 31 and 32. Under certain circumstances, the interpreter is competent to attest a changing meaning of the text of a treaty such as the notion of peace and security. The changing interpretation of the concept of peace and security is based on flexibility pointing towards the paradigm of fluxus. It seems that the understanding of the term by particular actors, in the present case actors such as the Security Council, the Secretary-General or the High-Level Panel, are determinative. Those actors decide based upon present challenges and compromises; the outcome of their decisions often has a new quality that is very far from the original understanding.

Yet, the evolutive interpretation of the notion of peace and security can also be understood from the perspective of the paradigm of temporality. The High-Level Panel Report looked for a 'new security consensus'. From the perspective of temporality, the consensus is something ascertainable that, once it is reached, endures to the next consensus and is, therefore, an expression of the temporality in the field of the interpretation of international treaties. On the other hand, one could also point to the fluidity of the concept itself, and to the fact that it largely depends on what states think at a certain point in time. From this perspective, one could question whether and to what extent a consensus reached on the interpretation could

[73] Report of the High-Level Panel on Threats, Challenges, and Change, A more secure world. Our shared responsibility, 2004, at 9 and 11.

[74] Ibid., at 11 and 15.

[75] For such an enterprise, see Abbott 2002.

[76] Report of the High-Level Panel on Threats, Challenges, and Change, A more secure world. Our shared responsibility, 2004, at 10.

[77] Ibid., at 14.

[78] See the respective parts of the three reports reprinted in Nolte 2013. See also Fitzmaurice 2008, 2010; Linderfalk 2011; Venzke 2012; Bjorge 2014. See also Djeffal 2015.

[79] Nolte 2012, at 1679.

really and substantially programme the way in which security is looked at in the future. This observation would again point towards fluxus. Both paradigms offer explanations as to how the meaning of the term security has been changed, yet both frame the process of that evolution in a very particular way. Fluxus focuses on the actions of the interpreters whereas temporality aims at ascertaining the content through legal method.

5.2.2.2 Changing Custom and Domestic Courts: New Exceptions to State Immunities

Article 38(1)(b) of the Statute of the International Court of Justice (ICJ Statute) defines the source of customary international law as 'international custom, as evidence of a general practice accepted as law'. In the mainstream methodology as well as in international legal practice, from this definition two criteria were deduced, namely *consuetudo* or state practice and *opinio iuris sive necessitatis*.

Legal practice as well as mainstream methodology requires evidence of those two elements. An interesting problem in this regard would be to look at custom formation as well as changes in customary law from a temporal perspective. Textor asked the question of 'what amount of time' was necessary for the formation of customary law.[80] He interestingly came up with a solution, which we would conceive today as being quite modern: he thought that 'any interval or period of time is enough for the introduction' of customary international law.[81] For him, every state had to engage in the custom, but it would be enough to engage once. The idea of instant custom was foreseen by Textor. His conception of custom could be considered to be in the middle of two extreme temporal conceptions of customary international law: the idea that custom ought to be practised over a substantial period of time to become binding on others, and the idea that custom can be changed at any time by courts. The first view is strongly related to the actual practice of the participants forming the custom. If the main focus lies on mere actions, it takes some time to stabilise the expectations so that the custom is ascertainable. Examples for such approaches can be found within traditional doctrine, especially during the period of the existence of the League of Nations.[82] Common law represents the other extreme since it is not really related to the actions of the legal subjects but is rather determined by courts and their system of judicial precedent. It is interesting to see that common law originated from a customary order being based on the practice of the King's court,[83] but then went on to emancipate itself. Such a customary system would be very

[80] Textor 1916 [1680], at 6 (Chapter 1, para 20).

[81] Ibid., at 6 (Chapter 1, para 21).

[82] See with further references Verdross and Simma 1984, at 361.

[83] Plucknett 2001 [1956], at 313.

close to the paradigm of fluxus because the judicial actors, if they are not bound by precedent, could at any time change the respective law. Is international law moving in this direction? To provide an answer to this question in an exemplary fashion, we will look at the role national that courts play in the determination of exceptions to state immunity.

State immunity is an expression of the sovereign equality of all states which was already articulated in the *maxim par in parem non habet imperium,* which can be traced back to *Bartolus de Sassoferato*. It has been customary that no state could exercise jurisdiction over another state. Any incident in which the actions of another state are determined by foreign domestic courts against its will used to amount to violations of customary international law. At the end of the 19th century, there was a significant trend to create limits to the doctrine of state immunity by distinguishing the nature of the acts of states. While *acta iure imperii* or sovereign acts were still immune from the jurisdiction of other states, *acta iure gestionis* or commercial acts did not fall under state immunity. It is interesting that this trend was created by domestic courts, starting in Italy and then followed by the Belgian, Egyptian, Austrian and English courts.[84]

Domestic courts can play an important role in the ascertainment of customary international law as they are organs of the state and judicial bodies at the same time.[85] They adjudicate in the name of the people, which means the people in their respective state but they are also independent bodies determining the law in a neutral and objective manner. This Janus-headedness could be conceived as giving them a special competence to change customary law to a larger extent as compared to international courts since they combine the authority of being an organ of a state with the status of being a neutral and objective interpreter and applier of international law. This could be an argument for the special status of domestic courts when it comes to customary international law. An attempt to alter the law was made by the Italian Corte di Cassazione, which held that the doctrine of state immunity was not applicable in cases of a violation of *ius cogens* norms,[86] i.e. the court purported to have found another exception to state immunity. It thereby purported to modify an institution of customary international law. The case came before the International Court of Justice (ICJ) and the question was whether lifting the immunity and admitting the case to be heard before an Italian court violated Germany's right to immunity. The ICJ stuck to the traditional method of validating changes in customary international law and denoted the decision of the Italian

[84] For a detailed analysis, see the ILC's Draft Convention on the Law of State Immunities, reprinted in Watts 1999, at 2052.

[85] Roberts 2011, at 60.

[86] Ferrini Corte di Cassazione (Sezioni Unite), Judgment, No 5044, 6 November 2003, registered 11 March 2004, 87 Rivista diritto internazionale (2004) 539. It should be mentioned that the Corte Constitutionale followed the ICJ in its determination of customary international law, but went on to establish the supremacy of the Italian constitution over international law. For this latter aspect, see Corte Constitutionale 238/2014.

courts as isolated practice that was considered to be illegal.[87] Regarding the status of *ius cogens*, the ICJ held that there was no norm conflict between the law of state immunity and preceding violations of *ius cogens*. It is also significant that the ICJ looked at state practice, and especially the practice of national courts also in this regard.[88] The judgment of the ICJ cannot be understood as accepting the notion of fluxus, and the court rather adhered to a temporal vision of customary international law. It can change quite quickly, but changes will always have to be related to actions of states and no changes will be made until sufficient uniformity is achieved.[89] Customary international law generally endures as long as it is not abrogated by contrary practice.

To ascertain changing custom is, nevertheless, not free from questions challenging the paradigm of temporality. Firstly, breaches could be subsequently legalised if other participants replicate the violation. Today's lawbreaker can become tomorrow's lawmaker. If a substantial number of states follow a state breaking the custom, this could lead to a state of fuzziness in which it is not clear whether states have actually changed the custom, whether the old custom is still in existence or whether the rule has become obsolete. The ICJ took a very clear stance on both issues. Its method took a clear temporal stance. According to the immunities case, the practice reviewed by the Court reinforces the temporal paradigm as custom is still rooted in the actions of the participants, i.e. the states. Domestic courts are viewed primarily as organs of the state, they are not accepted as authoritative decision-makers, rather their practice is through the traditional method of finding customary international law. The method employed by the Corte di Cassatione would point more towards fluxus. A different assessment of the law based on the non-derogable status of *ius cogens* could generally lead to more dynamism and the independent assessment of the law by single actors. The traditional method as used by the ICJ is more in line with the paradigm of temporality than with fluxus as it looks for a consensus in the practice of states. As long as the consensus is there, the law endures. The law cannot be changed by single actors in a rather spontaneous manner.

5.2.2.3 Sustainable Development and the Materialisation of International Law

Article 38(1)(c) ICJ Statute also mentions 'the general principles of law recognized by civilized nations' as a source of law. Examples of such general principles include good faith and *estoppel*. These are all rather general or technical principles. From the outset, it was not clear whether Article 38(1)(c) ICJ Statute would

[87] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), ICJ, Judgment of 3 February 2012, paras 69–74, 83–89, 96.

[88] Ibid., para 96.

[89] Lepard 2010, at 35–36; Villiger 1997, at 24–25.

only import principles shared amongst all legal systems into the international sphere or whether there were also principles that were genuine to international law.[90] The text can be read either way: this recognition could be internal within the legal systems of the member states or external in the sense that states accepted them in the international sphere. During the drafting process of the Statute of the Permanent Court of International Justice, which contained a provision with almost the same text, Delegate La Pardelle remarked that principles could be based on principles in the national legal order (‘*principes qui sont à la base du droit national*’), while Delegate Fernandez remarked that they could also be based on international consensus thereon (‘*principes de droit supérieurs de tote controverse*’).[91] This difference has partly been captured by distinguishing between principles of law and principles of international law.[92]

Yet, principles are not necessarily only a source of law, they can also be seen as a category of norms that have features which are different from other categories such as rules.[93] Whereas sources confer legal validity on norms, categories of norms describe certain common features shared by norms (formal principles). Under certain conditions, norms have the status of a norm in international law (material principles). Among existing international legal norms are such that could be described as principles. They are described as flexible standards that influence the law rather indirectly and do not function in an all or nothing fashion.[94] In cases of intersections between different material principles, they would need to be weighed and balanced against each other. Principles as a category of norms can also be enshrined in treaties or customary international law. Article 2 UN Charter contains principles, such as sovereign equality and the peaceful settlement of disputes, which guide the actions of the organisation and its members. In this sense, there might be material principles of international law irrespective of which actual formal source they stem from.[95] One principle belonging to this category is the principle of sovereignty.[96] While the principle of sovereignty has a long tradition, the idea of principles as a category of norms is gaining ground in international legal scholarship and practice also in other areas of international law.[97] Borrowing a phrase from Max Weber, this development could be described as the ‘materialisation of international law’ as the law is not only based on formal rules but is enriched with material principles. This tendency also affects the way in which

[90] Schlüter 2010, at 74–86.

[91] Verdross and Simma 1984, at 383–384.

[92] For a detailed analysis with further references see Raimondo 2008, at 41.

[93] Ibid., at 41–42.

[94] Dworkin 1978, at 24–25.

[95] A major textbook based on this idea was written by the late Brownlie 2008, at 18–19.

[96] For a recent general treatment, see Crawford 2012. For a discussion of the similar notion of sovereign equality, see Fassbender 2012a.

[97] See, for example, Letsas 2004; Simma and Alston 1988–1989.

international law is conceived temporally, which shall be shown using the example of sustainable development.

The content as well as the *problematique* of sustainable development is best described by the definition of the World Commission on Environment and Development (the Brundtland Commission), which denoted sustainable development as 'development that meets the needs of the present without comprising the ability of future generations to meet their own needs'.[98] Three points of this formulation ought to be highlighted. First, the formal source of the principle of sustainable development is unclear. Second, sustainable development has a general temporal connotation in that it balances considerations of the present with considerations of the future which could also indicate something of the underlying temporal vision. Third, a general problematic feature of legal principles is that their legal effects vary to a significant extent.

Sustainable development has been mentioned in soft law instruments as well as in international treaties.[99] The normative status of the principle is, however, not clear. 'Is it an objective, or a process, or a principle or all of those things', a commentator once asked.[100] The ICJ described it in the *Gabčíkovo–Nagymaros* case as a concept and left its normative status open.[101] It was denoted as a legal principle in the *Iron Rhine* arbitration.[102] The arbitral tribunal interestingly decided not to enter into the controversies concerning the sources but went on to make the following statement:

> Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm … This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties.[103]

It is significant that the tribunal established sustainable development as a principle between those two sentences. It found a common core of all 'emerging principles' and deduced from this that sustainable development has become a principle of general international law. It is remarkable that in the determination of the validity

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[98] World Commission on Environment and Development, Our common future, 1987, at 43. See also United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, 2–14 June 1992, principle 3.

[99] For an extensive overview, see Schrijver 2008.

[100] Sands 1995, at 305.

[101] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), ICJ, Judgment of 25 September 1997, para 140.

[102] For details, see Djeffal 2011, at 579–585.

[103] *Iron Rhine Arbitration* (*Belgium/Netherlands*), Arbitral Tribunal, Judgment of 24 May 2004, para 59.

of this legal principle, the tribunal went beyond the ordinary doctrine of sources and deduced sustainable development from emerging principles.[104]

Regarding the content of the norm, the tribunal defined it as 'conservation, management, notions of prevention and of sustainable development, and protection for future generations'.[105] It stressed the environmental aspect of the principle. The ICJ gave the principle a slightly different meaning in the *Pulp Mills* case as it held that 'the balance between economic development and environmental protection … is the essence of sustainable development'.[106] It would also be possible to emphasise another aspect of the principle, namely the development in less developed states. One could also reconceptualise this tension as competing notions of inter-generational and intra-generational justice. The development of states seeks to achieve justice so that all human beings living together on Earth have a roughly equivalent status (intra-generational justice). Yet, sustainable development also seeks to achieve justice between current and future generations living on Earth (inter-generational justice). This means that sustainable development aims to marry different considerations in the way of balancing. It is not only a principle competing with other principles but a principle parts of which compete with each other internally:[107] applied to a problem separately, sustainability and development might point in different directions. This creates a tension within the notion of sustainable development that has to be resolved. From the perspective of temporality, one would say that the principle appears in different shapes at different times, stressing either intra-generational or inter-generational justice, but there is an abstract content as described above. From the perspective of fluxus, one would say that this principle is vague so that it is determined by different decision-makers. They set the priorities differently.

The flexibility inherent in the principle of sustainable development is all the more interesting in our context as it has a strong temporal aspect: development partly focuses on changing the present state of affairs by putting states on a more equal footing. The environmental aspect enshrined in the concept of sustainability is concerned with the future and aims at preserving Earth for future generations. Sustainable development is therefore an institutionalised balancing process between the needs of the present and the needs of the future. As a legal principle it functions as a temporal meta-norm as it imports assumed considerations of future generations into today's law. The evolution of the concept exemplifies the general problem of this principle as described above: it aims at

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104 Ibid., para 58.

105 Ibid., para 58.

106 *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), ICJ, Judgment of 20 April 2010, para 179.

107 This is quite different from formal principles like the precautionary principle or proportionality. These latter principles are formal in that they require a balancing of the different material considerations in the respective situations. In contrast, sustainable development contains the two competing normative considerations.

marrying divergent considerations on which there has never been agreement. Therefore, it remains to be seen whether the principle will evolve in a way that it can be conceptualised as incrementally developing over time in a certain direction or whether it will be a flexible tool in the hands of different decision-makers. This flexibility can be of great benefit for international disputes especially in the so-called hard cases, as Dworkin has shown.[108] The principle of sustainable development might be well explained by the paradigm of fluxus since its content can currently be determined to a large extent by the person competent to render the decision based on the principle. All in all, the use of principles as a category of norms makes the legal system more flexible but harder to ascertain legal norms. Especially in the case of sustainable development, which is not only indeterminate but is composed of diametrically conflicting parts, it becomes clear that principles are pointing towards the temporal paradigm of fluxus.[109]

5.3 General Conclusions

The present article inquired into how the concept of time in society (social time) and, in particular, international lawyers have been seeing time. Three temporal paradigms have been assumed and substantiated in the present article: atemporality (unchangeabilty of the law), temporality (changeability and durability for specific periods of the law) and the paradigm of fluxus (moving, instable and changing character of the law). The paradigm shift from atemporality to temporality (the temporalisation of international law) was exemplified by several voices from legal scholarship and the different construction of the notion of peace in international peace treaties from the Treaty of Osnabrück to treaty practice in the 19th century. The idea of an eternal law vanquished, the notion of eternal peace was far less prominent in later treaty practice. Is there another paradigm shift from temporality to fluxus, as some voices viewing law as a process suggest? Three case studies looked into which paradigm can best explain specific problems relating to the sources of international law. A disputed question was whether there ought to be another exception to the law of state immunity in cases in which breaches of *ius cogens* norms are at issue. Such an exception was called for by certain domestic courts, which posed the question whether domestic courts ought to be regarded as more independent. The ICJ stuck to the traditional method that is much closer to the paradigm of temporality. The principle of sustainable development has already been applied as a legal principle in international law and aims at mitigating development considerations with environmental concerns. Those normative considerations are both included in this legal principle which makes its application very flexible. It is hard to predict which of the two elements of the principle will prevail in any specific case which is

[108] Dworkin 1975.

[109] This might not be true for every legal principle.

why this principle can be aptly explained by the paradigm of fluxus. The evolutive interpretation of the notion of security in the United Nations Charter can be explained from the perspective of both temporal paradigms, the paradigm of temporality and the paradigm of fluxus. It has changed substantially over time, which again points to fluxus. Yet, the relevant actors seem to believe that their consensus establishes its meaning. Such a consensus would endure for a limited time, which points towards temporality. Both paradigms can explain the evolutive interpretation of the term security, yet the respective paradigms show the meaning of the term and its changeability in a different light. All in all, the case studies suggest that the question whether there has been or will be a paradigm shift towards fluxus is open.

The paradigms that were introduced as hypotheses were framed in an ideal-typical manner. They served to illustrate certain approaches to time that were held in international legal scholarship and practice. The fact that we do not know how our general knowledge about time evolves poses another question: will international legal scholarship continue to analyse international law in this paradigmatic fashion that also produces certain general assumptions about time or is another mode of inquiry possible? Such an inquiry beyond the paradigmatic approach would not take a definite stance but try to view the problems from the perspective of different paradigms at the same time. The approaches of Christian Wolff and Emer de Vattel are examples of such a combination concerning the paradigm of atemporality and the paradigm of temporality. The result of such an analysis would be equivalent to a cubistic picture uniting different standpoints regarding one problem. It would result not only in a combination of the perspectives but transcending them. The inquiry would aim at showing all aspects of the problem at the same time. The method would then be different from the case study conducted above; it would not try to identify one fitting paradigm but would look at the cases through the lenses of all paradigms at the same time. What, then, is time? A cubistic enterprise would not answer this question but keep asking. Atemporality, temporality and fluxus would all be part of the picture (Table 5.1).

Table 5.1 Summary: the three temporal paradigms in international law

	Atemporality	Temporality	Fluxus
Concept of law	Natural law	Positivism	Post-positivism
How to find the law	Recognition	Ascertainment	Construction
Temporal state	Eternal	Measurable and Durable	Necessarily moving
Changeability	Unchangeable	Changeable	Changing
Temporal dimensions	Past, present and future	Present	Next moment
Construction of temporality	Transcendent	Immanent	Contingent

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