PRINCIPLES OF PUBLIC INTERNATIONAL LAW

Seventh Edition

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SOURCES OF THE LAW[1]

1. INTRODUCTION

As objects of study, the sources of international law and the law of treaties (treated in Chapter 27) must be regarded as fundamental: between them they provide the basic particles of the legal regime.

It is common for writers to distinguish the formal sources and the material sources of law. The former are those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application. In systems of municipal law the concept of formal source refers to the constitutional machinery of law-making and the status of the rule is established by constitutional law. In the context of international relations the use of the term 'formal source' is awkward and misleading since the reader is put in mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law. Decisions of the International Court, unanimously supported resolutions of the General Assembly of the United Nations concerning matters of law, and important multilateral treaties concerned to codify or develop rules of international law, are all lacking the quality to bind states generally. In a sense 'formal sources' do not exist in international law. As a substitute, and perhaps an equivalent, there is the principle that the general consent of states creates rules of general application. The definition of custom in international law[2] is essentially a statement of this principle (and not a reference to ancient custom as in municipal law).

[1] See generally Sørensen, 101 Hague *Recueil* (1960, III), 16–108; Fitzmaurice, *Symbolae Verzijl* (1958), 153–76; Parry, *The Sources and Evidences of International Law* (1965); Lauterpacht, *International Law: Collected Papers*, i (1970), 58–135; Elias, in Friedmann, Henkin, and Lissitzyn (eds.), *Transnational Law in a Changing Society* (1972), 34–69; Schachter, in Macdonald and Johnston (eds.), *The Structure and Process of International Law* (1983), 745–99; *Études en l'honneur de Roberto Ago* (1987), i; Cassese and Weiler (eds.), *Change and Stability in International Law-Making* (1988); Thirlway, 61 *BY* (1990), 31–131 and 76 (2005), 77–119; Charney, 87 *AJ* (1993), 529–51; Tomuschat, 241 Hague *Recueil* (1993, IV), 195–374; Fidler, 39 *German Yrbk.* (1996), 198–248; Zemanek, 266 Hague *Recueil* (1997), 131–232; Degan, *Sources of International Law* (1997); Boyle and Chinkin, *The Making of International Law* (2007).

[2] *Infra*, pp. 6–12.

The consequence is that in international law the distinction between formal and material sources is difficult to maintain. The former in effect consist simply of a quasi-constitutional principle of inevitable but unhelpful generality. What matters then is the variety of material sources, the all-important *evidences* of the existence of consensus among states concerning particular rules or practices. Thus decisions of the International Court, resolutions of the General Assembly of the United Nations, and 'law-making' multilateral treaties are very material evidence of the attitude of states toward particular rules, and the presence or absence of consensus. Moreover, there is a process of interaction which gives these evidences a status somewhat higher than mere 'material sources'. Thus neither an unratified treaty nor a report of the International Law Commission to the General Assembly has any binding force either in the law of treaties or otherwise. However, such instruments stand as candidates for public reaction, approving or not, as the case may be: they may stand for a threshold of consensus and confront states in a significant way.

The law of treaties concerns the question of the content of obligations between individual states: the incidence of obligations resulting from express agreement. In principle, the incidence of particular obligations is a matter distinct from the sources. Terminology presents some confusion in this respect. Thus treaties binding a few states only are dubbed 'particular international law' as opposed to 'general international law' comprising multilateral 'law-making' treaties[3] to which a majority of states are parties. Yet in strictness there is no fundamental distinction here: both types of treaty only create particular obligations and treaties are *as such* a source of obligation and not a source of rules of general application. Treaties may form an important material source, however: see section 4 below.

It is perhaps useful to remark on two other usages of the term 'sources'. Thus the term may refer to the source of the binding quality of international law as such and also to the literary sources of the law as sources of information.

2. THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

The pertinent provisions are as follows:

Article 38. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

[3] See *infra*, pp. 12–14.

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Article 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

These provisions are expressed in terms of the function of the Court, but they represent the previous practice of arbitral tribunals, and Article 38 is generally regarded as a complete statement of the sources of international law.[4] Yet the article itself does not refer to 'sources' and, if looked at closely, cannot be regarded as a straightforward enumeration of the sources. The first question which arises is whether paragraph 1 creates a hierarchy of sources. The provisions are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word 'successively' appeared.[5] In practice the Court may be expected to observe the order in which they appear: (a) and (b) are obviously the important sources, and the priority of (a) is explicable by the fact that this refers to a source of mutual obligations of the parties. Source (a) is thus not primarily a source of rules of general application, although treaties may provide evidence of the formation of custom. Sources (b) and, perhaps, (c) are formal sources, at least for those who care for such classification. Source (d), with its reference 'as subsidiary means for the determination of rules of law', relates to material sources. Yet some jurists regard (d), as a reference to formal sources, and Fitzmaurice has criticized the classification of judicial decisions as 'subsidiary means'.[6]

In general Article 38 does not rest upon a distinction between formal and material sources, and a system of priority of application depends simply on the order (a) to (d), and the reference to subsidiary means. Moreover, it is probably unwise to think in terms of hierarchy dictated by the order (a) to (d) in all cases.[7] Source (a) relates to *obligations* in any case; and presumably a treaty contrary to a custom or to a general principle part of the *jus cogen*[8] would be void or voidable. Again, the interpretation of a treaty may involve resort to general principles of law or of international law.[9] A treaty may be displaced or amended by a subsequent custom, where such effects are recognized by the subsequent conduct of the parties.[10]

[4] See Hudson, *The Permanent Court of International Justice*, (1943), 601 ff. See also the Revised General Act for the Pacific Settlement of International Disputes, Art. 28; Model Rules on Arbitral Procedure adopted by the ILC, Art. 10, *Yrbk. ILC* (1958), ii. 83; Report of Scelle, ibid. 8. Art. 38 has often been incorporated textually or by reference in the *compromis* of other tribunals.

[5] Cf. *Castillo* v. *Zalles*, ILR 22 (1955), 540. See also Quadri, 113 Hague *Recueil*, 342–5; Judge Tanaka, Diss. Op., *South West Africa Cases* (Second Phase), ICJ Reports (1966), 300; Akehurst, 47 *BY* (1974–5), 273–85.

[6] *Symbolae Verzijl*, at p. 174.

[7] See Judge Moreno Quintana, *Right of Passage Case*, ICJ Reports (1960), 90.

[8] *Infra*, ch. 23, on *jus cogens* and its effects.

[9] See *infra*, pp. 16–19.

[10] *Air Transport Services Agreement Arbitration*, 1963, ILR 38, 182; *RIAA* xvi, 5; Award, Pt. IV, s. 5.

3. INTERNATIONAL CUSTOM[11]

DEFINITION

Article 38 refers to 'international custom, as evidence of a general practice accepted as law', and Brierly[12] remarks that 'what is sought for is a general recognition among States of a certain practice as obligatory'. Although occasionally the terms are used interchangeably, 'custom' and 'usage' are terms of art and have different meanings. A usage is a general practice which does not reflect a legal obligation,[13] and examples are ceremonial salutes at sea and the practice of exempting diplomatic vehicles from parking prohibitions.[14]

EVIDENCE

The material sources of custom are very numerous and include the following:[15] diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation,[16] international and national judicial decisions,[17] recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs,[18]

[11] See *supra*, n. 1, and see further: Lauterpacht, *The Development of International Law by the International Court* (1958), 368–93; Guggenheim, in *Études en l'honneur de Georges Scelle* (1950), i. 275–84; id., *Traité* i. 93–113; Skubiszewski, 31 *Z.a.ö.R.u.V.* (1971), 810–54; Thirlway, *International Customary Law and Codification* (1972); Barberis, *Neths. Int. LR* (1967), 367–81; Manin, 80 *RGDIP* (1976), 7–54; Akehurst, 47 *BY* (1974–5), 1–53; Meijers, *Neths. Yrbk.* (1978), 3–26; Stern, *Mélanges Reuter* (1981), 479–99; Bos, *German Yrbk.*, 25 (1982), 9–53; Cheng, in Macdonald and Johnston (eds.) *The Structure and Process of International Law*, pp. 513–50; Virally, 183 Hague *Recueil*, (1983, V), 167–206; Jiménez de Aréchaga, in *Essays in Honour of Judge Manfred Lachs* (1984), 575–85; Abi-Saab, in *Études en l'honneur de Roberto Ago*, i. 53–65; Thirlway, 61 *BY* (1990), 31–110 and 76 *BY* (2005), 92–108; Wolfke, *Custom in Present International Law*, 2nd edn. (1993); id., 24 *Neths. Yrbk.* (1993), 1–16; Mendelson, 66 *BY* (1995), 177–208; Zemanek, *Recueil des Cours*, vol. 266 (1997), 149–67; I.L.A., *Report of the Sixty-Ninth Conference* (London), 2000, 712–90; Kammerhofer, *Europ. Journ.* 15 (2004), 523–53; Arangio-Ruiz, *Mélanges Salmon* (2007), 93–124.

[12] *Law of Nations*, 6th edn. (1963), 61. See also Judge Read in the *Fisheries* case, ICJ Reports (1951), 191: 'Customary international law is the generalization of the practice of States.'

[13] See further *infra*, pp. 8–10, on the *opinio juris*.

[14] See *Parking Privileges for Diplomats Case*, ILR 70, 396 (Fed. Admin. Ct., FRG).

[15] See in particular Parry, 44 *Grot. Soc.* (1958, 1959), 145–86; McNair, *Opinions*, i. Preface; Zemanek, *Festschrift für Rudolf Bernhardt* (1995), 289–306. Custom apart from the practice of *states* may be influential, e.g. in the general law of the sea; cf. the *Tolten* [1946] P. 135; *Ann. Digest* (1946), no. 42.

[16] Cf. the *Scotia* (1871) 14 Wallace 170.

[17] The latter provided a basis for the concept of the historic bay.

[18] In its Advisory Opinion in the *Genocide* case the ICJ refers to the practice of the Council of the League of Nations in the matter of reservations to multilateral conventions: ICJ Reports (1951), 25. See also the Joint Diss. Op., ibid. 34ff.

and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.

THE ELEMENTS OF CUSTOM

(a) Duration

Provided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will of course be a part of the evidence of generality and consistency. A long (and, much less, an immemorial) practice is not necessary, and rules relating to airspace and the continental shelf have emerged from fairly quick maturing of practice. The International Court does not emphasize the time element as such in its practice.

(b) Uniformity, consistency of the practice

This is very much a matter of appreciation and a tribunal will have considerable freedom of determination in many cases. Complete uniformity is not required, but substantial uniformity is, and thus in the *Fisheries* case[19] the Court refused to accept the existence of a 10-mile rule for bays.[20]

The leading pronouncements by the Court appear in the Judgment in the *Asylum*[21] case:

> The party which relies on a custom... must prove that this custom is established in such a manner that it has become binding on the other party... that the rule invoked... is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.
>
> The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum[22] and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law....

[19] ICJ Reports (1951), 116 at 131. See also the *Genocide* case, ibid. 25: 'In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule.'

[20] See *infra*, pp. 176–8.

[21] ICJ Reports (1950), at 276–7. See also *U.S. Nationals in Morocco* case, ICJ Reports (1952), 200; *Nottebohm* case (Second Phase), ICJ Reports (1955), 30 per Judge Klaestad; *Right of Passage* case (*Merits*), ICJ Reports (1960), 40, 43; ibid. 62 per Judge Wellington Koo; p. 99 per Judge Spender, and ibid. 136 per Fernandes, judges *ad hoc*; *North Sea Continental Shelf Cases*, ICJ Reports (1969), 43; ibid. 86 per Judge Padilla Nervo; ibid. 229 per Judge Lachs; ibid. 246 per Judge Sørensen; *Nicaragua* v. *United States* (Merits), ICJ Reports (1986), p. 98, para. 186.

[22] The Court was concerned with the right to decide whether the offence was political and whether the case was one of urgency.

(c) Generality of the practice

This is an aspect which complements that of consistency. Certainly universality is not required, but the real problem is to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others. Silence may denote either tacit agreement or a simple lack of interest in the issue. It may be that the Court in the *Lotus* case[23] misjudged the consequences of absence of protest and also the significance of fairly general abstention from prosecutions by states other than the flag state.[24] In the *Fisheries Jurisdiction Case* (*United Kingdom* v. *Iceland*) the International Court referred to the extension of a fishery zone up to a 12-mile limit 'which appears now to be generally accepted' and to 'an increasing and widespread acceptance of the concept of preferential rights for coastal states' in a situation of special dependence on coastal fisheries.[25]

(d) *Opinio juris et necessitatis*[26]

The Statute of the International Court refers to 'a general practice *accepted as law*'.[27] Brierly[28] speaks of recognition by states of a certain practice 'as obligatory', and Hudson[29] requires a 'conception that the practice is required by, or consistent with, prevailing international law'. Some writers do not consider this psychological element to be a requirement for the formation of custom,[30] but it is in fact a necessary ingredient. The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of states recognizes a distinction between obligation and usage. The essential problem is surely one of proof, and especially the incidence of the burden of proof.

In terms of the practice of the International Court of Justice—which provides a general guide to the nature of the problem—there are two methods of approach. In many cases the Court is willing to assume the existence of an *opinio juris* on the bases of evidence of a general practice,[31] or a consensus in the literature, or the previous

[23] See *infra*, pp. 9–10.

[24] Lauterpacht, *Development*, pp. 384–6. See also the *Paquete Habana* (1900), 175 US 677.

[25] ICJ Reports (1974), 3 at 23–6. See also the *North Sea Continental Shelf Cases*, ICJ Reports (1969), 4 at 42. For reliance on the practice of a limited number of states see the *Wimbledon* (1923), PCIJ, Ser. A, no. 1. See also *Fernandez* v. *Wilkinson*, ILR, 87, 446, 455–8.

[26] See Chaumont, 129 Hague *Recueil* (1970, I), 434–45; Verzijl, *International Law in Historical Perspective*, i. 37–41; Barberis, 50 *Rivista di d.i.* (1967), 563–83; P. de Visscher, 136 Hague *Recueil* (1972, II), 70–5; Bos, *A Methodology of International Law* (1984), 236–44; Mendelson, 66 *BY* (1995), 177–208; Elias, 44 *ICLQ* (1995), 501–20; Schachter in, *Essays in Honour of Krzysztof Skubiszewski* (1996), 531–40; Sienho Yee. *German Yrbk.*, 43 (2000), 227–38.

[27] Italics supplied.

[28] p. 61.

[29] Quoted in Briggs, p. 25.

[30] See Guggenheim, *Études Scelle*, i. 275–80; Fischer Williams, *Some Aspects of Modern International Law* (1934), 44–6. See now Guggenheim, i. 103–5. For Kelsen the *opinio juris* is a fiction to disguise the creative powers of the judge: see *Revue internationale de la théorie du droit* (1939), 253–74; and cf. *Principles of International Law* (1952), 307; (2nd edn., 1967), 450–1.

[31] See Lauterpacht, *Development*, p. 380; id., *Coll. Papers*, i. 63; Baxter, 129 Hague *Recueil* (1970, I), 69; Guggenheim, i. 103–5. Cf. Sørensen, p. 134.

determinations of the Court or other international tribunals.[32] However, in a significant minority of cases the Court has adopted a more rigorous approach and has called for more positive evidence of the recognition of the validity of the rules in question in the practice of states. The choice of approach appears to depend upon the nature of the issues (that is, the state of the law may be a primary point in contention), and the discretion of the Court.

Three cases have involved the more exacting second method of approach, of which the first was the *Lotus*, in which the Permanent Court said:[33]

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand... there are other circumstances calculated to show that the contrary is true.

Presumably the same principles should apply to both positive conduct and abstention, yet in the *Lotus* the Court was not ready to accept continuous conduct as prima facie evidence of a legal duty and required a high standard of proof of the issue of *opinio juris*.[34]

In the *North Sea Continental Shelf Cases*[35] the International Court was also strict in requiring proof of the *opinio juris*. The Court did not presume the existence of *opinio juris* either in the context of the argument that the equidistance–special circumstances basis of delimiting the continental shelf had become a part of general or customary law at the date of the Geneva Convention of 1958, or in relation to the proposition that the *subsequent* practice of states based upon the Convention had produced a customary rule. However, it is incorrect to regard the precise findings as in all respects incompatible with the view that the existence of a general practice raises a presumption of *opinio juris*. In regard to the position *before* the Convention concerning the equidistance principle, there was little 'practice' apart from the records of the International Law Commission, which revealed the experimental aspect of the principle prior to 1958.[36] In considering the argument that practice *based upon* the Convention had produced a customary rule the Court made it clear that its unfavourable reception to the argument rested primarily upon two factors: (*a*) the peculiar form of the equidistance principle in Article 6 of the Convention was such that the rules were not of a norm-creating

[32] See the *Gulf of Maine* case, Judgment of the Chamber, ICJ Reports (1984), 293–4, paras. 91–3.

[33] Ser. A, no. 10, p. 28. See also the individual opinions of Nyholm and Altamira, ibid. 60, 97; the *European Commission of the Danube*, Ser. B, no. 14, p. 14 per Deputy-Judge Negulesco. Cf. the passage from the Judgment in the *Asylum* case quoted *supra*.

[34] See the criticisms of Lauterpacht, *Development*, p. 386. See, however, MacGibbon, 33 *BY* (1957), 131.

[35] ICJ Reports (1969), 3.

[36] Ibid. 28, 32–41.

character;[37] (*b*) the Convention had only been in force for less than three years when the proceedings were brought and consequently:[38]

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

Nevertheless, the general tenor of the Judgment[39] is hostile to the presumption as to *opinio juris* and the Court quoted the passage from the *Lotus* case set out above.[40]

A broadly similar approach was adopted by the Judgment of the Court in the *Case of Nicaragua* v. *United States* (Merits),[41] and the Court expressly referred to the *North Sea Cases*:[42]

In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*'. (*ICJ Reports* (1969), 44, para. 77.)

BILATERAL RELATIONS AND LOCAL CUSTOMS

In the case concerning *U.S. Nationals in Morocco*[43] the Court quoted the first of the passages from the *Asylum* case quoted earlier[44] and continued: 'In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established *in such a manner that it has become binding on Morocco*'.[45]

In this case the Court may seem to have confused the question of law-making and the question of opposability, i.e. the specific relations of the United States and

[37] Ibid. 41–2.

[38] Ibid. 43.

[39] Ibid. 43–5, and see, in particular, p. 44, para. 77.

[40] For comment see Baxter, 129 Hague *Recueil* (1970, I), 67–9; D'Amato, 64 *AJ* (1970), 892–902; Marek, *Revue belge* (1970), 44–78. For the views of dissenting judges see ICJ Reports (1969), 156–8 (Koretsky), 175–9 (Tanaka), 197 (Morelli), 221–32 (Lachs), 241–2 (Sørensen). See also the Sep. Op. of Judge Petrén in the *Nuclear Tests Case*, ICJ Reports (1974), 253 at 305–6.

[41] ICJ Reports (1986), 14.

[42] Ibid. 108–9, para. 207. See also pp. 97–8, para. 184, pp. 97–103, paras. 184–93; pp. 106–8, paras. 202–6.

[43] ICJ Reports (1952), 199–200. See Lauterpacht, *Development*, pp. 388–92.

[44] *Supra*, p. 7.

[45] Italics supplied.

Morocco.[46] The fact is that general formulae concerning custom do not necessarily help in penetrating the complexities of the particular case. The case concerning a *Right of Passage over Indian Territory*[47] raised an issue of bilateral relations, the existence of a local custom in favour of Portugal in respect of territorial enclaves inland from the port of Daman (Damão). In this type of case the general law is to be varied and the proponent of the special right has to give affirmative proof of a sense of obligation on the part of the territorial sovereign: *opinio juris* is here not to be presumed on the basis of continuous practice and the notion of *opinio juris* merges into the principle of acquiescence.[48]

THE PERSISTENT OBJECTOR[49]

The way in which, as a matter of practice, custom resolves itself into a question of special relations is illustrated further by the rule that a state may contract out of a custom in the process of formation.[50] Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals,[51] and in the practice of states. Given the majoritarian tendency of international relations the principle is likely to have increased prominence.

THE SUBSEQUENT OBJECTOR

In the *Fisheries* case[52] part of the Norwegian argument was that certain rules were not rules of general international law, and, even if they were, they did not bind Norway, which had 'consistently and unequivocally manifested a refusal to accept them'. The United Kingdom admitted the general principle of the Norwegian argument here while denying that, as a matter of fact, Norway had consistently and unequivocally manifested a refusal to accept the rules. Thus the United Kingdom regarded the question as one of persistent objection. The Court did not deal with the issue in this way,

[46] See Fitzmaurice, 92 Hague *Recueil* (1957, II), 106. On opposability in general see *infra*, pp. 85–6. The *Asylum* case itself concerned a regional custom.

[47] ICJ Reports (1960), 6 at 39–43. Cf. Judges Wellington Koo at pp. 62–3; Armand-Ugon at pp. 82–4; and Spender at p. 110. See also Deputy-Judge Negulesco, *European Commission of the Danube*, PCIJ, Ser. B, no. 14, p. 114; and Judge Klaestad, *Nottebohm* (Second Phase), ICJ Reports (1955), 30.

[48] See generally MacGibbon, 33 *BY* (1957), 125–31; D'Amato, 63 *AJ* (1969), 211–23.

[49] See generally Akehurst, 47 *BY* (1974–5), 23–7; Bos, *German Yrbk.* 25 (1982), 43–53, id., *A Methodology of International Law* pp. 247–55; Stein, *Harvard Int. LJ*, 26 (1985), 457–82; Colson, *Washington LR*, 61 (1986), 957–69; Charney, 56 *BY* (1985), 1–24; id., 87 *AJ* (1993), 538–42; Thirlway, 61 *BY* (1990), 106–8.

[50] The principle was recognized by both parties in the *Anglo-Norwegian Fisheries* case; and also by authoritative opinion: see Fitzmaurice, 92 Hague *Recueil* (1957, II), 99–100; Waldock, 106 Hague *Recueil* (1962, II), 49–50; Sørensen, 101 Hague *Recueil* (1960, III), 43–4; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 30. See further Schachter, 178 Hague *Recueil* (1982, V), 36–8.

[51] See the *Anglo-Norwegian Fisheries* case ICJ Reports (1951), 131; *North Sea Continental Shelf* case, ibid. (1969), 26–7; Sep. Op. of Judge Ammoun, p. 131; Diss. Op. of Judge Lachs, pp. 235, 238; and Diss. Op. of Judge *ad hoc* Sørensen, p. 247. See also the *Asylum* case, ibid. (1950), 277–8.

[52] ICJ Reports (1951), 116. On which generally see *infra*, pp. 176ff.

however, and the *ratio* in this respect was that Norway had departed from the alleged rules, if they existed, *and other states had acquiesced* in this practice. But the Court is not too explicit about the role of acquiescence in validating a subsequent contracting out of rules.[53] Here one has to face the problem of change in a customary regime.[54] Presumably, if a substantial number of states assert a new rule, the momentum of increased defection, complemented by acquiescence, may result in a new rule,[55] as in the case of the law on the continental shelf. If the process is slow and neither the new rule nor the old have a majority of adherents then the consequence is a network of special relations based on opposability, acquiescence, and historic title.[56]

PROOF OF CUSTOM

In principle a court is presumed to know the law and may apply a custom even if it has not been expressly pleaded. In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings. Thus in the *Lotus* case[57] the Court spoke of the plaintiff's burden in respect of a general custom. Where a local or regional custom is alleged, the proponent 'must prove that this custom is established in such a manner that it has become binding on the other Party'.[58]

4. 'LAW-MAKING' TREATIES AND OTHER MATERIAL SOURCES

It may seem untidy to depart from discussion of the 'formal' sources, of which custom is the most important, and yet a realistic presentation of the sources involves giving prominence to certain forms of evidence of the attitude of states to customary rules and general principles of the law.[59] 'Law-making' treaties, the conclusions of international conferences, resolutions of the United Nations General Assembly, and drafts adopted by the International Law Commission have a direct influence on the content

[53] See Fitzmaurice, 30 *BY* (1953), 24–6; id., 92 Hague *Recueil* (1957, II), 99–101; Sørensen, 101 Hague *Recueil* (1960, III), 43–7. The dictum which requires explanation, at p. 131 of the Reports, is: 'In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempt to apply it to the Norwegian coast.'

[54] See *Lauritzen et al.* v. *Government of Chile*, ILR 23 (1956), 708 at 710–12.

[55] Since delict cannot be justified by an allegation of a desire to change the law, the question of *opinio juris* arises in a special form and in the early stages of change can amount to little more than a plea of good faith.

[56] Both forms of objection are restricted in any case by the norms of *jus cogens*: on which see *infra*, ch. 23, s. 5.

[57] PCIJ, Ser. A, no. 10, p. 18.

[58] *Asylum* case, ICJ Reports (1950), 276.

[59] See *infra*, pp. 16–19.

of the law, an influence the significance of which is not conveyed adequately by their designation as material sources.

LAW-MAKING TREATIES[60]

Such treaties create legal obligations the observance of which does not dissolve the treaty obligation. Thus a treaty for the joint carrying out of a single enterprise is not law-making, since fulfilment of its objects will terminate the obligation. Law-making treaties create *general* norms for the future conduct of the parties in terms of legal propositions, and the obligations are basically the same for all parties. The Declaration of Paris, 1856 (on neutrality in maritime warfare), the Hague Conventions of 1899 and 1907 (on the law of war and neutrality), the Geneva Protocol of 1925 (on prohibited weapons), the General Treaty for the Renunciation of War of 1928, and the Genocide Convention of 1948 are examples of this type. Moreover, those parts of the United Nations Charter which are not concerned with constitutional questions concerning competence of organs, and the like, have the same character.[61] Such treaties are in principle binding only on parties,[62] but the number of parties, the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule.[63] By their conduct non-parties may accept the provisions of a multilateral convention as representing general international law:[64] this has been the case with Hague Convention IV[65] of 1907 and the rules annexed relating to land warfare. Even an unratified treaty may be regarded as evidence of generally accepted rules, at least in the short run.[66]

In the *North Sea Continental Shelf Cases*[67] the principal issue was to what extent, if at all, the German Federal Republic was bound by the provisions of the Continental Shelf Convention which it had signed but not ratified. The International Court concluded, by eleven votes to six, that only the first three articles of the Convention were emergent or

[60] See McNair, *Law of Treaties* (1961), 5, 124, 749–52; id., 11 *BY* (1930), 100–18 (repr. in *Law of Treaties*, p. 739); id., 19 *Iowa LR* (1934) (repr. in *Law of Treaties*, p. 729); Sørensen, 101 Hague *Recueil* (1958, III), 72–90; Baxter, 41 *BY* (1965–6), 275–300; id., 129 Hague *Recueil* (1970, I), 31–75; Shihata, 22 *Rev. égyptienne* (1966), 51–10; Mann, 80 *RGDIP* (1976), 7–54; Thirlway, 61 *BY* (1990), 87–102. See further ch. 27, s. 11.

[61] In particular the principles in Art. 2.

[62] But see ch. 27, s. 8.

[63] See McNair, *Law of Treaties*, pp. 216–18, for expression of a firm opinion on the effect of Art. 2, para. 3 and 4, of the Charter, which he describes as the 'nearest approach to legislation by the whole community of States that has yet been realised'.

[64] There must be evidence of consent to the extension of the rule, particularly if the rule is found in a regional convention: in the *Asylum* case the Court was unwilling to hold Peru bound by the rule contained in the Montevideo Conv. Cf. the *European Human Rights Convention Case*, ILR 22 (1955), 608 at 610.

[65] Scott, *The Hague Conventions and Declarations of 1899 and 1907* (3rd edn., 1915), 100. See the Nuremberg Judgment; *Ann. Digest*, 13 (1946), no. 92; and the declarations of both sides in the Korean war.

[66] See Baxter, 129 Hague *Recueil* (1970, I), 61; *Nottebohm* case (Second Phase), ICJ Reports (1955), 23; *Namibia* Opinion, ibid. (1971), 47. Cf. *North Sea Continental Shelf Cases*, ibid. (1969), 41–3.

[67] ICJ Reports (1969), 3.

pre-existing customary law.[68] The principles on which the Court discriminated between articles included reference to the faculty of making unilateral reservations which applied to some articles but not to those which, by inference, had a more fundamental status. With respect it may be doubted if the existence of reservations of itself destroys the probative value of treaty provisions.[69] The Court concluded, further, that the provision on delimitation of shelf areas in Article 6 of the Convention had not become a rule of customary law by virtue of the subsequent practice of states and, in particular, of non-parties.[70] The six dissenting judges regarded the Convention as having greater potency, more particularly in generating rules after its appearance.[71] Both in the *Gulf of Maine* case[72] and in the *Libya–Malta Continental Shelf* case,[73] the Chamber of the Court and the full Court, respectively, accorded evidential weight to certain aspects of the United Nations Convention on the Law of the Sea adopted in 1982 (but not then in force).

In any event, even if norms of treaty origin crystallize as new principles or rules of customary law, the customary norms retain a separate identity even if the two norms appear identical in content.[74]

OTHER TREATIES

Bilateral treaties may provide evidence of customary rules,[75] and indeed there is no clear and dogmatic distinction between 'law-making' treaties and others. If bilateral treaties, for example on extradition, are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation.[76] However, considerable caution is necessary in evaluating treaties for this purpose.

THE CONCLUSIONS OF INTERNATIONAL CONFERENCES[77]

The 'Final Act' or other statement of conclusions of a conference of states may be a form of multilateral treaty, but, even if it be an instrument recording decisions not

[68] Ibid. 32–41. See also Padilla Nervo, Sep. Op., pp. 86–9; Ammoun, Sep. Op., pp. 102–6, 123–4.

[69] See Baxter, 129 Hague *Recueil* (1970, I), 47–51. See also Judges Tanaka, Diss. Op., ICJ Reports (1969), 182; Morelli, Diss. Op., p. 198; Lachs, Diss. Op., pp. 223–5; Sørensen, Diss. Op., p. 248.

[70] ICJ Reports (1969), pp. 41–5.

[71] Ibid. 56 (Bengzon); 156–8, 163, 169 (Koretsky); 172–80 (Tanaka); 197–200 (Morelli); 221–32 (Lachs); 241–7 (Sørensen).

[72] ICJ Reports (1982), 294–5, paras. 94–6.

[73] Ibid. (1985), 29–34, paras. 27–34.

[74] See the Judgment in the *Case of Nicaragua* v. *United States* (Merits), ibid. 92–6, paras. 174–9. See further on the same issue, ibid. 152–4 (Sep. Op., Nagendra Singh); 182–4 (Sep. Op., Ago); 204–8 (Sep. Op., Ni); 216–19 (Diss. Op., Oda); 302–6 (Diss. Op., Schwebel); 529–36 (Diss. Op., Jennings).

[75] See Baxter, 129 Hague *Recueil* (1970, I), 75–91; Sørensen, *Les Sources de droit international* (1946) 96–8. See also the *Wimbledon*, PCIJ Ser. A, no. 1, p. 25; *Panevezys–Saldutiskis Railway*, Ser. A/B, no. 76, pp. 51–2, per Judge Ehrlich; *Nottebohm*, ICJ Reports (1955), 22–3; see also *In re Lechin et al.*, *Ann. Digest*, 16 (1949), no. 1; *In re Dilasser et al.*, LR 18 (1951), no. 99; *The State (Duggan)* v. *Tapley*, ibid., no. 109; *Lagos* v. *Baggianini*, ibid. 22 (1955), 533; *Lauritzen* v. *Government of Chile*, ibid. 23 (1956), 708 at 715–16.

[76] Cf. *In re Muzza Aceituno*, ILR 18 (1951), no. 98; *Re Tribble*, ibid. 20 (1953), 366.

[77] See Johnson, 35 *BY* (1959), 1–33. See also *infra*, ch. 28, on international transactions.

adopted unanimously, the result may constitute cogent evidence of the state of the customary law on the subject concerned. Even before the necessary ratifications are received, a convention embodied in a Final Act and expressed as a codification of existing principles has obvious importance.[78]

RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY[79]

The law-making role of organizations is considered further in Chapter 31, section 10. In general these resolutions are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions.[80] Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules. Examples of important 'law-making' resolutions are the Resolution[81] which affirmed 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal'; the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes,[82] the Declaration on the Granting of Independence to Colonial Countries and Peoples;[83] the Declaration on Permanent Sovereignty over Natural Resources;[84] and the Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space.[85] In some cases a resolution may have direct legal effect as an authoritative interpretation and application of the principles of the Charter.[86] In general each individual resolution must be assessed in the light of all the circumstances and also by reference to other evidence of the opinions of states on the point in issue.

[78] See *Re Cámpora et al.*, ILR 24 (1957); 518, *Namibia* Opinion, ICJ Reports (1971), 47.

[79] Generally see Cheng, 5 *Indian Journ.* (1965), 23–48; Castañeda, *Legal Effects of United Nations Resolutions* (1969); id., 129 Hague *Recueil* (1970, I), 211–331; Bastid, *Recueil d'études en hommage à Guggenheim* (1968), 132–45; Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966); Skubiszewski, 41 *BY* (1965–6), 198 at 242–8; Bishop, 115 Hague *Recueil* (1965, II), 241–5; Arangio-Ruiz, 137 Hague *Recueil* (1972, III), 431–628; P. de Visscher, 136 Hague *Recueil* (1972, II), 123–33; d., *Festschrift für Rudolf Bindschedler* (1980), 173–85; Schachter, 178 Hague *Recueil* (1982, V), 111–23; Skubiszewski, *Annuaire de l'Inst.* 61 (1985), i. 29–358; id., *Études en l'honneur de Roberto Ago*, i. 503–19; Thierry, 167 Hague *Recueil* (1980, II), 432–44; Blaine Sloan, 58 *BY* (1987), 39–150. See further *South West Africa Cases* (Second Phase), ICJ Reports (1966), 171–2 (Sep. Op., van Wyk), 291–3 (Diss. Op., Tanaka), 432–41 (Diss. Op., Jessup), 455–7, 464–70 (Diss. Op., Padilla Nervo).

[80] See the Judgment in the *Case of Nicaragua* v. *United States* (Merits), ICJ Reports (1986), 98–104, paras. 187–95; pp. 107–8, paras. 203–5.

[81] Resol. no. 95; 11 Dec. 1946. Adopted unanimously.

[82] Resol. no. 1653 (XVI); 24 Nov. 1961. Adopted by 55 votes to 20; 26 abstentions.

[83] Resol. no. 1514 (XV), 14 Dec. 1960. Adopted by 89 votes to none; 9 abstentions.

[84] Resol. no. 1803 (XVII), 14 Dec. 1962; *UK Contemp. Practice* (1962), ii. 283. Adopted by 87 votes to 2; 12 abstentions.

[85] Resol. no. 1962 (XVIII), 13 Dec. 1963; 3 *ILM* (1964), 160; 58 *AJ* (1964), 477. Adopted unanimously.

[86] See e.g. the Decl. on the Elimination of All Forms of Racial Discrimination; adopted 20 Nov. 1963; Art. 1 (in Resol. 1904 (XVIII)); 3 *ILM* (1964), 164; Decl. on Principles of International Law Concerning Friendly Relations; adopted without vote, 24 Oct. 1970; Resol no. 2625; Brownlie, *Documents*, p. 27.

5. GENERAL PRINCIPLES OF LAW[87]

Article 38(1)(c) of the Statute of the International Court refers to 'the general principles of law recognized by civilized nations', a source which comes after those depending more immediately on the consent of states and yet escapes classification as a 'subsidiary means' in paragraph (d). The formulation appeared in the *compromis* of arbitral tribunals in the nineteenth century, and similar formulae appear in draft instruments concerned with the functioning of tribunals.[88] In the committee of jurists which prepared the Statute there was no very definite consensus on the precise significance of the phrase. The Belgian jurist, Baron Descamps, had natural law concepts in mind, and his draft referred to 'the rules of international law recognized by the legal conscience of civilized peoples'. Root considered that governments would mistrust a court which relied on the subjective concept of principles of justice. However, the committee realized that the Court must be given a certain power to develop and refine the principles of international jurisprudence. In the result a joint proposal by Root and Phillimore was accepted and this is the text we now have.[89]

Root and Phillimore regarded the principles in terms of rules accepted in the domestic law of all civilized states, and Guggenheim[90] holds the firm view that paragraph (c) must be applied in this light. However, the view expressed in Oppenheim[91] is to be preferred: 'The intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States'. The latter part of this statement is worthy of emphasis. It would be incorrect to assume that tribunals have in practice adopted a mechanical system of borrowing from domestic law after a census of domestic systems. What has happened is that international tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process. Thus, it is impossible, or at least difficult, for state practice to evolve the rules of

[87] Sørensen, 101 Hague *Recueil* (1960, III), 16–34, id., *Les Sources*, pp. 123–52; Guggenheim, *Traité*, i. 291–312; Verzijl, *International Law in Historical Perspective*, i. 47–74; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); id., *International Law: Collected Papers*, ii (1975), 173–212; id., *Development* pp. 158–72; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 163–80; McNair, 33 *BY* (1957), 1–19; Rousseau, *Droit international public*, i. 370–97; Jenks, *The Prospects of International Adjudication* (1964), 266–315; Parry, *The Sources and Evidences of International Law*, pp. 83–91; Verdross, *Recueil d'études en hommage à Guggenheim*, 521–30; Paul, 10 *Indian Journ.* (1970), 324–50; Akehurst, 25 *ICLQ* (1976), 813–25; Lammers, *Essays in Memory of H.F. van Panhuys* (1980), 53–75; Thirlway, 61 *BY* (1990), 110–27 and 76 *BY* (2005), 108–13; Shahabuddeen, *Essays in Honour of Sir Robert Jennings* (1996), 90–103. For the view that general principles of law provide a third system for disputes between corporations and governments see McNair, 33 *BY* (1957), 1–19, and the *Abu Dhabi* award (1951), 1 *ICLQ* (1952), 247.

[88] See the draft treaty for the establishment of an international prize court, 1907, Art. 7 (general principles of justice and equity). See also the European Conv. for the Protection of Human Rights and Fundamental Freedoms, Art. 7, para. 2.

[89] *Procés-verbaux* (1920), 316, 335, 344. Sørensen remarks that the compromise formula has an inherent ambiguity which is inimical to any rational interpretation of the provision: *Les Sources*, p. 125.

[90] 94 Hague *Recueil* (1958, II), 78.

[91] i. 29.

procedure and evidence which a court must employ. An international tribunal chooses, edits, and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law.[92]

In practice tribunals show considerable discretion in the matter. The decisions on the acquisition of territory[93] tend not to reflect the domestic derivatives on the subject to be found in the textbooks, and there is room for the view that domestic law analogies have caused more harm than good in this sphere. The evolution of the rules on the effect of duress on treaties[94] has not depended on changes in domestic law. In the *North Atlantic Fisheries*[95] case the tribunal considered the concept of servitude and then refused to apply it. Moreover, in some cases, for example the law relating to expropriation of private rights, reference to domestic law might give uncertain results and the choice of models might reveal ideological predilections.

GENERAL PRINCIPLES OF LAW IN THE PRACTICE OF TRIBUNALS

(a) Arbitral tribunals[96]

Arbitral tribunals have frequently resorted to municipal analogies. In the *Fabiani*[97] case between France and Venezuela the arbitrator had recourse to municipal public law on the question of the responsibility of the state for the acts of its agents, including judicial officers, committed in the exercise of their functions. Reliance was also placed on general principles of law in the assessment of damages. The Permanent Court of Arbitration applied the principle of moratory interest on debts in the *Russian Indemnity* case.[98] Since the original Statute of the International Court came into force in 1920, tribunals not otherwise bound by it have treated Article 38(1)(c) as declaratory of the law applicable.[99]

(b) The International Court of Justice and its predecessor[100]

The Court has used this source sparingly, and it normally appears, without any formal reference or label, as a part of judicial reasoning. However, the Court has on occasion

[92] See Tunkin, 95 Hague *Recueil* (1958, III), 23–6; and de Visscher, *Theory and Reality in Public International Law* (1957), 356–8. Cf. McNair, ICJ Reports (1950), 148–50.

[93] See *infra*, ch. 7.

[94] See *infra*, ch. 27, s. 7. Nineteenth-century writers took the view that duress had no vitiating effect. Since 1920 the contrary view has been gaining ground.

[95] (1910) Hague Court Reports, i. 141.

[96] See Simpson and Fox, *International Arbitration*, pp. 132–7; Jenks, *Prospects of International Adjudication*, pp. 306–9; Lauterpacht, *Analogies*, pp. 60–7; id., *Function* pp. 115–18; Seidl-Hohenveldern, 53 *AJ* (1959), 853–72.

[97] (1896), La Fontaine, p. 344; *RIAA* x. 83. The claim was based on denial of justice by the Venezuelan courts.

[98] (1912), Hague Court Reports, p. 297. See also *Sarropoulos* v. *Bulgarian State* (1927), *Ann. Digest*, 4 (1927–8), no. 173 (extinctive prescription).

[99] Admin. Decision no. II (1923), Mixed Claims Commission, US–Germany; *Ann. Digest*, 2 (1923–4), no. 205; *Goldenberg & Sons* v. *Germany* (1928), ibid. 4 (1927–8), no. 369; *Lena Goldfields* arbitration (1930), ibid. 5 (1929–30), no. 1; 36 *Cornell LQ* 42.

[100] See Jenks, *Prospects of International Adjudication*, pp. 268–305; Lauterpacht, *Development*, pp. 158–72; Fitzmaurice, 35 *BY* (1959), 216–29; Waldock, 106 Hague *Recueil* (1962, II), 57–69; Beckett, *Corfu Channel* case, ICJ Pleadings; iii. 267ff.; Blondel, *Recueil d'études en hommage à Guggenheim*, 201–36.

referred to general notions of responsibility. In the *Chorzów Factory* case[101] the Court observed: '...one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him'. In a later stage of the same case[102] the following statement was made: '...the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'. In a number of cases the principle of estoppel or acquiescence (*préclusion*) has been relied on by the Court,[103] and on occasion rather general references to abuse of rights and good faith may occur.[104] Perhaps the most frequent and successful use of domestic law analogies has been in the field of evidence, procedure, and jurisdictional questions. Thus there have been references to the rule that no one can be judge in his own suit,[105] litispendence,[106] *res judicata*,[107] various 'principles governing the judicial process',[108] and 'the principle universally accepted by international tribunals...to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given...'.[109] In the *Corfu Channel* case[110] the Court had recourse to circumstantial evidence and remarked that 'this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions'. In his dissenting opinion in the *South West Africa* cases (Second Phase),[111] Judge Tanaka referred to Article 38(1)(c) of the Court's Statute as a basis for human rights concepts and pointed out that the provision contains natural law elements. The reasoning of the Court in the *Barcelona Traction* case (Second Phase)[112] related very closely to the general conception of the limited liability company to be found in systems of municipal law.

[101] *Chorzów Factory* (Indemnity; Jurisdiction), PCIJ, Ser. A, no. 9, p. 31.

[102] *Chorzów Factory* (Merits), PCIJ, Ser. A, no. 17, p. 29.

[103] See the *Eastern Greenland* case (1933), PCIJ, Ser. A/B, no. 53, pp. 52ff., 62, 69; *Arbitral Award of the King of Spain*, ICJ Reports (1960), 192 at 209, 213; the *Temple* case, ICJ Reports (1962), at 23, 31, 32 (see ch. 28, s. 4); ibid., individual op. of Judge Alfaro, pp. 39–51. See also ibid. 26, where the Court said: 'it is an established rule of law that a plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error'.

[104] e.g. the *Free Zones* case (1930), PCIJ, Ser. A, no. 24, p. 12; and (1932), Ser. A/B, no. 46, p. 167. For references to individual judges' use of analogies see Lauterpacht, *Development*, p. 167, n. 20, and see also ICJ Reports (1960), 66–7, 90, 107, 136.

[105] *Mosul Boundary* case (1925), PCIJ, Ser. B, no. 12, p. 32.

[106] *German Interests in Polish Upper Silesia* (1925), PCIJ, Ser. A, no. 6, p. 20.

[107] *Effect of Awards of the U.N. Administrative Tribunal*, ICJ Reports (1954), 53.

[108] Adv. Op. *Application for Review of Judgment No. 158*, ICJ Reports (1973), 166 at 177, 181, 210; Adv. Op. *Application for Review of Judgment No. 273*, ibid. (1982), 325 at 338–40, 345, 356.

[109] *Electricity Company of Sofia and Bulgaria* (1939), PCIJ, Ser. A/B, no. 79, p. 199.

[110] ICJ Reports (1949), 18. See also *Right of Passage over Indian Territory* (Prelim. Objection), ICJ Reports (1957), 141–2; *German Interests in Polish Upper Silesia*, PCIJ, Ser. A, no. 6 (1925), p. 19; and, on *forum prorogatum*, *infra*, ch. 32, s. 9.

[111] ICJ Reports (1966), 6 at 294–9.

[112] Ibid. (1970), at 33–5. See generally *infra*, ch. 22, s. 5.

6. GENERAL PRINCIPLES OF INTERNATIONAL LAW[113]

The rubric may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies. What is clear is the inappropriateness of rigid categorization of the sources. Examples of this type of general principle are the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas. In many cases these principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer *directly* connected with state practice. In a few cases the principle concerned, though useful, is unlikely to appear in ordinary state practice. In general the subject-matter of 'general principles of law' overlaps that of the present section. However, certain fundamental principles have recently been set apart as overriding principles of *jus cogens* which may qualify the effect of more ordinary rules.[114]

7. JUDICIAL DECISIONS[115]

(a) Decisions of international tribunals

Judicial decisions are not strictly speaking a formal source, but in some instances at least they are regarded as authoritative evidence of the state of the law, and the practical significance of the label 'subsidiary means' in Article 38(1)(d) is not to be exaggerated.[116] A coherent body of jurisprudence will naturally have important consequences for the law.

ARBITRAL TRIBUNALS

The literature of the law contains frequent reference to decisions of arbitral tribunals. The quality of arbitral tribunals has varied considerably, but there have been a number

[113] See Rousseau, i. 389–95; Fitzmaurice, 92 Hague *Recueil* (1957, II), 57–8, Sørensen, *Les Sources*, pp. 112–22; Waldock, 106 Hague *Recueil* (1962, II), 62–4; Simpson and Fox, *International Arbitration*, p. 132. See also ICJ Reports (1958), 106–7 (Moreno Quintana); ibid. (1960), 136–7 (Fernandes); and ibid. (1962), 143 (Spender); Verdross, *Recueil d'études en hommage à Guggenheim*, pp. 521–30; Virally, ibid. 531–54. Cf. Fitzmaurice, 30 *BY* (1953), 1, 36 *BY* (1959), 185, rubric 'General Principles'; and id., *Symbolae Verzijl*, pp. 161–8.

[114] See ch. 23, s. 5.

[115] Lauterpacht, *Development*, pp. 8–22; Waldock, 106 Hague *Recueil* (1962, II), 88–95; Fitzmaurice, *Symbolae Verzijl*, pp. 168–73; Sørensen, *Les Sources*, pp. 153–76; Thirlway, 61 *BY* (1990), 127–33; and 76 *BY* (2005), 114–18.

[116] Fitzmaurice, *Symbolae Verzijl*, p. 174, criticizes the classification.

of awards which contain notable contributions to the development of the law by eminent jurists sitting as arbitrators, umpires, or commissioners.[117]

REFERENCE TO ARBITRAL AWARDS BY THE INTERNATIONAL COURT OF JUSTICE AND ITS PREDECESSOR

The Court has referred to particular decisions on only five occasions,[118] but on other occasions[119] has referred compendiously to the jurisprudence of international arbitration.

DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE AND ITS PREDECESSOR

The Court applies the law and does not make it, and Article 59 of the Statute[120] in part reflects a feeling on the part of the founders that the Court was intended to settle disputes as they came to it rather than to shape the law. Yet it is obvious that a unanimous, or almost unanimous, decision has a role in the progressive development of the law. Since 1947 the decisions and advisory opinions in the *Reparation*,[121] *Genocide*,[122] *Fisheries*,[123] and *Nottebohm*[124] cases have had decisive influence on general international law. However, some discretion is needed in handling decisions. The *Lotus* decision, arising from the casting vote of the President, and much criticized, was rejected by the International Law Commission in its draft articles[125] on the law of the sea, and at its third session the Commission refused to accept the principles emerging from the *Genocide* case (a stand which was reversed at its fourteenth session).[126] Moreover, the

[117] See e.g. the *Alabama Claims* arbitration (1872), Moore, *Arbitrations*, i. 653; and the *Behring Sea Fisheries* arbitration (1893), Moore, *Arbitrations*, i. 755. See also *infra*, pp. 139–40 on the *Palmas Island* case, and pp. 403ff. on the *Canevaro* case, and, generally, the series of *Reports of International Arbitral Awards* published by the UN since 1948, and the foreword to vol. i.

[118] *Polish Postal Service in Danzig* (1925), PCIJ, Ser. B, no. 11, p. 30 (to the PCA in the case of the *Pious Funds of the Californias*, *RIAA* ix. 11); the *Lotus* (1927), PCIJ, Ser. A, no. 10, p. 26 (to the *Costa Rica Packet* case, Moore, *Arbitrations*, v. 4948); *Eastern Greenland* case (1933), PCIJ, Ser. A/B, no. 53, pp. 45–6; Hague Court Reports, iii, at p. 170 (to the *Island of Palmas* case, *infra*, pp. 141–2); *Nottebohm*, ICJ Reports (1953), 119 (to the *Alabama* arbitration, *infra*, p. 34); *Gulf of Maine* case, ibid., 1984, pp. 302–3, 324 (to the *Anglo-French Continental Shelf* arbitration, ILR 54, 6).

[119] *Chorzów Factory* (Jurisdiction) (1927), PCIJ, Ser. A, no. 9, p. 31; *Chorzów Factory* (Merits) (1928), PCIJ, Ser. A, no. 17, pp. 31, 47; *Fisheries* case, ICJ Reports (1951), 131. See also *Peter Pázmány University* (1933), PCIJ, Ser. A/B, no. 61, p. 243 (consistent practice of mixed arbitral tribunals); *Barcelona Traction* case (Second Phase), ICJ Reports (1970), at 40. The Court has also referred generally to decisions of other tribunals without specific reference to arbitral tribunals: *Eastern Greenland* case, *supra*, at p. 46; *Reparation for Injuries*, ICJ Reports (1949), 186.

[120] *Supra*, p. 4.

[121] *Infra*, ch. 31.

[122] *Infra*, ch. 27, s. 3.

[123] *Infra*, p. 176.

[124] *Infra*, ch. 19.

[125] See *infra*, pp. 239–40.

[126] See *infra*, ch. 27, s. 3.

view may be taken that it is incautious to extract general propositions from opinions and judgments devoted to a specific problem or settlement of disputes entangled with the special relations of two states.[127]

JUDICIAL PRECEDENT AND THE STATUTE OF THE COURT

It will be remembered that Article 38(1)(d) of the Statute starts with a proviso: 'Subject to the provisions of Article 59, judicial decisions... as subsidiary means for the determination of rules of law'. Article 59 provides: 'The decision of the Court has no binding force except as between the parties and in respect of that particular case'. Lauterpacht has argued[128] that Article 59 does not refer to the major question of judicial precedent but to the particular question of intervention. In Article 63 it is provided that, if a third state avails itself of the right of intervention, the construction given in the judgment shall be equally binding upon it. Lauterpacht concludes that 'Article 59 would thus seem to state directly what Article 63 expresses indirectly'. Beckett[129] took the view that Article 59 refers to the actual decision as opposed to the legal principles on which it is based. However, the debate in the committee of jurists responsible for the Statute indicates clearly that Article 59 was not intended merely to express the principle of *res judicata* but to rule out a system of binding precedent.[130] Thus in one judgment the Court said:[131] 'The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes. In its practice, however, it has not treated earlier decisions in such a narrow spirit'.

JUDICIAL PRECEDENT IN THE PRACTICE OF THE COURT[132]

Strictly speaking, the Court does not observe a doctrine of precedent,[133] but strives nevertheless to maintain judicial consistency. Thus, in the case on *Exchange of Greek and Turkish Populations*,[134] the Court referred to 'the precedent afforded by its Advisory

[127] On the *Genocide* case see McNair, *Law of Treaties*, pp. 167–8. On the *Nottebohm* case see the *Liechtenstein* case, ILR 25 (1958, I), 91 at 148–50.

[128] *Development*, p. 8. He relies on the final report of the committee of jurists in 1920.

[129] 39 Hague *Recueil* (1932, I), 141.

[130] See Descamps, *Procès-Verbaux*, pp. 332, 336, 584. See also Sørensen, *Les Sources*, p. 161; Hudson, *The Permanent Court of International Justice 1920–1942*, p. 207, and Waldock, 106 Hague *Recueil* (1962, II), 91. The latter observes: 'It would indeed have been somewhat surprising if States had been prepared in 1920 to give a wholly new and untried tribunal explicit authority to lay down law binding upon all States'.

[131] *German Interests in Polish Upper Silesia* (1926), PCIJ, Ser. A, no. 7, p. 19; World Court Reports, i. 510.

[132] See Thirlway, 61 *BY* (1990), 131–3; Lauterpacht, 12 *BY* (1931), 60; id., *Development*, pp. 9–20; Beckett, 39 Hague *Recueil* (1932; I), 138; Sørensen, *Les Sources*, pp. 166–76; *Case Concerning the Land, Island and Maritime Frontier Dispute*, ICJ Reports (1990), 52–3 (Diss. Op. of Judge Shahabuddeen), Shahabuddeen, *Precedent in the World Court* (1996).

[133] But precedent is firmly adhered to in matters of procedure.

[134] (1925), PCIJ, Ser. B, no. 10, p. 21. See also *Peace Treaties* case, ICJ Reports (1950), 89, 103, 106 (Winiarski, ZorIAb, and Krylov, dissenting); *South West Africa* cases, ICJ Reports (1962), 328, 345; *Cameroons* case, ibid. (1963), 27–8, 29–30, 37; *Aerial Incident* case, ibid. (1959), 192 (Joint Dissent); *South West Africa* cases

Opinion No. 3', i.e. the *Wimbledon* case, in respect of the view that the incurring of treaty obligations was not an abandonment of sovereignty. In the *Reparation*[135] case the Court relied on a pronouncement in a previous advisory opinion[136] for a statement of the principle of effectiveness in interpreting treaties. Such references are often a matter of 'evidence' of the law, but a fairly substantial consistency is aimed at and so the technique of distinguishing previous decisions may be employed. In the case on *Interpretation of Peace Treaties*[137] certain questions were submitted by the General Assembly to the Court for an advisory opinion. The questions concerned the interpretation of clauses in the peace treaties with Bulgaria, Hungary, and Romania, clauses relating to the settlement of disputes concerning the interpretation or execution of these treaties. In fact the request arose from allegations against these three states by other parties of breaches of the provisions of the treaties on the maintenance of human rights, a matter of substance. The Court rejected arguments to the effect that it lacked the power to answer the request for an opinion. The Court said:[138]

> Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the *Eastern Carelia* case[139] (Advisory Opinion No. 5), when that Court declined to give an Opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.
>
> ... the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes.

(Second Phase), ICJ Reports (1966), 240–1 (Koretsky, Diss. Op.); *North Sea Continental Shelf Cases*, ibid. (1969), 3 at 44, 47–9; ibid. 101–2, 121, 131, 138 (Ammoun, Sep. Op.); ibid. 210 (Morelli, Diss. Op.); ibid. 223, 225, 229, 231, 232–3, 236, 238 (Lachs, Diss. Op.); ibid. 243–4, 247 (Sørensen, Diss. Op.); *Namibia* Opinion, ibid. (1971), 26ff., 53–4; *Case Concerning Kasikili/Sedudu Island*, ibid. (1999), 1073, 1076, 1097–1100; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (2002), paras. 68, 84, 223, 237–8, 286–90, 292–5, 301, 304, 321.

[135] ICJ Reports (1949), 182–3.

[136] *Competence of the I.L.O. to regulate, incidentally, the Personal Work of the Employer* (1926), PCIJ, Ser. B, no. 13, p. 18.

[137] ICJ Reports (1950), 65.

[138] ICJ Reports (1950), 72 (this is not the only significant passage). See Lauterpacht, *Development*, pp. 352–7, the criticism of the distinction between procedure and substance. See further Fitzmaurice, 29 *BY* (1952), 50–2 and the Diss. Ops. Cf. Joint Diss. Op. of Spender and Fitzmaurice, *South West Africa* cases, ICJ Reports (1962), 471–3; the *Cameroons* case, ibid. (1963), 35, 37–8, 62–4 (Wellington Koo, Sep. Op.), 68–79 (Sir Percy Spender, Sep. Op.); 108, 125–7 (Sir Gerald Fitzmaurice, Sep. Op.), 140–1 (Morelli, Sep. Op.), 150–1 (Badawi, Diss. Op.), 156–9, 170, 182 (Bustamante, Diss. Op.), 187–91, 194–6 (Beb a Don, Diss. Op.). The *Eastern Carelia* case was also distinguished in the *Namibia* Opinion, ICJ Reports (1971), 16 at 23.

[139] (1923), PCIJ, Ser. B, no. 5, at p. 27.

(b) Decisions of the Court of Justice of the European Communities[140]

Several decisions of this Court have involved issues of general importance.

(c) Decisions of national courts[141]

Article 38(1)(d) of the Statute of the International Court is not confined to international decisions and the decisions of national tribunals have evidential value. Some decisions provide indirect evidence of the practice of the state of the *forum* on the question involved;[142] others involve a free investigation of the point of law and consideration of available sources, and may result in a careful exposition of the law. Writers from common law jurisdictions make frequent reference to municipal decisions, and such use is universal in monographs from this source. French, German, and Italian jurists tend to use fewer case references, while Russian jurists are even more sparing. In the recent past there has been a great increase in the availability of decisions as evidence of the law.[143] Municipal decisions have been an important source for material on recognition of belligerency, of governments and of states, state succession, sovereign immunity, diplomatic immunity, extradition, war crimes, belligerent occupation, the concept of a 'state of war', and the law of prize.[144] However, the value of these decisions varies considerably, and many present a narrow national outlook or rest on a very inadequate use of the sources.

(d) *Ad hoc* international tribunals

Tribunals set up by agreement between a number of states, for some *ad hoc* purpose, may produce valuable pronouncements on delicate issues, much depending on the status of the tribunal and its members and the conditions under which it does its work. The Judgment of the International Military Tribunal for the Trial of German Major War Criminals,[145] the decisions of the Iran–United States Claims Tribunal, and the decisions of the International Criminal Court for the Former Yugoslavia contain a number of significant findings on issues of law.

(e) Municipal courts and disputes between parts of composite states[146]

The Supreme Court of the United States, the Swiss Federal Court, and the *Staatsgerichtshof* of the Weimar Republic have had occasion to decide disputes

[140] See Reuter, *Recueil d'études en hommage à Guggenheim*, p. 665 at pp. 673–85.

[141] See Lauterpacht, 10 *BY* (1929), 65–95 (also in Coll. Papers, ii. 238–68); Schwarzenberger, *International Law*, i (3rd edn., 1957), 32–4.

[142] Note the relation between English decisions and the Foreign Office Certificates: see Lyons, 23 *BY* (1946), 240–81. See also the *Lotus*, PCIJ, Ser. A, no. 10, pp. 23, 28–30; and the Diss. Ops. of Judges Finlay and Moore, pp. 54, 68–9 respectively; and the *Eichmann* case (1961), 56 *AJ* (1962), 805; ILR 36, 5.

[143] See the *Journal du droit international* (Clunet) and the *Annual Digest of Public International Law Cases*, now the International Law Reports.

[144] See also the *Scotia* (1871), 14 Wallace 170; the *Paquete Habana* (1900), 175 US 677; the *Zamora* [1916] 2 AC 77; *Gibbs* v. *Rodriguez* (1950), ILR 18 (1951), no. 204; *Lauritzen* v. *Government of Chile*, ILR 23 (1956), 708.

[145] Cmd. 6964; *Ann. Digest*, 13 (1946), no. 92.

[146] See 10 *BY* (1929), 74–5. See e.g. *New Jersey* v. *Delaware* (1934), 291 US 361; 29 *AJ* (1935), 309; *Labrador Boundary* case (1927), 43 TLR 289.

between members of the federal communities involved on the basis of doctrines of international law. The practice of the first of these is of importance in view of the fact that the United States has its origin in a union of independent states and this gives an international element to its internal relations.[147]

(f) Pleadings in cases before international tribunals

Pleadings before the International Court contain valuable collations of material and, at the least, have value as comprehensive statements of the opinions of particular states on legal questions.

8. THE WRITINGS OF PUBLICISTS[148]

The Statute of the International Court includes, among the 'subsidiary means for the determination of rules of law', 'the teachings of the most highly qualified[149] publicists of the various nations' or, in the French text, 'la doctrine'. Once again the source only constitutes evidence of the law, but in some subjects individual writers have had a formative influence. Thus Gidel has had some formative influence on the law of the sea.[150] It is, however, obvious that subjective factors enter into any assessment of juristic opinion, that individual writers reflect national and other prejudices, and, further, that some publicists see themselves to be propagating new and better views rather than providing a passive appraisal of the law.

Whatever the need for caution, the opinions of publicists are used widely. The law officers' opinions tendered confidentially to the executive in Great Britain contain references to the views of Vattel, Calvo, Hall, and others, and the opinions themselves represent the views of experts, including Harcourt, Phillimore, and Finlay.[151] Arbitral tribunals[152] and national courts[153] make use of the writings of jurists. National courts are unfamiliar with state practice and are ready to lean on secondary sources. Superficially the International Court might seem to make little use of doctrine,[154] and majority judgments contain few references: but this is because of the process of

[147] See also *infra*, pp. 58–9.

[148] See Lauterpacht, *Development*, pp. 23–5; Waldock, 106 Hague *Recueil* (1962, II), 95–6.

[149] This phrase is not given a restrictive effect by tribunals; but authority naturally affects the weight of the evidence.

[150] *Droit international public de la mer*, 3 vols. (1932–4). His work is associated with the concept of the contiguous zone. See also Colombos, *The International Law of the Sea* (6th edn., 1967), translated into French, Italian, Russian, Spanish, German, Portuguese, and Greek.

[151] See McNair, *Opinions*, i, Preface; iii. 402–6.

[152] Particularly in the period 1793 to 1914, using Grotius, Vattel, and Bynkershoek.

[153] See the judgments in the *Eichmann* case (1961), 56 *AJ* (1962), 805; ILR, 36, 5; *R.* v. *Keyn* (1876), 2 Ex. D. 63; *Public Prosecutor* v. *Oie Hee Koi* [1968] AC 829.

[154] But see the *Wimbledon* (1923), PCIJ, Ser. A, no. 1, p. 28 ('general opinion'); *German Settlers in Poland* (1923), PCIJ, Ser. B, no. 6, p. 36 ('almost universal opinion'); *Jaworzina* case (1923), PCIJ, Ser. B, no. 8, p. 37 (French text, 'une doctrine constante'); *German Interests in Polish Upper Silesia* (1925), PCIJ, Ser. A, no. 6, p. 20 ('the "teachings of legal authorities"' 'the jurisprudence of the principal countries'); the *Lotus* (1927),

collective drafting of judgments, and the need to avoid a somewhat invidious selection of citations. The fact that writers are used by the Court is evidenced by the dissenting and separate opinions[155] in which the 'workings' are set out in more detail and reflect the actual methods of approach of the Court as a whole. Many references to writers are to be found in the pleadings before the Court.

Sources analogous to the writings of publicists, and at least as authoritative, are the draft articles produced by the International Law Commission,[156] reports and secretariat memoranda prepared for the Commission,[157] Harvard Research drafts,[158] the bases of discussion of the Hague Codification Conference of 1930, and the reports and resolutions of the Institute of International Law and other expert bodies.[159]

9. EQUITY IN JUDGMENTS AND ADVISORY OPINIONS OF THE INTERNATIONAL COURT[160]

'Equity' is used here in the sense of considerations of fairness, reasonableness, and policy, often necessary for the sensible application of the more settled rules of law. Strictly, it cannot be a source of law, and yet it may be an important factor in the process of decision. Equity may play a dramatic role in supplementing the law or appear unobtrusively as a part of judicial reasoning. In the case on *Diversion of Water from the River Meuse*[161] Judge Hudson applied the principle that equality is equity[162] and stated

PCIJ, Ser. A, no. 10, p. 26 ('teachings of publicists', 'all or nearly all writers'); *Nottebohm* (Second Phase), ICJ Reports (1955), 22 ('the writings of publicists').

155 *Diversion of Water from the Meuse* (1937), PCIJ, Ser. A/B, no. 70, pp. 76–7 (Hudson); *South West Africa* case, ICJ Reports (1950), 146ff. (McNair); *Peace Treaties* case, ibid. 235 (Read); *Asylum* case, ibid. 335ff. (Azevedo); *Genocide* case, ICJ Reports (1951), 32ff. (Joint Dissent, Guerrero, McNair, Read, Hsu Mo); *Temple* case, ICJ Reports (1962), 39ff. (Alfaro); *Aerial Incident* case, ICJ Reports (1959), 174 (Joint Diss., Lauterpacht, Wellington Koo, Spender).

156 See *LAFICO and the Republic of Burundi*, ILR 96, 279, 318–19; the Judgment of the International Court in the *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), ICJ Reports (1997), 39–46, 55; and the *New Zealand v. France Arbitration*, Award of 30 April 1990, 20 *RIAA*, 215 at 252–5.

157 See generally the *Yearbook of the International Law Commission*.

158 See *AJ* 26 (1932), Suppl., p. 29 (1935), Suppl., p. 33 (1939), Suppl., and the *Genocide* case, ICJ Reports (1951), 32ff.

159 See the decision of the New Zealand Court of Appeal in *KPMG Peat Marwick* v. *Davison*, ILR 104, 96 at p. 616.

160 Jenks, *The Prospects of International Adjudication*, pp. 316–427; Lauterpacht, *Development*, pp. 213–17; *American and British Claims Arbitration, Report of Fred K. Nielsen* (1926), 51–72; Akehurst, 25 ICLQ (1976), 801–25; Schachter, 178 Hague *Recueil* (1982, V), 82–90; Thirlway, 60 *BY* (1989), 49–62; Lowe, 12 *Austral. Yrbk.*, 54–81; Higgins, *Peace and Process* (1994), 219–37; Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes* (1993); Bernhardt, *Encyclopedia*, II (1995), 109–13.

161 (1937), PCIJ, Ser. A/B, no. 70, p. 77. See also the *Wimbledon* (1923), PCIJ, Ser. A, no. 1, p. 32; World Court Reports, i. 163 (on the currency in which the damages were to be paid). Instances of equity in arbitral jurisprudence: *Orinoco Steamship Co.* case (1910); Hague Court Reports, i. 228; *RIAA* xi. 237; *Norwegian Shipowners' claims* (1922), Hague Court Reports, ii. 40; *RIAA* i. 309; *Eastern Extension, Australasia and China Telegraph Co., Ltd.* (1923), *RIAA* vi. 112; *Trail Smelter* arbitration (1938, 1941), *RIAA* iii. 1905.

162 See also *supra*, p. 19, on 'general principles of international law'.

as a corollary that a state seeking the interpretation of a treaty must itself have completely fulfilled the obligations of that treaty. He observed that under 'Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply'.

In the *North Sea Continental Shelf Cases*[163] the Court had to resort to the formulation of equitable principles concerning the lateral delimitation of adjacent areas of continental shelf, as a consequence of its opinion that no rule of customary or treaty law bound the states parties to the dispute over the seabed of the North Sea. Considerations of equity advanced by Belgium in the *Barcelona Traction* case (Second Phase)[164] did not cause the Court to modify its views on the legal principles and considerations of policy. In the *Fisheries Jurisdiction* case (United Kingdom v. Iceland) the International Court outlined the elements of an 'equitable solution' of the differences over fishing rights and directed the parties to negotiate accordingly.[165] In the *Burkina Faso–Mali* case the Chamber of the Court applied 'equity *infra legem*' to the division of a frontier pool.[166]

Equity, in the present context, is encompassed by Article 38(1)(c) of the Statute, and not by Article 38(2),[167] which provides: 'This provision [para. I, *supra*, p. 3] shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto'.

This power of decision *ex aequo et bono* involves elements of compromise and conciliation whereas equity in the English sense is applied as a part of the normal judicial function. In the *Free Zones* case[168] the Permanent Court, under a special agreement between France and Switzerland, was asked to settle the questions involved in the execution of the relevant provision in the Treaty of Versailles. While the Court was to declare on the future customs regime of the zones, the agreement contained no reference to decision *ex aequo et bono*. Switzerland argued that the Court should work on the basis of existing rights, and, by a technical majority including the vote of the President, the Court agreed with the argument. The Court said:[169]

> ...even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to the effect, which is not to be found in the Special Agreement. ...

[163] ICJ Reports (1969), 3 at 46–52. See also ibid. 131 ff. (Sep. Op., Ammoun), 165–8 (Diss. Op., Koretsky), 192–6 (Diss. Op., Tanaka), 207–9 (Diss. Op., Morelli), 257 (Diss. Op., Sørensen).

[164] Ibid. (1970), 3 at 48–50.

[165] ICJ Reports (1974), 3 at 30–5.

[166] Ibid. (1986), 554 at 631–3. See also Schwebel (Diss. Op.), Adv. Op. on *Application for Review of Judgment No. 273*, ibid. (1982), 325 at 536–7.

[167] Judge Kellogg in the *Free Zones* case (1930), PCIJ, Ser. A, no. 24, pp. 39–40, thought otherwise, but was in error. See the *North Sea Cases*, ICJ Reports (1969), 48.

[168] (1930), PCIJ, Ser. A, no. 24. See the earlier phase: (1929), Ser. A, no. 22; and Lauterpacht, *Development*, pp. 213–17; and *Function*, p. 318.

[169] Ser. A, no. 24, p. 10.

The majority of the Court expressed doubts as to the power of the Court to give decisions *ex aequo et bono*, but it would be unwise to draw general conclusions from such doubts since much depended on the nature of the special agreement. In any case the majority of the Court regarded the power to decide *ex aequo et bono* as distinct from the English notion of equity. However, the terminology of the subject is not well settled. The draftsmen of the General Act of Geneva, 1928,[170] seem to regard the power to decide *ex aequo et bono* and equity as synonymous. The converse, 'equity' to mean settlement *ex aequo et bono*, occurs in some arbitration agreements. On occasion equity is regarded as an equivalent of the general principles of law.[171]

10. CONSIDERATIONS OF HUMANITY

Considerations of humanity may depend on the subjective appreciation of the judge, but, more objectively, they may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy. Such criteria have obvious connections with general principles of law and with equity, but they need no particular justification. References to principles or laws of humanity appear in preambles to conventions,[172] in resolutions of the United Nations General Assembly,[173] and also in diplomatic practice. The classical reference is the passage from the Judgment of the International Court in the *Corfu Channel* case,[174] in which the Court relied on certain 'general and well-recognized principles', including 'elementary considerations of humanity, even more exacting in peace than in war'. In recent years the provisions of the United Nations Charter concerning the protection of human rights and fundamental freedoms,[175] and references to the 'principles' of the Charter, have been used as a more concrete basis for considerations of humanity, for example in matters of racial discrimination and self-determination.[176]

[170] Art. 28. The provision was copied in other treaties.

[171] *Norwegian Shipowners' claim* (1922), Hague Court Reports, ii. 40; *RIAA* i. 309.

[172] Cf. Hague Conv. Concerning the Laws and Customs of War on Land, 1907, preamble, 'until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience'. This is known as the 'de Martens clause'. See also the draft provisions on war criminals debated at the Paris Peace Conference, 1919–20.

[173] See the Resol. on the Prohibition of the Use of Nuclear Weapons for War Purposes, 24 Nov. 1961.

[174] *ICJ Reports* (1949), 22. The statement was in respect of Albania's duty to warn of the presence of mines in her waters. See also the Judgment in the *Case of Nicaragua* v. *United States*, ibid. (1986), 112–14; and Thirlway, 61 *BY* (1990), 6–13.

[175] See generally ch. 25, s. 3.

[176] In approaching the issues of interpretation in the *South West Africa* cases (Second Phase), ICJ Reports (1966), 6 at 34, the International Court held that humanitarian considerations were not decisive. See also, in the same cases, Judge Tanaka, Diss. Op., pp. 252–3, 270, 294–9.

11. LEGITIMATE INTERESTS

In particular contexts rules of law may depend on criteria of good faith, reasonableness, and the like, and legitimate interests, including economic interests, may then be taken into account. However, legitimate interests may play a role in creating exceptions to existing rules and bringing about the progressive development of international law. Recognition of legitimate interest explains the extent of acquiescence in face of claims to the continental shelf[177] and fishing zones.[178] In this type of situation it is, of course, acquiescence and recognition which provide the formal bases for development of the new rules. In the *Fisheries* case[179] the International Court did not purport to do anything other than apply existing rules, but it had to justify the special application of the normal rules to the Norwegian coastline. In doing so the Court stated:[180] 'Finally, there is one consideration not to be overlooked... that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage'. Moreover, the Court referred to traditional fishing rights buttressed by 'the vital needs of the population' in determining particular baselines.[181]

Judge McNair, dissenting in the *Fisheries* case,[182] expressed disquiet:

> In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.

This caution is no doubt justified, but the law is inevitably bound up with the accommodation of the different interests of states, and the rules often require an element of appreciation. Examples of such rules are those concerning the invalidity of treaties,[183] excuses for delictual conduct,[184] and the various compromises in conventions between the standard of civilization and the necessities of war.[185]

NOTE ON COMITY

International comity, *comitas gentium*, is a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, mutual

[177] See *infra*, pp. 205ff.

[178] See *infra*, p. 198.

[179] See *infra*, pp. 176ff.

[180] ICJ Reports (1951), 133. See also at p. 128: 'In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing'. See also Fitzmaurice, 30 *BY* (1953), 69–70; id. 92 Hague *Recueil* (1957, II), 112–16; and Thirlway, 61 *BY* (1990), 13–20.

[181] ICJ Reports (1951), 142.

[182] p. 169.

[183] See ch. 27, s. 5.

[184] See ch. 21, s. 13.

[185] On the provisions in the Hague Regulations on Land Warfare and the Geneva Conventions of 1949 see Schwarzenberger, in *Mélanges Séfériadès* (1961), 13–21.

respect, and the friendly waiver of technicalities are involved, and the practice is exemplified by the exemption of diplomatic envoys from customs duties.[186] Oppenheim[187] writes of 'the rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them'. Particular rules of comity, maintained over a long period, may develop into rules of customary law.

Apart from the meaning just explained, the term 'comity' is used in four other ways: (1) as a synonym for international law;[188] (2) as equivalent to private international law (conflict of laws);[189] (3) as a policy basis for, and source of, particular rules of conflict of laws;[190] and (4) as the reason for and source of a rule of international law.[191]

NOTE ON CODIFICATION

Narrowly defined, codification involves the setting down, in a comprehensive and ordered form, of rules of existing law and the approval of the resulting text by a law-determining agency. The process in international relations has been carried out by international conferences, such as the First and Second Hague Peace Conferences of 1899 and 1907, and by groups of experts whose drafts were the subjects of conferences sponsored by the League of Nations or the American states. However, the International Law Commission,[192] created as a subsidiary organ of the General Assembly of the United Nations, has had more success than the League bodies. Its membership combines technical qualities and experience of government work, so that its drafts are more likely to adopt solutions which are acceptable to governments. Moreover, its membership reflects a variety of political and regional standpoints and thus its agreed drafts provide a realistic basis for legal obligations. In practice the Commission has not maintained a strict separation of its tasks of codification and 'progressive development' of the law. Its work on various topics, including the law of the sea, has provided the basis for successful conferences of plenipotentiaries and the resulting multilateral conventions.

[186] Cf. now Art. 36 of the Vienna Conv. on Diplomatic Relations, 1961.

[187] p. 34, n. 1. French usage is 'convenance et courtoisie internationale'. See the *Alabama* arbitration, Moore, *Arbitrations*, i. 653; the *Paquete Habana* (1900), 175 US 677; and *Parking Privileges for Diplomats Case*, ILR 70, 396 (Fed. Admin. Ct., GFR).

[188] British and American courts often use the term thus, e.g. the *Parlement Belge* (1880), 5 PD 197, 214, 217, per Brett, LJ.

[189] See Phillimore, *Commentaries* (3rd edn., 1879), iv, para. 1.

[190] i.e. as an aspect of public policy. See *Hilton* v. *Guyot* (1895), 159 US 113; *Oetjen* v. *Central Leather Co.* (1918), 246 US 297, 303; *Foster* v. *Driscoll* [1929] 1 KB 470; and Briggs, pp. 407–8.

[191] *The Cristina* [1938] AC 485, 502, per Lord Wright; *Re A.B.* [1941] 1 KB 454, 457; *Krajina* v. *Tass Agency* [1949] 2 All ER 274, 280, per Cohen, LJ.

[192] See *International Law on the the Eve of the Twenty-first Century: Views from the International Law Commission* (1997), 1–18.