Multiple events or situations have been qualified as “footnotes to history”. But footnotes are to history what they might also be to the progressive development of international law. In other words, they are neither the proper avenue for the crystallization of norms of customary international law nor the adequate receptacle of norms in statu nascendi. Footnotes are indeed often ignored or simply forgotten due to their isolated status in international documents, be they legal or non-legal documents.

The treatment of the principle or concept of mutual supportiveness in the Report of the International Law Commission (ILC) on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law is an (un)conscious attempt at reducing mutual supportiveness to a “footnote to history”. The ILC Report mentions mutual supportiveness only in two instances, and then only briefly. First, to say that the “technique” of mutual supportiveness “seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared—‘systemic’—objective”. Second, to convey that “often regimes operate on the basis of administrative coordination and ‘mutual supportiveness’ the point of which is to seek regime-optimal outcomes” before concluding that “while this is clearly appropriate in regard to treaty provisions that are framed in general or ‘programmatory’ terms, it seems less proper in regard to provisions

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2 Id.
3 Id., at 252, para. 493.
establishing subjective rights or obligations the purpose of which it is to guarantee such rights.”

The ILC concludes in the Appendix to the above-mentioned Report by mentioning “rules, methods and techniques for dealing with collisions” of norms and regimes but does not refer to mutual supportiveness as such. All of a sudden, mutual supportiveness was turned into “mutual accommodation.” The ILC limited itself to acknowledging that “in case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization.”

Yet mutual supportiveness has not emerged ex nihilo in the international legal discourse and is not a legal epiphenomenon. Its birth or rise was precipitated by the phenomenon of international legal pluralism, also referred to as “fragmentation,” “diversity,” “cacophony,” “interconnected islands,” “regime-collisions,” “global law,” and “internormativity.” Mutual supportiveness has emerged as a means to cure “postmodern anxieties” caused by the so-called phenomenon of “fragmentation” of international law. Rüdiger Wolfrum recognized the problem very early in seminal works.

Although it is undeniable that mutual supportiveness has emerged and developed in a specific context—that of the relationship between

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4 Id.
6 Id., paras. 27, 28 (italics added).