Introduction

International law, so many claim, is predominantly made by states, and this still holds true in large measure. Since states are considered to be sovereign, it follows that there is no authority above them; and if there is no authority above them, it follows that law can only be made with their consent – otherwise the system would be authoritarian. Hence, international law is often said to be a consent-based (or consensual) system.

International law does not have a specific document specifying how it is made; there is no treaty on the correct ways and processes for making international law. Instead, the Statute of the ICJ contains a listing of instruments that the Court may apply in deciding cases, and it is this listing that is often used as a starting point for a discussion of the sources of the law. This already suggests that the list is not exhaustive; it is possible that there are sources of law not mentioned in article 38 Statute ICJ. And indeed, recalling that the same list already graced the Statute of the PCIJ and was drafted in the early 1920s, it seems eminently plausible that in the years since then, the possibilities for law-making have expanded. It is plausible to say that international organizations can make law, although one can also explain their resolutions as being treaty based, since the authority of such resolutions derives from the constitutive instrument of the organization. There is widespread discussion (if little truly conclusive) about the role of civil society and non-governmental organizations (NGOs) in the making of international law. And there are heated debates about whether states can make so-called 'soft law', and whether law can (and should be allowed to) arise through networks of civil servants and regulators.

In this chapter and the next the sources of international law will be discussed. The current chapter will concentrate on customary international law and general principles of law as well as sources doctrine generally, whereas the next chapter will be devoted to the law of treaties. Before continuing, however, it is imperative to first sketch the basics of the system, and underline the role of consent. For while it may be the case that consent is of less importance nowadays than a century ago, it needs to be underlined that state consent is still of vital importance.

Two ships (or perhaps three): *Lotus* and *Wimbledon*

On the second day of August 1926, the steamships *Boz-Kourt* (flying the Turkish flag) and *Lotus* (French) collided on the high seas, off the Turkish coast. The *Boz-Kourt* was cut in two, eight Turkish nationals died and the Turkish authorities started criminal proceedings against Lieutenant Demons, first officer of the *Lotus*, as well as the captain of the *Boz-Kourt*, Hassan Bey. Both were found guilty by the Criminal Court of Istanbul and sentenced to a fine and some months' imprisonment.[1]

The fact that a French citizen (Demons) was being prosecuted in Turkey did not go down well with the French authorities, who claimed that Turkey lacked the required jurisdiction to prosecute a foreigner for acts committed outside Turkish territory. Turkey and France agreed to take the matter to the PCIJ which in 1927 rendered its classic decision.[2]

The main question asked of the Court, as formulated by both parties together, was whether Turkey, in instituting proceedings against Lieutenant Demons, had acted in conflict with principles of international law. In other words, the question was not whether Turkey had permission to start proceedings, but rather whether starting proceedings was prohibited. The Court actually agreed that

this was the proper way to ask the question, for it was 'dictated by the very nature and existing conditions of international law'.[3]

The Court discussed the nature of international law as follows, in a famous paragraph:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[4]

Since no prohibition could be found in international law, the Court eventually decided that Turkey had not violated international law. There was simply no rule prohibiting Turkey from starting proceedings against Lieutenant Demons, in the circumstances of the case, and thus Turkey had done nothing wrong.

This proved to be a monumental decision, as much for its reasoning as for its outcome. The Court here laid down the idea of international law as a permissive system; behaviour must be considered permitted unless and until it is prohibited. The alternative, as argued by France, would have been to regard international law as a prohibitive system, where behaviour is only lawful if there is a rule that specifically allows it. Then again, it is easy to exaggerate the monumentality of the *Lotus* case. In most domestic societies, the same basic starting point applies; people can do as they please unless the law says they can't. We do not normally need specific rules telling us that we are allowed to walk on the sidewalk; instead, we are free to do so, unless there is a rule that prohibits walking on the sidewalk. As one of the basic principles of the modern *Rechtsstaat* puts it, *nulla crimen sine lege* (no crime without a law).

The *Lotus* case still echoes in international law. The Court's starting point (that states are permitted to do whatever they please unless it is prohibited) is still valid enough, although it is possible to claim that there are exceptions; surely committing genocide is wrong, even for those states that have never accepted the prohibition of genocide.[5] Some aspects of the decision were questionable. Thus, the Court equated a Turkish ship with Turkish territory in order to establish a jurisdictional link, even though strictly speaking the territory on which the collision occurred was the high seas,[6] and arguably it concluded too rapidly that in cases of collision the affected state could exercise jurisdiction. Later treaties on the law of the sea limit the penal jurisdiction of states to the flag state or the state of nationality of the responsible officer, which suggests some dissatisfaction with the Court's broad jurisdictional sweep in the *Lotus* case.[7]

The *Lotus* case was decided by the casting vote of the Court's president, the Swiss lawyer Max Huber, known for his 'sociological jurisprudence' and generally positivist outlook.[8] Either way, the decision should not have come as a surprise; four years earlier, in its first ever contentious decision (the *Wimbledon* case), the PCIJ had strongly suggested the outlines of a positivist, permissive international legal order.

After World War I the victorious powers negotiated the Versailles Treaty and then told Germany to consent to it. Under the treaty, the Kiel Canal, in northern Germany, was declared an international waterway; Germany could not block the passage of any ship, save in times of war. When Germany refused access, in 1921, to the steamer *Wimbledon*, flying the English flag and chartered by a French company, some of those victorious powers started proceedings in the PCIJ.[9] France, the UK, Italy and Japan, joined by Poland, claimed that in refusing access to the *SS Wimbledon*, Germany had violated article 380 of the Versailles Treaty. One of Germany's counter-arguments, no doubt inspired by the awkward circumstance that Germany had not been allowed to participate in the drafting of the

Versailles Treaty, was that the Versailles Treaty was difficult to reconcile with sovereignty. Surely concluding a treaty could not be equated with giving up sovereignty, yet this, Germany argued, was precisely what the internationalization of the Kiel Canal signified. Germany's argument invoked a powerful theoretical point. How is it even possible to have law in a system of sovereign states?

The Court effectively shot down Germany's argument. While it agreed that concluding a treaty could place restrictions on the exercise of sovereign rights, it disagreed with the position that sovereignty and international law were fundamentally irreconcilable, and instead suggested that sovereignty and international law went hand in hand: 'the right of entering into international engagements is an attribute of State sovereignty'.[10]

The two cases, *Lotus* and *Wimbledon*, together establish that in a horizontal order of sovereign equals international law is by no means impossible; indeed, it is precisely because states are sovereign that they can make international law. But the same sovereignty entails that rules can only be made on the basis of consent; the rules of international law emanate from the freely expressed will of sovereign states.

In other words, international law is often deemed a positivist system in that rules are created by consent of the states themselves, and do not flow from elsewhere. International law does not stem from religion (although historically this was often posited), or from considerations of morality, but instead stems from the acts of the system's subjects. That is not to say that 'natural law' has no place whatsoever; it is sometimes claimed that some rules are so important that they also exist without consensual foundations, and may even bind those states that have not accepted them. Such rules are known as *jus cogens*rules: peremptory rules from which no derogation is permitted, and examples often mentioned include the prohibitions of genocide, torture, slavery and aggression.[11]

Article 38 Statute ICJ

After World War II the PCIJ was replaced by the ICJ. Drafted to become part of the Statute of the PCIJ, in 1920, article 38(1) ICJ provides as follows:

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

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[12]

It is generally agreed that article 38 does not establish a rigid hierarchy of sources, in particular when it comes to the relationship between customary law and treaties; these can supersede each other and also, as the Court confirmed in 1986, exist alongside each other.[13] That said, two elements of hierarchy can be seen in article 38. First, judicial decisions and the writings of the most highly qualified publicists are listed as subsidiary means only, and the reference to article 59 ICJ Statute further makes clear that judicial decisions have no precedent effect in international law; decisions of the Court can only bind the parties to the dispute. This makes sense, of course; it follows from the organizing principle of sovereignty that the Court cannot make law, but only apply it. Difficult as it

may be to draw the line between applying the law and making law, what is clear none the less is that precedential effect would by definition involve law-making, and can thus not be accepted.

Second, there is also general agreement between international lawyers that general principles of law (mentioned in subparagraph (c)) have as their main function the filling of gaps. In other words, general principles will normally only be resorted to if there is a situation where there is neither an applicable treaty nor an applicable rule of customary international law. Thus put, it would seem that treaties and custom are the stronger sources, and that should perhaps not come as a surprise, as both rest (at least in theory) firmly on the consent of states.

Treaties

Lord McNair, in his day the world's leading authority on the law of treaties, once described treaties as the only, and sadly overworked workhorses of the international legal order.[14] If states want to make a deal (say, exchange territory), the only instrument at their disposal is the treaty. Likewise, they can effectively only use the treaty form if the ambition is legislative in nature (e.g. to protect against climate change or to guarantee human rights). The only instrument available to set up an institution such as the UN is, again, the treaty. Hence, a lot is demanded from treaties and, especially during the twentieth century, the treaty has become the dominant source of international law – or, if not of 'law' *per se*, then at least of rights and obligations.[15]

Accordingly, treaties can come in all forms and sizes. They can be bilateral but also multilateral; they can be highly solemn and cast in language with biblical overtones (think of the designation 'Covenant,' which graced the constituting instrument of the League of Nations and is nowadays associated with two general and universal human rights instruments), but also highly informal. Typically, what matters is that states express their consent to be bound; in this way, being bound by treaty can be reconciled with the starting point of state sovereignty.

Treaties have been concluded and have operated since time (almost) immemorial, and it stands to reason that over the centuries, rules have developed, in customary international law, on the conclusion of treaties, the effects and application of treaties, their validity and on their termination. These rules have been codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), which applies to treaties concluded between states only. A later Vienna Convention was concluded (in 1986) to address treaties concluded with or between international organizations, but this has yet to enter into force. In the meantime, though, it is fair to say that treaties concluded with or between international organizations are governed, by and large, by the same customary rules underlying the 1969 Vienna Convention, and much the same applies to treaties involving yet other actors. Thus, a peace agreement following a civil war, if governed by international law (as is normally the case), or an agreement between a state and a mineral extraction company,[16] will typically be subjected to the customary law of treaties, and this, it is often claimed, is well-nigh identical to the 1969 Vienna Convention. These rules will be discussed in greater detail in the next chapter, as will the question of what exactly constitutes a treaty.

Customary law

People living in groups engage in all sorts of practices, and it is probably the case that all societies recognize that in certain circumstances, those practices can acquire the force of law.[17] This makes some practical sense; it may be easier to regard activities that people do anyway as law, instead of making written laws. While written law tends to be more precise, customary law has the advantage that precisely because it is based on social practices, it is usually deeply engrained in the everyday life of that society. In international law, characterized by the absence of a central legislator, customary law has traditionally played a very important role, and continues to do so. When treaties were still rare events, much of the law was based on the customs of the members of the international society – states.

Article 38 ICJ Statute defines customary law, in somewhat lapidary terms, as evidence of a general practice accepted as law. This is a bit curious (if not all that important) in that the custom is not, strictly, evidence of a general practice, but rather the other way around; the practice is evidence that there is a custom. Be this as it may, the definition provides two main requirements: there must be a general practice, and this general practice must be accepted as law or, as international lawyers tend to say, the general practice must be accompanied by *opinio juris*, a sense of legal obligation. Both requirements have their own complications, and the precise relationship between them is problematic as well.[18]

A general practice

Societies differ from one another, and also over time; accordingly, it is difficult to say in the abstract when a practice is general enough to award it the status of a rule of customary international law. One would think that the practice of only a handful of states might not really qualify as 'general', but this would be mistaken. There is, for example, the possibility of regional customary law, confirmed as matter of principle in the 1950 *Asylum* case.[19] There may even be something like a custom between two states only, although here it might be more appropriate to speak of a set of historic rights and obligations.[20]

In earlier days it was sometimes thought that the formation of a customary rule could take quite some time. Without being very specific, Vattel noted in the eighteenth century that customary law consisted of customs and maxims 'consecrated by long use', which suggests quite a lengthy period of gestation, possible decades.[21] By contrast, the ICJ found in 1969 that 'even without the passage of any considerable period of time, a very widespread and representative [practice] might suffice of itself'.[22]

Likewise, it cannot be specified, in the abstract, how many instances of practice are required. Many incidents over a short period of time may be just as forceful as a handful of instances spread out over a long period of time, or even more so. Much may depend also on the precise issue area; it seems generally accepted that since there are few space activities to begin with, space law can develop without too many instances of practice, and it has even been suggested that in such a field 'instant custom' may develop.[23] In other walks of life things may be different though; in fields such as the law of the sea, there is more practice and therefore the demands on a new rule of custom may be considerably higher.

Another relevant question is whose practice is required. Obviously, landlocked states such as Austria and Switzerland will not have much practice when it comes to maritime affairs; consequently, a focus on their practice will not be very revealing. By the same token, the development of customary space law will owe more to the practices of the USA, Russia and France than those of Sierra Leone or Norway. Consequently, what matters in particular is that those states whose interests are especially affected by a customary rule participate in its making.[24] If this seems difficult to reconcile with

sovereign equality, none the less given the very nature of custom as the normative reflection of practice, it could hardly be otherwise. The Belgian jurist Charles de Visscher, a long-time judge at the ICJ, once made an apt analogy with footprints in the sand; there are always 'some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way'.[25]

Perhaps the most controversial question concerning practice is what exactly counts as practice. Practice, after all, can take various forms; acting is practice, but so is speaking; philosophically at any rate, humans act through speech, and a lot also depends on the context. Saying 'I do' at a wedding ceremony is bound to give rise to different expectations from saying 'I do' when asked whether one is enjoying a nice lunch or whether one supports Manchester United.[26]

It is generally accepted that the material acts of states (thus, actively seizing foreign vessels, actually expropriating foreign property or sending satellites into orbit) count as elements of state practice. It is also generally accepted that the legislative acts of states, and their legal practices generally, may qualify as state practice. Thus, if many states enact a law for the protection of fish stocks up to 200 miles off their coasts, and if they actively prosecute violators, then at some point the conclusion may be warranted that this is a general practice with the potential to crystallize into a rule of customary international law.

More controversial is whether mere statements may qualify as state practice. If state representatives proclaim before international audiences that the state in question condemns torture, is this to be counted as state practice, or merely an example of talk being cheap? If the head of government of a state declares to his parliament that the state will never expropriate foreign property, is this to be regarded as state practice, or rather as a public statement, without any probative value unless the state actually enacts a law protecting against expropriation? And what if a state votes in an international meeting; is voting to be regarded as acting, on the same level as the material act, or is voting closer to mere speech? In short, the evidences of custom are, and will remain, controversial.

Accepted as law

Complications are compounded by the second main requirement of custom; not only must there be a general practice, but this practice must also be accepted as law (*opinio juris*). This makes sense; there are many practices which are deemed useful or pleasant in one way or another, but which it would be silly to try and enforce in a court of law, or to ask for compensation upon violation. Thus, it might be customary to welcome visiting foreign dignitaries by rolling out the red carpet, but few would think of such a rule as a rule of law; it has force, but has not been 'accepted as law'. The requirement of *opinio juris* therewith plays the useful role of separating law from other normative control systems, such as etiquette or morality, or of separating legally warranted behaviour from merely politically expedient behaviour.

How, then, to recognize *opinio juris*? In fact, often the evidences of *opinio juris* are identical to those of state practice; enacting a law, concluding a treaty, engaging in a legal practice may all count both as evidence of state practice, and as evidence of the sentiment that the behaviour is legally warranted. In addition, it is generally acknowledged that resolutions adopted by international organizations (in particular the UN General Assembly, whose resolutions do not formally bind the UN's membership) or at international conferences may, their non-binding status notwithstanding, reflect *opinio juris*.

The method of custom: the *Paquete Habana*

Difficult as all this seems, in practice it transpires that with common sense one can go a long way. A good way to illustrate the identification of a rule of customary international law is an old decision, from the year 1900, of the US Supreme Court, in the *Paquete Habana* case.[27] This arose out of the Spanish-American war, in 1898. The *Paquete Habana* and the *Lola* were Cuban fishing vessels and, since Cuba was still ruled by Spain, seen by the USA as enemy ships. A US gunboat seized the vessels in 1898, after they had been at sea for nearly a month (the crews were unaware that war had broken out). They were sold by auction for the princely sums of $490 and $800. The original owners claimed that the USA had no right to seize foreign fishing vessels, even in times of war. The case reached the US Supreme Court, which was thus given the task of trying to verify whether the capture of foreign fishing vessels in times of war was in accordance with international law.

The Court studied the matter carefully, and was able to cite orders by the English king Henry IV, from the early fifteenth century, to the effect that fishing vessels were not to be seized in wartime. The Court found similar decrees or orders from other countries (France, the USA itself), and unearthed a number of treaties between England and France, France and Holland, and the USA and Prussia, all of them stipulating in essence that fishing vessels were exempt from seizure in times of war. And this was not just a matter of law on paper; the Supreme Court found that local courts would habitually apply the rule and exempt foreign fishing vessels from seizure.

The Court also found some exceptions. France, for instance, at one point had withdrawn the exemption for fishing vessels, due to abuse by its enemies, but the overwhelming evidence of the practice investigated by the Court pointed to the existence of a general practice, and thus a rule of customary international law. This was confirmed by the opinions of the writers of general textbooks on international law, including jurists from countries such as Portugal, Italy, Spain and Argentina. In the end, the Supreme Court concluded that the capture had been unlawful, and that the proceeds of the sale (the $490 and $800) should be restored to the original owners, as well as costs and damages.

The case is highly instructive for the methodology the Supreme Court uses. First, it is noticeable that it does not separate practice from *opinio juris*; it takes at face value that the two elements of custom are closely related and evidenced by legal materials, such as royal orders, legislation, treaties and court decisions. This makes sense, of course; it would be very curious for a state to issue a law or decree while denying the legal relevance of the law or decree thus enacted.

It is also useful to note that the Court looks at the practice of various states but, at the same time, that the number of states is quite limited. The Court cites orders and treaties involving England, France, Holland, the USA and Prussia, but not many more countries. Then again, those states would have arguably been among the most important ones, in particular when it came to maritime affairs (although surely, by that criterion, Portugal and Spain should not be left out). And to alleviate any doubts, as a subsidiary means, to invoke the language of article 38 ICJ Statute, the Court also looked at the opinions of the most highly qualified publicists.

Consent and the persistent objector

As a matter of theory, since international law is supposed to be about sovereign states, customary international law too is said to rest on the consent of states. Where other instruments may be consented to expressly, however, a state's consent to custom is thought to be tacit or implied. The standard

position is this. If a state notices that a new rule of customary law is in the process of being created, and it feels unable to accept it, it should make its opposition known. By objecting persistently, the state can ensure that it does not become bound. What is more, if many states object persistently, together they can prevent the rule from coming into being.

The leading case on what constitutes persistent objection is the 1951 *Anglo-Norwegian Fisheries* case.[28] At issue was the question of whether the UK had accepted Norway's practice of delimiting its maritime zones not by measuring directly from the coastline,[29] but by drawing straight, artificial baselines from the outer edges of a number of islands and rocks in front of the coast (the so-called *skjaergaard*). The net result was that by doing so, Norway increased the width of its maritime zones. When English fishermen were arrested for fishing in Norway's territorial sea (which was wider than would have been the case had Norway used the normal method of delimitation), the UK started proceedings before the ICJ.

Norway justified its unorthodox practice essentially on a combination of two grounds: necessity and history. First, Norway's curious coastline (the *skjaergaard*) consists of a messy formation of islands, rocks, reefs and islets, some 120,000 in total, which makes the regular method of delimitation very difficult, and would result in the near-total absence of any territorial sea. As a result (and this is the historical argument), Norway had for many years engaged in the drawing of straight baselines, had announced this to the world at large in various royal decrees and at various international meetings, and could thus claim a historic right to do so. In order to make this argument work, Norway could point out that already in 1812 it had issued a royal decree announcing that it would draw straight baselines. It had repeated this at various times during the nineteenth and twentieth centuries, the most recent one dating from 1935. No states had objected.

The UK, in turn, claimed that it was not aware of the Norwegian decrees or the subsequent practice of Norway, and therefore it could not have objected, but this argument lacked credibility: ‘As a coastal State on the North Sea, greatly interested in fisheries in this area, as a maritime Power traditionally concerned with the law of the sea…the United Kingdom could not have been ignorant’.[30]

The case suggests strongly that the Court recognizes that persistent objections can block the formation of rights *vis-à-vis* others; had the UK objected persistently to Norway's claim, it is possible that the Court could have found that Norway had a historic right, but one that was not binding on the UK. Strictly speaking though, a historic right is not the same as a general customary rule, since historic rights, by their very nature, can only belong to one state at a time. However, since states are sovereign and therefore consent is needed, it also follows that the theory of custom must allow for the possibility that states do not consent, and will therefore not be bound. Any other construction would be incompatible with the basic structure of the system.[31]

A normative problem, or towards modern custom

Customary law owes its recognition to the circumstance that it reflects what states do. But what if states breach an existing custom? Does this imply that the existing rule is weakened and possibly a new one is being formed? Or what if the practice of states is morally difficult to accept? If many states commit acts of torture, is the conclusion then inevitable that torture is allowed under customary international law, or can it still be said that torture is not permissible under customary international law? Here, the distinction between material acts and verbal acts, made above, is of relevance, as it is this distinction which allowed the ICJ to come to terms with the problem of immoral acts in the *Nicaragua* case.[32]

The case arose out of Nicaragua's claim that the USA had used force against it by helping to train opposition groups, by assisting others in small invasions into Nicaragua and by laying mines in some of Nicaragua's ports and attacking oil installations and a naval base. Since the ICJ was barred from testing the legality of the US behaviour against the UN Charter (which clearly prohibits the use of force) for technical reasons,[33] it had to identify whether there existed a prohibition on the use of force in customary international law.

In doing so, the ICJ was confronted with the problematic (some would say hypocritical) situation that while many states publicly claim that they will not use force and hold it to be illegal, none the less history is replete with instances in which states actually use force. State practice thus seemed to allow for the use of force. The Court, however, was not too bothered by this:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[34]

In other words, what matters most is what states say they do. If they generally proclaim that the use of force is illegal, then the occasional use of force does not affect the existing customary rule. The classic maxim that with respect to custom, 'law breaking is an essential method of law making',[35] no longer holds true completely; law-breaking is best seen as a violation, not as the beginning of a new custom, as long as states agree that the old rule is still worth keeping. Likewise, if states generally proclaim that torture is illegal, if they prohibit torture in their constitutions and penal codes and prosecute those who commit torture, then it can be said that torture is prohibited under customary international law. Things will be different if acts of torture are accompanied by statements that the torture was justified, or necessary, or acceptable or even desirable. In such a case, at some point in time customary law will no longer prohibit torture; breaking the law will have resulted in making new law.

The methodological importance of the Court's approach in *Nicaragua* can hardly be overstated. Instead of inductively looking at state practice and drawing conclusions, it started from the other end; it deduced the existence of a rule from the existence of *opinio juris*, and then suggested that contrary state practice was not really all that relevant as long as states continued to uphold the rule verbally. This has greatly facilitated the finding that morally desirable rules (think of human rights) can be considered as customary international law, but has done so by creating, so to speak, a virtual reality. Custom is no longer based on what states actually do, but partly at least based on what they say to do, even if they act differently.[36]

On law-breaking and law-making

The customary process, and the possible normative relevance of wrongful behaviour, can perhaps best be understood by means of a (morally less explosive) example: the formation of the customary right to claim sovereignty over the continental shelf. The continental shelf is, technically, the part of the landmass where it continues under the sea. In some cases, it hardly exists – the sea floor will fall sharply. In other cases, the change is less abrupt, and this, in turn, might make it possible to find and exploit reserves of oil and natural gas.[37]

Among the first to realize this (and among the first with the technology to make it happen) was the USA, and US President Harry Truman issued a proclamation, in 1945, according to which the continental shelf off the US coast would fall under the jurisdiction of the USA: 'the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control'.[38]

In principle, this had the potential to violate existing international law. The continental shelf and the water above it extend into what were known as the high seas, and the high seas, so it had been commonly held since the days of Grotius, cannot be subject to any state's jurisdiction. Hence, other states could have regarded this as incompatible with their own rights on the high seas, and could have claimed that the Truman Proclamation was illegal. However, other states decided that they wanted to do the same as the USA, and started to make similar proclamations. Thus, the UK made similar claims on behalf of Jamaica and the Bahamas,[39] and various states in Latin America and in the Persian Gulf area followed suit. While the contents of the claims varied (with some claiming full sovereignty, instead of functional jurisdiction, as Truman had done), their core was invariably that some kind of jurisdiction was claimed, and this core, so Lord Asquith noted in September 1951 in the *Abu Dhabi* arbitration, was 'acquiesced in by the generality of Powers, or at least not actively gainsaid by them'.[40]

However, Lord Asquith was, in 1951, not yet convinced that the rule had become part of customary international law, even though he thought it would be desirable, since the world appeared to be running out of oil. He concluded, in notable language, that

there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of International Law.[41]

Not long thereafter though, the continental shelf became the topic of a multilateral convention, which finally eradicated any doubts; in the space of roughly a decade, the potentially law-breaking Truman Proclamation had given rise to a new rule of law, and when the *North Sea Continental Shelf* cases came before the ICJ in 1969, the ICJ went so far as to refer to coastal state rights over the continental shelf as being 'inherent'.[42]

General principles of law

Article 38 Statute ICJ also allows the ICJ to have recourse to the general principles of law, recognized by civilized nations. The latter part of the sentence (addressing civilized nations) is a throwback to the early twentieth century, when it was still common to distinguish between civilized and not so civilized nations. Nowadays that distinction is seriously frowned upon, although in the literature sometimes a similar distinction is made between liberal states (i.e. states that operate under the rule of law, are democratically organized and respect human rights) and illiberal regimes.[43]

If treaties and custom are traceable to a state's express consent to be bound, this is less obvious with general principles. These are often, authoritatively, viewed as general notions that form part of the legal system and can be applied in a variety of settings, and it is this characteristic that distinguishes them from rules.[44] Thus, the prohibition on murder is a rule which can only be applied if a murder occurs; it offers little help in cases of shoplifting or insider trading. And if it is established

that a murder has taken place, the rule can be applied, and whatever consequences it spells out may take place.

By contrast, principles are far more open ended, and can be applied in a variety of settings. Thus, the principle that 'no one shall benefit from their own wrong' can be applied in murder cases (the murderer shall not inherit his victim's fortune or be entitled to keep the victim's wallet), but also with respect to shoplifting or insider trading (the perpetrator shall not be allowed to keep the proceeds) and even to military invasions. Generally then, principles do not immediately specify a particular outcome to a case, but may help point the way. Therewith, they are eminently useful to fill in possible gaps in the law.[45] If there is no applicable customary rule or treaty provision, then resort to a general principle of law can be helpful.

The notion of general principles includes such things as the notion of good faith, as well as generally accepted ideas that no one shall be judge in their own cause, that people shall not be sentenced twice for the same act and that there shall be no crime without a law.[46] Those principles are not, in any direct sense, 'adopted' or 'legislated'; instead, they form part of most, perhaps all, legal systems of the world. It would, after all, be difficult to conceive of a legal order based on bad faith, or one where double jeopardy was the norm. Since these principles are not adopted or legislated, they cannot be traced back to expressions of consent by states, and it is probably for that reason that the ICJ has never decided a case solely and expressly on the basis of a general principle of law. Doing so would render it vulnerable to the critique that the state losing out never accepted the principle in question, and this is something the Court is no doubt keen to avoid.

That said, the ICJ sometimes uses notions that come very close, and gives these a prominent place. An example is the idea of equity, which often plays a role in maritime delimitation. Confronted with an island just off another state's coast (think of the British Channel Islands off the French coast), the Court can decide that the island should not be given full weight when delimiting the maritime boundary, for giving it full weight could be unfair; it would leave the coastal state with very small maritime zones.

General principles of law are sometimes conceptualized as a sort of 'custom lite', as rules which are perhaps a bit more 'necessary' (necessity, of course, is always in the eye of the beholder) than other rules, and for which therefore there would apply less strict demands on state practice and *opinio juris*.[47] This would make it possible to also hold actors other than states bound to such 'general principles', for it remains unclear to what extent customary international law (created as it is between states) can be considered binding on entities other than states. Still, conceiving of general principles as 'custom lite' is perhaps not advisable, partly because it undermines traditional custom (whose strength is precisely that it is embedded in social practices), and partly because it tends to circumvent consent, and experience suggests that actors are generally not very keen on adhering to rules they have not consented to.

Unilateral declarations

The World Court has on several occasions suggested that unilateral statements by states may well come to bind those states. It has done so if the statement is made in the context of long-standing negotiations,[48] but also in the absence of such a framework. Clearly, not all unilateral declarations will come to have binding effect. Some statements are best seen as declarations of fact or expressions of political opinions, such as an act of recognition. While a state that has formally recognized another state cannot later deny having done so, the recognition as such does not give rise to tangible rights or

obligations.[49] Sometimes statements can also be little more than political outbursts; a presidential address labelling genocide in a neighbouring country a 'disgrace' will not have legal effects, unless the labelling is accompanied by some kind of promise ('it is a disgrace, and we shall intervene to bring it to an end').

The leading cases on unilateral declarations are the *Nuclear Tests* cases.[50] After France had started nuclear testing in French Polynesia and some of the fall-out landed in Australia and New Zealand, the latter countries claimed that France had interfered with their sovereign right to be free from nuclear materials on their territories. They asked the Court to order France to stop testing, and this placed the Court in a difficult position, for while it was no doubt the case that states did not have to accept nuclear fall-out, it was also true that there was no general rule against nuclear testing – and even if there had been a general rule, it was by no means certain that it would be binding on France.

Fortunately, several French government officials (including the president and members of the government) had made public declarations to the effect that if things went well, testing could soon come to an end. Thus, the President's Office had issued the statement that 'in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed'.[51] And France's Foreign Minister had told the UN General Assembly that '[w]e have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year'.[52] The Court would come to interpret these statements as promises, as they seemed to indicate an intention to be bound on the part of France; France had thus promised to stop testing. Australia and New Zealand could thus rely on this promise, which effectively meant that the case no longer had an object.

The *Nuclear Tests* decision is vulnerable to strict legal criticism. Thus, one may well wonder, as some have done, whether unilateral statements are a recognized mode of law-making to begin with.[53] One may also wonder whether France actually intended to be bound: many of its statements were in conditional form ('if p, then q'), rather than strict promises ('we shall q'). And the Court conveniently ignored that in addition to an order to stop France's testing, the applicants had also requested the Court to declare that testing nuclear weapons was incompatible with applicable rules of international law – by deciding the way it did, the Court never got around to deciding on the general legal issue.

But, in all likelihood, that was precisely what the Court was after; it could not say anything on the basis of general law, as there was arguably no general law. A finding that nuclear testing was prohibited would lack proper legal foundation, and run the risk of being ignored by the major nuclear powers. Conversely, a finding that nuclear testing was perfectly legal would also lack a proper legal foundation,[54] and upset all non-nuclear powers. Hence, the best thing the Court could do was to make sure that the case would go away without upsetting anyone, and this it brilliantly achieved.

Other possible sources and the renewal of sources doctrine

The two major sources of international law, custom and treaty, both work on the assumption of regular, formalized contact between regular, formalized entities: states. In theory (often left implicit), the idea is that states act through formally designated organs and representatives, come to some form of agreement (either in writing or by means of their practices), and that their agreements should have legal effect. In such an idealized world, there would not be much need or much room for other sources. Moreover, such a model has the great benefit that it is nicely reconcilable with democratic theory;

after all, states act through governments, and governments can be controlled by parliaments and, ultimately, by the electorate. Thus, in theory, the making of international law could be subjected to democratic scrutiny, and it is surely no coincidence that in most democratic states the conclusion of treaties is subject to parliamentary approval – in particular if those treaties can come to be directly effective in the domestic legal orders.[55]Otherwise, after all, a piece of domestic law could with impunity be set aside by the government by means of concluding a contradictory treaty.

The world of global governance, however, no longer fits this stylized model – if it ever did. Many dealings between states take place in other ways, for instance on the level of individual governmental departments (the ministry of trade, the ministry of health), lower governmental authorities (provinces, cities) or agencies on different functional levels (central banks, water boards).[56] Moreover, it is also clear that much authority is exercised by entities that are not related to states; this applies to large companies, but equally to non-governmental entities that may have no formal authority but whose authority rests on their expertise on a given topic, or on the fact that they are known as principled actors who may command some form of respect.[57] The big challenge for international lawyers is to come to terms with the activities of such actors and, somehow, to decide when their work gives rise to international law, and when it does not. Clearly Greenpeace, Human Rights Watch, Transparency International, the One World Trust and similar actors exercise quite a bit of influence and set standards of desirable behaviour. Clearly, the Basel Committee exercises loads of influence on the financial sector, and sets standards as to desirable behaviour. And clearly, the practices of traders are of great influence in the commercial sector in the form of a so-called *lex mercatoria*, whether or not they are confirmed by states.

In addition, many intergovernmental organizations (from the UN and the World Bank to the African Union or the Inter American Tropical Tuna Commission) set standards concerning what, to their minds, constitutes desirable action. While many of the instruments arising from international organizations are formally non-binding recommendations, in some cases it is nevertheless possible for international organizations to take binding decisions and even to engage in law-making activities, depending on the powers that have been given to these organizations or have been appropriated by them.[58]

Governance, in short, no longer follows the classic modernist model but, in a useful phrase, has become 'network governance'.[59] How then to assess the products of these kinds of governance in legal terms? Many international lawyers have adopted the phrase 'soft law' to denominate normative utterances that do not neatly fit the listing of article 38 ICJ Statute, but the term 'soft law' is misleading and unhelpful. It is misleading to speak of soft law as this phrase suggests that law can come in varying degrees of 'bindingness'; as if a treaty, properly concluded between state representatives, were more binding than, say, standards developed by the Basel Committee. It is, moreover, unhelpful to refer to soft law, in that it still does not say anything about why some expressions come to be seen as law and therewith demand some kind of compliance (however soft perhaps), whereas others need not be so regarded.[60]

The heart of the problem is that international law lacks a proper criterion for distinguishing between law and non-law. Traditionally, following the statist model, this was hardly an issue; the only validity requirement that was needed was the consent of states, and this could be explicit (as with treaties) or tacit (with custom). But where political action, including governance, is no longer the sole prerogative of states and their duly authorized representatives, a different criterion of validity is required. Some have proposed a behavioural criterion:[61] normative statements are law when they are respected (when they have 'normative ripples') – but this lacks analytical rigour. After all, it is perfectly possible for a valid treaty provision to be ignored; surely, this cannot mean that the treaty provision is not law. Moreover, this would also entail that the law cannot be known in advance; one would have to see whether a rule was respected before it could be considered law, and this, ultimately,

would be difficult to reconcile with the requirements of the rule of law. After all, people should know what the law says before they act, and not have to wait to find out whether their behaviour will, ultimately, be found illegal.[62]

Others have suggested that the question of whether something is law or not is really not all that relevant, and perhaps even smacks of a 'politics of definition';[63] whoever gets to define law (and legal validity) puts himself in a position of authority. What matters, on this view, is not so much whether something is 'law', but whether transgressions of norms provoke some kind of community reaction. Again then the perspective becomes *ex post facto*. This may be useful for the social scientist looking to explain behaviour, but is less helpful to the lawyer, whose task is to facilitate, constrain and evaluate behaviour.

In this light, perhaps the better view (however 'legalistic' perhaps) is to propose a 'presumption of binding force'; normative utterances should be presumed to give rise to law, unless and until the opposite can somehow be proven.[64] Thus, banking rules adopted by the Basel Committee or fisheries standards set under auspices of the Inter American Tropical Tuna Commission should be considered as law, unless it can be demonstrated that no normative effects were intended, or that not all relevant stakeholders were involved in the process of setting the standards.

This presumptive thesis will have the benefit of being workable (in that one can hardly imagine a legal order working on the presumption that normative utterances have no legal significance unless otherwise proven) and of allowing for participation by the relevant actors, whether they are states or not. Additionally, and not unimportantly, it would seem that international courts have traditionally worked on the basis of this presumption, and continue to do so; they typically allow for commitments to be highly informal, and tend only to dismiss the legal force of instruments if those instruments are clearly not intended to give rise to rights or obligations. Thus, the Court of Justice of the European Union (CJEU) could dismiss a claim based on an agreement concluded between the EU's Commission and the US Department of Commerce and the United States Trade Representative on technical barriers to trade, since the agreement specified that the parties would implement it 'on a voluntary basis'. This then clearly rebuts the presumption that the agreement would give rise to rights and obligations, and the Court acted accordingly.[65] On the other hand, on this presumptive theory, the International Tribunal for the Law of the Sea (ITLOS) attached legally binding force to regulations adopted by the International Seabed Authority,[66] and likewise, a WTO panel had no problem accepting the binding force of standards developed under auspices of the Inter American Tropical Tuna Commission: these tribunals presumed these regulations and standards to have legal effect, and found no evidence to rebut that presumption.[67]

Final remarks

Legal systems need rules that help them identify which rules form part of that system, and which do not but might be useful social norms, ethical norms, or otherwise influence the behaviour of actors albeit without the imprimatur of law. Traditionally, international lawyers specified that this rule was the consent of states; anything states consented to, as law, would become recognized as a source of international law. It could hardly be otherwise in a system of sovereign states – one cannot hold states bound against their will.

Yet the old system is losing vitality in the wake of the emergence of actors other than states and with 'network governance' complementing traditional diplomatic intercourse. It is no coincidence that international lawyers have, since the 1960s or thereabouts, started to reconsider sources doctrine,

first to come to terms with the role of the UN General Assembly in world affairs,[68] and more recently to come to terms with the increasing number of possible instruments adopted and apparent authority and influence of actors other than states.[69] There is even a semantic shift; the term 'law-making' has come to replace the more traditional term 'sources doctrine', presumably because 'law-making' carries more dynamic and politically astute overtones.[70] 'Sources' suggest that the law springs from somewhere, in much the same way as a river may have its source in a mountain stream; 'law-making', on the other hand, evokes a less pastoral image, and is far more suggestive of law being man made and, possibly, coming in many different guises.

Be that as it may, sources doctrine cannot be done away with.[71] While the penumbra may be under discussion, at its core sources doctrine (or law-making) stands for the translation of political agreement between the relevant actors into legally enforceable rights and obligations. The next chapter will provide a closer look at what has arguably become the most relevant instrument through which international law is made: the treaty.

[1] See case of the *SS Lotus*, [1927] Publ. PCIJ, Series A, no. 10.
[2] A fine study of the contribution of the PCIJ to the formation of the international legal order is Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005).
[3] See *SS Lotus*, at 18.
[4] Ibid.
[5] The ICJ referred to this in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, [1951] ICJ Reports 15, at 23, suggesting that the principles underlying the Genocide Convention 'are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.
[6] Obviously, a vehicle is not territory; a German car driving in the Netherlands is not a piece of German territory in the Netherlands.
[7] See article 1(1) of the 1958 Geneva Convention on the High Seas (450 UNTS 11), confirmed in article 97 United Nations Convention on the Law of the Sea (UNCLOS).
[8] See Max Huber, *Die soziologischen Grundlagen des Völkerrechts* (Berlin: Rothschild, 1928 [1910]).
[9] See the *SS Wimbledon*, [1923] Publ. PCIJ, Series A, no. 1.
[10] Ibid., at 25. For further discussion, see Jan Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux' (1998) 3 *Austrian Review of International and European Law*, 345–67.
[11] This will be further discussed in the next chapter.
[12] Article 59 ICJ Statute provides, in turn, that decisions of the Court are only binding on the parties to the dispute.
[13] See *Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua* v. *USA*), merits, [1986] ICJ Reports 14, para. 176.
[14] See A. D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961).
[15] On the distinction, see Sir Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in F. M. van Asbeck *et al*. (eds.), *Symbolae Verzijl* (The Hague: Martinus Nijhoff, 1958), 153–76.
[16] See sole arbitrator Réné-Jean Dupuy, in *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *Libya*, merits, reproduced in 53 *International Law Reports*, 420.
[17] See David J. Bederman, *Custom as a Source of Law* (Cambridge University Press, 2010).
[18] See generally Anthony A. d'Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971).
[19] See *Asylum case* (Colombia/Peru), [1950] ICJ Reports 266, esp. at 276–7. The Court accepted the possible existence of regional custom, but held that Colombia had failed to demonstrate the existence of the specific customary rule it relied on.

[20] See *case concerning Right of Passage over Indian Territory* (*Portugal* v. *India*), [1960] ICJ Reports 6, at 44, where 'the Court finds a practice clearly established between two States which was accepted by the parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations'. One author even opines that custom as such does not exist in international law, but that all instances of custom are, in fact, recognitions of historic rights. See Ingrid Detter de Lupis, *The Concept of International Law*(Stockholm: Norstedts, 1987), at 115–16.
[21] See Emer de Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, 2008, T. Nugent trans., first published 1758), at 77.
[22] See *North Sea Continental Shelf Cases* (Germany/Denmark; Germany/Netherlands), [1969] ICJ Reports 3, para. 73.
[23] See Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" Customary International Law?', reproduced in Bin Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens & Sons, 1982), 237–62.
[24] The passage just quoted from the *North Sea* cases continues 'provided it [the practice] included that of States whose interests were specially affected'. See *North Sea Continental Shelf* cases, para. 73.
[25] See Charles de Visscher, *Theory and Reality in International Law*, rev. edn (Princeton University Press, 1968, P. Corbett trans.), at 155.
[26] On speech act theory, see J. L. Austin, *How to Do Things With Words*, 2nd edn (Oxford University Press, 1975); John R. Searle, *Speech Acts* (Cambridge University Press, 1969).
[27] See *the Paquete Habana*, 175 US 677, US Supreme Court, 8 January 1900. Another interesting aspect, to be discussed in Chapter 16 below, is that international law was deemed to be part of US law, and thus had to be applied by the Supreme Court.
[28] See *Fisheries* case (*United Kingdom* v. *Norway*), [1951] ICJ Reports 116.
[29] This will be further discussed in Chapter 13 below.
[30] See *Fisheries case*, at 139.
[31] Having said that, the doctrine is only rarely invoked, which either suggests that many states do not follow all developments very closely or that they tend to agree by and large on new practices crystallizing into customary international law. See Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *British Yearbook of International Law*, 1–24.
[32] See Nicaragua.
[33] To be discussed below, in Chapter 8, 152.
[34] See *Nicaragua*, para. 186.
[35] See J. G. Merrills, *Anatomy of International Law* (London: Sweet and Maxwell, 1976), at 8.
[36] For an attempt to reconcile the two approaches, see Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law*, 757–91.
[37] See further Chapter 13 below.
[38] The text of the Truman Proclamation is available at the American Presidency Project of the University of California at Santa Barbara, at www.presidency.ucsb.edu/ws/index.php?pid=12332 (visited 20 August 2010).
[39] In fact, the UK had already concluded a treaty on behalf of Trinidad with Venezuela to much the same effect in 1942. See R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd edn (Manchester University Press, 1999), at 142–3.
[40] See *Petroleum Development Ltd* v. *Sheikh of Abu Dhabi*, award by Lord Asquith of Bishopstone, September 1951, in 18 *International Law Reports*, 144, at 154.
[41] Ibid., at 155.
[42] See *North Sea Continental Shelf* cases, para. 19.
[43] Among the most extreme is Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview, 1998). More sensibly, the great philosopher John Rawls has claimed that a distinction

between liberal and illiberal can be made, but that the latter should not be excluded. See John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).
[44] This owes much to Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978).
[45] On gaps, see Ulrich Fastenrath, *Lücken im Völkerrecht* (Berlin: Duncker & Humblot, 1990).
[46] Still the leading study is Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006 [1953]).
[47] Among the more sophisticated examples to date is Olivier de Schutter, 'Human Rights and the Rise of International Organisation: The Logic of Sliding Scales in the Law of International Responsibility', in Jan Wouters *et al.* (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010), 51–128.
[48] See *Legal Status of Eastern Greenland*, [1933] Publ. PCIJ, Series A/B, no. 53.
[49] The leading study is by Eric Suy, *Les actes unilateraux en droit international public* (Paris: LGDJ, 1962).
[50] There were two of these, almost identical: see *Nuclear Tests* (*Australia* v. *France*), (1974) ICJ Reports 253, and *Nuclear Tests* (*New Zealand* v. *France*), (1974) ICJ Reports 457.
[51] See *Nuclear Tests* (Australia), para. 34.
[52] Ibid., para. 39.
[53] See Alfred P. Rubin, 'The International Legal Effect of Unilateral Declarations' (1977) 71 *American Journal of International Law*, 1–30.
[54] Except perhaps by reliance on the *Lotus* doctrine; what is not prohibited (i.e. nuclear testing) is therefore permitted. Surely though, this would be an unsatisfactory foundation for a judgment on such a politically sensitive matter, and it may also be contended that precisely in the law of armed conflict, the presumption is reversed, due to the so-called De Martens clause (this will be discussed in Chapter 11below).
[55] This will be further discussed in Chapter 16 below.
[56] The leading study is Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).
[57] A useful framework is developed by political scientists Deborah D. Avant, Martha Finnemore and Susan K. Sell (eds.), *Who Governs the Globe?* (Cambridge University Press, 2010).
[58] Thus, it is generally accepted that the EU can make law in the form of regulations, and that the UN Security Council can take binding administrative decisions. Whether the latter can also 'legislate' is debated, and debatable.
[59] For a useful analytical discussion on these two models, see Maarten A. Hajer, *Authoritative Governance: Policy-making in the Age of Mediatization* (Oxford University Press, 2009).
[60] See generally Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law*, 167–82.
[61] A monumental recent attempt is José E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005).
[62] One influential formulation of the rule of law (without using the term) is Lon L. Fuller, *The Morality of Law*, rev. edn (New Haven, CT: Yale University Press, 1969).
[63] See Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd edn (London: Butterworths, 2002), at 91. Similarly, Anderson dismisses the quest for a validity requirement as 'liberal legalism'. See Gavin Anderson, *Constitutional Rights after Globalization* (Oxford: Hart, 2005), esp. at 40–4.
[64] See, in far greater detail, Jan Klabbers, 'Law-making and Constitutionalism', in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009), 81–124.
[65] See Case C-233/02, *France* v. *Commission*, [2004] ECR I-2759. For further discussion and examples, see Jan Klabbers, 'International Courts and Informal International Law', in Joost

Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012), 219–40.

[66] See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, advisory opinion, ITLOS, 1 February 2011.

[67] See *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO, DS381, panel report circulated 15 September 2011.

[68] See e.g. Jorge Castaneda, *Legal Effects of United Nations Resolutions* (New York: Columbia University Press, 1969).

[69] See G. J. H van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983).

[70] See G. M. Danilenko, *Law-making in the International Community* (Dordrecht: Martinus Nijhoff, 1994); Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007).

[71] And, arguably, positivist approaches are experiencing something of a resurgence. See e.g. Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2011), and Jörg Kammerhofer, *Uncertainty in International Law* (London: Routledge, 2011).