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Sources

Ascertainment of the law on any given point in domestic legal orders is not usually too difficult a process.[1] In the English legal system, for example, one looks to see whether the matter is covered by an Act of Parliament and, if it is, the law reports are consulted as to how it has been interpreted by the courts. If the particular point is not specifically referred to in a statute, court cases will be examined to elicit the required information. In other words, there is a definite method of discovering what the law is. In addition to verifying the contents of the rules, this method also demonstrates how the law is created, namely, by parliamentary legislation or judicial case-law. This gives a degree of certainty to the legal process because one is able to tell when a proposition has become law and the

[1] See generally C. Parry, *The Sources and Evidences of International Law*, Cambridge, 1965; M. Sørensen, *Les Sources de Droit International*, Paris, 1946; V. D. Degan, *Sources of International Law*, The Hague, 1997; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 22; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, chapter 1; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 111; A. Boyle and C. Chinkin, *The Making of International Law*, Oxford, 2007; G. M. Danilenko, *Law-Making in the International Community*, The Hague, 1993; G. I. Tunkin, *Theory of International Law*, London, 1974, pp. 89–203; J. W. Verzijl, *International Law in Historical Perspective*, Leiden, 1968, vol. I, p. 1; H. Lauterpacht, *International Law: Collected Papers*, Cambridge, 1970, vol. I, p. 58; *Change and Stability in International Law-Making* (eds. A. Cassese and J. Weiler), Leiden, 1988; A. Bos, *A Methodology of International Law*, Amsterdam, 1984; A. Cassese, *International Law*, 2nd edn, Oxford, 2005, chapters 8–10; A. Pellet, 'Article 38' in *The Statute of the International Court of Justice: A Commentary* (eds. A. Zimmermann, C. Tomuschat and K. Oellers-Frahm), Oxford, 2006, p. 677; M. Virally, 'The Sources of International Law' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 116; C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 HR, 1993, p. 195; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 HR, 1994, p. 219; M. Mendelson, 'The International Court of Justice and the Sources of International Law' in *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 63; G. Abi-Saab, 'Les Sources du Droit International – Un Essai de Déconstruction' in *Le Droit International dans un Monde en Mutation*, Montevideo, 1994, p. 29, and O. Schachter, 'Recent Trends in International Law-Making', 12 Australian YIL, 1992.

necessary mechanism to resolve any disputes about the law is evident. It reflects the hierarchical character of a national legal order with its gradations of authority imparting to the law a large measure of stability and predictability.

The contrast is very striking when one considers the situation in international law. The lack of a legislature, executive and structure of courts within international law has been noted and the effects of this will become clearer as one proceeds. There is no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law. One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule. This perplexity is reinforced because of the anarchic nature of world affairs and the clash of competing sovereignties. Nevertheless, international law does exist and is ascertainable. There are 'sources' available from which the rules may be extracted and analysed.

By 'sources' one means those provisions operating within the legal system on a technical level, and such ultimate sources as reason or morality are excluded, as are more functional sources such as libraries and journals. What is intended is a survey of the process whereby rules of international law emerge.[2]

Article 38(1) of the Statute of the International Court of Justice is widely recognised as the most authoritative and complete statement as to the sources of international law.[3] It provides that:

> 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 recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised 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.

Although this formulation is technically limited to the sources of international law which the International Court must apply, in fact since

[2] See also, e.g., M. S. McDougal and W. M. Reisman, 'The Prescribing Function: How International Law is Made', 6 *Yale Studies in World Public Order*, 1980, p. 249.

[3] See e.g. Brownlie, *Principles*, p. 5; *Oppenheim's International Law*, p. 24, and M. O. Hudson, *The Permanent Court of International Justice*, New York, 1934, pp. 601 ff.

the function of the Court is to decide disputes submitted to it 'in accordance with international law' and since all member states of the United Nations are *ipso facto* parties to the Statute by virtue of article 93 of the United Nations Charter (states that are non-members of the UN can specifically become parties to the Statute of the Court: Switzerland was the most obvious example of this until it joined the UN in 2002), there is no serious contention that the provision expresses the universal perception as to the enumeration of sources of international law.

Some writers have sought to categorise the distinctions in this provision, so that international conventions, custom and the general principles of law are described as the three exclusive law-creating processes while judicial decisions and academic writings are regarded as law-determining agencies, dealing with the verification of alleged rules.[4] But in reality it is not always possible to make hard and fast divisions. The different functions overlap to a great extent so that in many cases treaties (or conventions) merely reiterate accepted rules of customary law, and judgments of the International Court of Justice may actually create law in the same way that municipal judges formulate new law in the process of interpreting existing law.[5]

A distinction has sometimes been made between formal and material sources.[6] The former, it is claimed, confer upon the rules an obligatory character, while the latter comprise the actual content of the rules. Thus the formal sources appear to embody the constitutional mechanism for identifying law while the material sources incorporate the essence or subject-matter of the regulations. This division has been criticised particularly in view of the peculiar constitutional set-up of international law, and it tends to distract attention from some of the more important problems by its attempt to establish a clear separation of substantive and procedural elements, something difficult to maintain in international law.

[4] See e.g. G. Schwarzenberger, *International Law*, 3rd edn, London, 1957, vol. I, pp. 26–7.

[5] There are a number of examples of this: see below, chapter 4, p. 138.

[6] See e.g. Brownlie, *Principles*, p. 1. See also Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 111–12, where it is noted that 'les sources *formelles* du droit sont les *procédés* d'élaboration du droit, les diverses techniques qui autorisent à considérer qu'une règle appartient au droit positif. Les sources *matérielles* constituent les fondements sociologiques des normes internationales, leur base politique, morale ou économique plus ou moins explicitée par la doctrine ou les sujets du droit', and Pellet, 'Article 38' p. 714.

Custom[7]

Introduction

In any primitive society certain rules of behaviour emerge and prescribe what is permitted and what is not. Such rules develop almost subconsciously within the group and are maintained by the members of the group by social pressures and with the aid of various other more tangible implements. They are not, at least in the early stages, written down or codified, and survive ultimately because of what can be called an aura of historical legitimacy.[8] As the community develops it will modernise its

[7] See generally, A. D'Amato, *The Concept of Custom in International Law*, Cornell, 1971; M. Akehurst, 'Custom as a Source of International Law', 47 BYIL, 1974–5, p. 1; M. Mendelson, 'The Formation of Customary International Law', 272 HR, 1999, p. 159; B. Cheng, 'Custom: The Future of General State Practice in a Divided World' in *The Structure and Process of International Law* (eds. R. St J. Macdonald and D. Johnston), Dordrecht, 1983, p. 513; A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 AJIL, 2001, p. 757; H. Thirlway, *International Customary Law and Codification*, Leiden, 1972; *Sources of State Practice in International Law* (eds. R. Gaebler and M. Smolka-Day), Ardley, 2002; K. Wolfke, *Custom in Present International Law*, 2nd edn, Dordrecht, 1993, and Wolfke, 'Some Persistent Controversies Regarding Customary International Law', Netherlands YIL, 1993, p. 1; L. Kopelmanas, 'Custom as a Means of the Creation of International Law', 18 BYIL, 1937, p. 127; H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge, 1958, pp. 368–93; J. Kunz, 'The Nature of Customary International Law', 47 AJIL, 1953, p. 662; R. J. Dupuy, 'Coutume Sage et Coutume Sauvage', *Mélanges Rousseau*, Paris, 1974, p. 75; B. Stern, 'La Coutume au Coeur du Droit International', *Mélanges Reuter*, Paris, 1981, p. 479; R. Y. Jennings, 'Law-Making and Package Deal', *Mélanges Reuter*, p. 347; G. Danilenko, 'The Theory of International Customary Law', 31 German YIL, 1988, p. 9; Barberis, 'Réfléxions sur la Coutume Internationale', AFDI, 1990, p. 9; L. Condorelli, 'Custom' in *International Law: Achievements and Perspectives* (ed. M. Bedjaoui), Paris, 1991, p. 206; M. Byers, 'Custom, Power and the Power of Rules', 17 *Michigan Journal of International Law*, 1995, p. 109; H. Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–89 (Part Two)', 61 BYIL, 1990, pp. 3, 31, and Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–89: Supplement, 2005: Parts One and Two', 76 BYIL, 2006, pp. 1, 92; J. Kammerhofer, 'The Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 EJIL, 2004, p. 523; P. M. Dupuy, 'Théorie des Sources et Coutume en Droit International Contemporain' in *Le Droit International dans un Monde en Mutation*, p. 51; D. P. Fidler, 'Challenging the Classic Conception of Custom', German YIL, 1997, p. 198; R. Müllerson, 'On the Nature and Scope of Customary International Law', *Austrian Review of International and European Law*, 1998, p. 1; M. Byers, *Custom, Power and the Power of Rules*, Cambridge, 1999, and A. Carty, *The Decay of International Law?*, Manchester, 1986, chapter 3. See also the 'Statement of Principles Applicable to the Formation of General Customary International Law' in *Report of the Sixty-Ninth Conference*, International Law Association, London, 2000, p. 713.

[8] See e.g. R. Unger, *Law in Modern Society*, London, 1976, who notes that customary law can be regarded as 'any recurring mode of interaction among individuals and groups,

code of behaviour by the creation of legal machinery, such as courts and legislature. Custom, for this is how the original process can be described, remains and may also continue to evolve.[9] It is regarded as an authentic expression of the needs and values of the community at any given time.

Custom within contemporary legal systems, particularly in the developed world, is relatively cumbersome and unimportant and often of only nostalgic value.[10] In international law on the other hand it is a dynamic source of law in the light of the nature of the international system and its lack of centralised government organs.

The existence of customary rules can be deduced from the practice and behaviour of states and this is where the problems begin. How can one tell when a particular line of action adopted by a state reflects a legal rule or is merely prompted by, for example, courtesy? Indeed, how can one discover what precisely a state is doing or why, since there is no living 'state' but rather thousands of officials in scores of departments exercising governmental functions? Other issues concern the speed of creation of new rules and the effect of protests.

There are disagreements as to the value of a customary system in international law. Some writers deny that custom can be significant today as a source of law, noting that it is too clumsy and slow-moving to accommodate the evolution of international law any more,[11] while others declare that it is a dynamic process of law creation and more important than treaties since it is of universal application.[12] Another view recognises that custom is of value since it is activated by spontaneous behaviour and thus mirrors the contemporary concerns of society. However, since international law now has to contend with a massive increase in the pace and variety of state activities as well as having to come to terms with many different cultural and political traditions, the role of custom is perceived to be much diminished.[13]

together with the more or less explicit acknowledgement by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied', p. 49. See also R. Dias, *Jurisprudence*, 5th edn, London, 1985, chapter 9, and H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

9 See e.g. D. Lloyd, *Introduction to Jurisprudence*, 4th edn, London, 1979, p. 649, and H. Maine, *Ancient Law*, London, 1861.

10 See e.g. Dias, *Jurisprudence*.

11 See e.g. W. Friedmann, *The Changing Structure of International Law*, New York, 1964, pp. 121–3. See also I. De Lupis, *The Concept of International Law*, Aldershot, 1987, pp. 112–16.

12 E.g. D'Amato, *Concept of Custom*, p. 12.

13 C. De Visscher, *Theory and Reality in Public International Law*, 3rd edn, Princeton, 1960, pp. 161–2.

There are elements of truth in each of these approaches. Amidst a wide variety of conflicting behaviour, it is not easy to isolate the emergence of a new rule of customary law and there are immense problems involved in collating all the necessary information. It is not always the best instrument available for the regulation of complex issues that arise in world affairs, but in particular situations it may meet the contingencies of modern life. As will be seen, it is possible to point to something called 'instant' customary law in certain circumstances that can prescribe valid rules without having to undergo a long period of gestation, and custom can and often does dovetail neatly within the complicated mechanisms now operating for the identification and progressive development of the principles of international law.

More than that, custom does mirror the characteristics of the decentralised international system. It is democratic in that all states may share in the formulation of new rules, though the precept that some are more equal than others in this process is not without its grain of truth. If the international community is unhappy with a particular law it can be changed relatively quickly without the necessity of convening and successfully completing a world conference. It reflects the consensus approach to decision-making with the ability of the majority to create new law binding upon all, while the very participation of states encourages their compliance with customary rules. Its imprecision means flexibility as well as ambiguity. Indeed, the creation of the concept of the exclusive economic zone in the law of the sea may be cited as an example of this process. This is discussed further in chapter 11. The essence of custom according to article 38 is that it should constitute 'evidence of a general practice accepted as law'. Thus, it is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is 'law'. As the International Court noted in the *Libya/Malta* case, the substance of customary law must be 'looked for primarily in the actual practice and *opinio juris* of states'.[14]

It is understandable why the first requirement is mentioned, since customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do. It is the psychological factor (*opinio juris*) that needs some explanation. If one left the definition of custom as state practice then one would be faced with the

[14] ICJ Reports, 1985, pp. 13, 29; 81 ILR, p. 239. See also the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 253; 110 ILR, p. 163.

problem of how to separate international law from principles of morality or social usage. This is because states do not restrict their behaviour to what is legally required. They may pursue a line of conduct purely through a feeling of goodwill and in the hope of reciprocal benefits. States do not have to allow tourists in or launch satellites. There is no law imposing upon them the strict duty to distribute economic aid to developing nations. The bare fact that such things are done does not mean that they have to be done.

The issue therefore is how to distinguish behaviour undertaken because of a law from behaviour undertaken because of a whole series of other reasons ranging from goodwill to pique, and from ideological support to political bribery. And if customary law is restricted to the overt acts of states, one cannot solve this problem.

Accordingly, the second element in the definition of custom has been elaborated. This is the psychological factor, the belief by a state that behaved in a certain way that it was under a legal obligation to act that way. It is known in legal terminology as *opinio juris sive necessitatis* and was first formulated by the French writer François Gény as an attempt to differentiate legal custom from mere social usage.[15]

However, the relative importance of the two factors, the overt action and the subjective conviction, is disputed by various writers.[16] Positivists, with their emphasis upon state sovereignty, stress the paramount importance of the psychological element. States are only bound by what they have consented to, so therefore the material element is minimised to the greater value of *opinio juris*. If states believe that a course of action is legal and perform it, even if only once, then it is to be inferred that they have tacitly consented to the rule involved. Following on from this line of analysis, various positivist thinkers have tended to minimise many of the requirements of the overt manifestation, for example, with regard to repetition and duration.[17] Other writers have taken precisely the opposite line and maintain that *opinio juris* is impossible to prove and therefore

[15] *Méthode d'Interprétation et Sources en Droit Privé Positif*, 1899, para. 110.

[16] See e.g. R. Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law' in *International Law – Theory and Practice* (ed. K. Wellens), The Hague, 1998, p. 161.

[17] See e.g. D. Anzilotti, *Corso di Diritto Internazionale*, 3rd edn, 1928, pp. 73–6; K. Strupp, 'Les Règles Générales du Droit International de la Paix', 47 HR, 1934, p. 263; Tunkin, *Theory of International Law*, pp. 113–33, and 'Remarks on the Juridical Nature of Customary Norms of International Law', 49 *California Law Review*, 1961, pp. 419–21, and B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian Journal of International Law*, 1965, p. 23.

of no tremendous consequence. Kelsen, for one, has written that it is the courts that have the discretion to decide whether any set of usages is such as to create a custom and that the subjective perception of the particular state or states is not called upon to give the final verdict as to its legality or not.[18]

The material fact

The actual practice engaged in by states constitutes the initial factor to be brought into account. There are a number of points to be considered concerning the nature of a particular practice by states, including its duration, consistency, repetition and generality. As far as the duration is concerned, most countries specify a recognised time-scale for the acceptance of a practice as a customary rule within their municipal systems. This can vary from 'time immemorial' in the English common law dating back to 1189, to figures from thirty or forty years on the Continent.

In international law there is no rigid time element and it will depend upon the circumstances of the case and the nature of the usage in question. In certain fields, such as air and space law, the rules have developed quickly; in others, the process is much slower. Duration is thus not the most important of the components of state practice.[19] The essence of custom is to be sought elsewhere.

The basic rule as regards continuity and repetition was laid down in the *Asylum* case decided by the International Court of Justice (ICJ) in 1950.[20] The Court declared that a customary rule must be 'in accordance with a constant and uniform usage practised by the States in question'.[21] The case concerned Haya de la Torre, a Peruvian, who was sought by his government after an unsuccessful revolt. He was granted asylum by Colombia in its embassy in Lima, but Peru refused to issue a safe conduct to permit Torre to leave the country. Colombia brought the matter before

[18] 'Théorie du Droit International Coutumier', 1 *Revue International de la Théorie du Droit*, 1939, pp. 253, 264–6. See also P. Guggenheim, *Traité de Droit International Public*, Paris, 1953, pp. 46–8; T. Gihl, 'The Legal Character of Sources of International Law', 1 *Scandinavian Studies in Law*, 1957, pp. 53, 84, and *Oppenheim's International Law*, pp. 27–31.

[19] See D'Amato, *Concept of Custom*, pp. 56–8, and Akehurst, 'Custom as a Source', pp. 15–16. Judge Negulesco in an unfortunate phrase emphasised that custom required immemorial usage: *European Commission of the Danube*, PCIJ, Series B, No. 14, 1927, p. 105; 4 AD, p. 126. See also Brownlie, *Principles*, p. 7, and the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 43; 41 ILR, pp. 29, 72.

[20] ICJ Reports, 1950, p. 266; 17 ILR, p. 280.

[21] ICJ Reports, 1950, pp. 276–7; 17 ILR, p. 284.

the International Court of Justice and requested a decision recognising that it (Colombia) was competent to define Torre's offence, as to whether it was criminal as Peru maintained, or political, in which case asylum and a safe conduct could be allowed.

The Court, in characterising the nature of a customary rule, held that it had to constitute the expression of a right appertaining to one state (Colombia) and a duty incumbent upon another (Peru). However, the Court felt that in the *Asylum* litigation, state practices had been so uncertain and contradictory as not to amount to a 'constant and uniform usage' regarding the unilateral qualification of the offence in question.[22] The issue involved here dealt with a regional custom pertaining only to Latin America and it may be argued that the same approach need not necessarily be followed where a general custom is alleged and that in the latter instance a lower standard of proof would be upheld.[23]

The ICJ emphasised its view that some degree of uniformity amongst state practices was essential before a custom could come into existence in the *Anglo-Norwegian Fisheries* case.[24] The United Kingdom, in its arguments against the Norwegian method of measuring the breadth of the territorial sea, referred to an alleged rule of custom whereby a straight line may be drawn across bays of less than ten miles from one projection to the other, which could then be regarded as the baseline for the measurement of the territorial sea. The Court dismissed this by pointing out that the actual practice of states did not justify the creation of any such custom. In other words, there had been insufficient uniformity of behaviour.

In the *North Sea Continental Shelf* cases,[25] which involved a dispute between Germany on the one hand and Holland and Denmark on the other over the delimitation of the continental shelf, the ICJ remarked that state practice, 'including that of states whose interests are specially affected', had to be 'both extensive and virtually uniform in the sense of the provision invoked'. This was held to be indispensable to the formation of a new rule of customary international law.[26] However, the Court emphasised in the *Nicaragua* v. *United States* case[27] that it was not necessary that the

[22] *Ibid.* [23] See further below, p. 92.

[24] ICJ Reports, 1951, pp. 116, 131 and 138; 18 ILR, p. 86.

[25] ICJ Reports, 1969, p. 3; 41 ILR, p. 29.

[26] ICJ Reports, 1969, p. 43; 41 ILR, p. 72. Note that the Court was dealing with the creation of a custom on the basis of what had been purely a treaty rule. See Akehurst, 'Custom as a Source', p. 21, especially footnote 5. See also the *Paquete Habana* case, 175 US 677 (1900) and the *Lotus* case, PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

[27] ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

practice in question had to be 'in absolutely rigorous conformity' with the purported customary rule. The Court continued:

> 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.[28]

The threshold that needs to be attained before a legally binding custom can be created will depend both upon the nature of the alleged rule and the opposition it arouses. This partly relates to the problem of ambiguity where it is not possible to point to the alleged custom with any degree of clarity, as in the *Asylum* case where a variety of conflicting and contradictory evidence had been brought forward.

On the other hand, an unsubstantiated claim by a state cannot be accepted because it would amount to unilateral law-making and compromise a reasonably impartial system of international law. If a proposition meets with a great deal of opposition then it would be an undesirable fiction to ignore this and talk of an established rule. Another relevant factor is the strength of the prior rule which is purportedly overthrown.[29] For example, the customary law relating to a state's sovereignty over its airspace developed very quickly in the years immediately before and during the First World War. Similarly, the principle of non-sovereignty over the space route followed by artificial satellites came into being soon after the launching of the first sputniks. Bin Cheng has argued that in such circumstances repetition is not at all necessary provided the *opinio juris* could be clearly established. Thus, 'instant' customary law is possible.[30]

This contention that single acts may create custom has been criticised, particularly in view of the difficulties of proving customary rules any other way but through a series of usages.[31] Nevertheless, the conclusion must be that it is the international context which plays the vital part in the creation of custom. In a society constantly faced with new situations because of the dynamics of progress, there is a clear need for a reasonably speedy method of responding to such changes by a system of prompt rule-formation. In

[28] ICJ Reports, 1986, p. 98; 76 ILR, p. 432.

[29] See D'Amato, *Concept of Custom*, pp. 60–1, and Akehurst, 'Custom as a Source', p. 19. See also Judge Alvarez, the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 152; 18 ILR, pp. 86, 105, and Judge Loder, the *Lotus* case, PCIJ, Series A, No. 10, 1927, pp. 18, 34.

[30] Cheng, 'United Nations Resolutions'.

[31] See e.g. Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 325–6.

new areas of law, customs can be quickly established by state practices by virtue of the newness of the situations involved, the lack of contrary rules to be surmounted and the overwhelming necessity to preserve a sense of regulation in international relations.

One particular analogy that has been used to illustrate the general nature of customary law was considered by de Visscher. He likened the growth of custom to the gradual formation of a road across vacant land. After an initial uncertainty as to direction, the majority of users begin to follow the same line which becomes a single path. Not long elapses before that path is transformed into a road accepted as the only regular way, even though it is not possible to state at which precise moment this latter change occurs. And so it is with the formation of a custom. De Visscher develops this idea by reflecting that just as some make heavier footprints than others due to their greater weight, the more influential states of the world mark the way with more vigour and tend to become the guarantors and defenders of the way forward.[32]

The reasons why a particular state acts in a certain way are varied but are closely allied to how it perceives its interests. This in turn depends upon the power and role of the state and its international standing. Accordingly, custom should to some extent mirror the perceptions of the majority of states, since it is based upon usages which are practised by nations as they express their power and their hopes and fears. But it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.[33]

The influence of the United Kingdom, for example, on the development of the law of the sea and prize law in the nineteenth century when it was at the height of its power, was predominant. A number of propositions later accepted as part of international customary law appeared this way.

[32] De Visscher, *Theory and Reality*, p. 149. See also Lauterpacht, *Development of International Law*, p. 368; P. Cobbett, *Leading Cases on International Law*, 4th edn, London, 1922, p. 5, and Akehurst, 'Custom as a Source', pp. 22–3.

[33] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 42–3; 41 ILR, pp. 29, 71–3.

Among many instances of this, one can point to navigation procedures. Similarly, the impact of the Soviet Union (now Russia) and the United States on space law has been paramount.[34]

One can conclude by stating that for a custom to be accepted and recognised it must have the concurrence of the major powers in that particular field. A regulation regarding the breadth of the territorial sea is unlikely to be treated as law if the great maritime nations do not agree to or acquiesce in it, no matter how many landlocked states demand it. Other countries may propose ideas and institute pressure, but without the concurrence of those most interested, it cannot amount to a rule of customary law. This follows from the nature of the international system where all may participate but the views of those with greater power carry greater weight.

Accordingly, the duration and generality of a practice may take second place to the relative importance of the states precipitating the formation of a new customary rule in any given field. Universality is not required, but some correlation with power is. Some degree of continuity must be maintained but this again depends upon the context of operation and the nature of the usage.

Those elements reflect the external manifestations of a practice and establish that it is in existence and exhibited as such. That does not mean that it is law and this factor will be considered in the next subsection. But it does mean that all states who take the trouble can discover its existence. This factor of conspicuousness emphasises both the importance of the context within which the usage operates and the more significant elements of the overt act which affirms the existence of a custom.

The question is raised at this stage of how significant a failure to act is. Just how important is it when a state, or more particularly a major state, does not participate in a practice? Can it be construed as acquiescence in the performance of the usage? Or, on the other hand, does it denote indifference implying the inability of the practice to become a custom until a decision one way or the other has been made? Failures to act are in themselves just as much evidence of a state's attitudes as are actions. They similarly reflect the way in which a nation approaches its environment. Britain consistently fails to attack France, while Chad consistently fails to send a man to the moon. But does this mean that Britain recognises a

[34] See e.g. Cheng, 'United Nations Resolutions'; C. Christol, *The Modern International Law of Outer Space*, New York, 1982, and Christol, *Space Law: Past, Present and Future*, The Hague, 1991. See further below, chapter 10.

rule not to attack its neighbour and that Chad accepts a custom not to launch rockets to the moon? Of course, the answer is in the first instance yes, and in the second example no. Thus, a failure to act can arise from either a legal obligation not to act, or an incapacity or unwillingness in the particular circumstances to act. Indeed, it has been maintained that the continued habit of not taking actions in certain situations may lead to the formation of a legal rule.[35]

The danger of saying that a failure to act over a long period creates a negative custom, that is a rule actually not to do it, can be shown by remarking on the absurdity of the proposition that a continual failure to act until the late 1950s is evidence of a legal rule not to send artificial satellites or rockets into space. On the other hand, where a particular rule of behaviour is established it can be argued that abstention from protest by states may amount to agreement with that rule.

In the particular circumstances of the *Lotus* case[36] the Permanent Court of International Justice, the predecessor of the International Court of Justice, laid down a high standard by declaring that abstention could only give rise to the recognition of a custom if it was based on a conscious duty to abstain. In other words, states had actually to be aware that they were not acting a particular way because they were under a definite obligation not to act that way. The decision has been criticised and would appear to cover categories of non-acts based on legal obligations, but not to refer to instances where, by simply not acting as against a particular rule in existence, states are tacitly accepting the legality and relevance of that rule.

It should be mentioned, however, that acquiescence must be based upon full knowledge of the rule invoked. Where a failure to take a course of action is in some way connected or influenced or accompanied by a lack of knowledge of all the relevant circumstances, then it cannot be interpreted as acquiescence.

What is state practice?

Some of the ingredients of state activities have been surveyed and attempts made to place them in some kind of relevant context. But what is state practice? Does it cover every kind of behaviour initiated by the state, or

[35] See e.g. Tunkin, *Theory of International Law*, pp. 116–17. But cf. D'Amato, *Concept of Custom*, pp. 61–3 and 88–9.

[36] PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

is it limited to actual, positive actions? To put it more simply, does it include such things as speeches, informal documents and governmental statements or is it restricted to what states actually do?

It is how states behave in practice that forms the basis of customary law, but evidence of what a state does can be obtained from numerous sources. Obvious examples include administrative acts, legislation, decisions of courts and activities on the international stage, for example treaty-making.[37] A state is not a living entity, but consists of governmental departments and thousands of officials, and state activity is spread throughout a whole range of national organs. There are the state's legal officers, legislative institutions, courts, diplomatic agents and political leaders. Each of these engages in activity which relates to the international field and therefore one has to examine all such material sources and more in order to discover evidence of what states do.[38]

The obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse the many official publications. There are also memoirs of various past leaders, official manuals on legal questions, diplomatic interchanges and the opinions of national legal advisors. All these methods are valuable in seeking to determine actual state practice.

In addition, one may note resolutions in the General Assembly, comments made by governments on drafts produced by the International Law Commission, decisions of the international judicial institutions, decisions of national courts, treaties and the general practice of international organisations.[39]

[37] See e.g. Pellet, 'Article 38', p. 751, and *Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 23–4; 128 ILR, pp. 60, 78–80.

[38] See e.g. *Yearbook of the ILC*, 1950, vol. II, pp. 368–72, and the *Interhandel* case, ICJ Reports, 1959, p. 27. Note also Brierly's comment that not all contentions put forward on behalf of a state represent that state's settled or impartial opinion, *The Law of Nations*, 6th edn, Oxford, 1963, p. 60. See also Brownlie, *Principles*, p. 6, and Akehurst, 'Custom as a Source', p. 2.

[39] The United States has produced an extensive series of publications covering its practice in international law. See the Digests of International Law produced by Wharton (1887), Moore (1906) and Whiteman (1963–70). From 1973 to 1980 an annual *Digest of US Practice in International Law* has been produced, while three composite volumes covering the years 1981–8 have appeared. The series resumed with effect from the year 2000. See also H. A. Smith, *Great Britain and the Law of Nations*, London, 2 vols., 1932–5; A. D. McNair, *International Law Opinions*, Cambridge, 3 vols., 1956; C. Parry, *British Digest of International Law*, London, 1965, and E. Lauterpacht, *British Practice in International Law*, London, 1963–7. Several yearbooks now produce sections devoted to national practice, e.g. *British Yearbook of International Law* and *Annuaire Français de Droit International.*

International organisations in fact may be instrumental in the creation of customary law. For example, the Advisory Opinion of the International Court of Justice declaring that the United Nations possessed international personality was partly based on the actual behaviour of the UN.[40] The International Law Commission has pointed out that 'records of the cumulative practice of international organisations may be regarded as evidence of customary international law with reference to states' relations to the organisations'.[41] The International Court has also noted that evidence of the existence of rules and principles may be found in resolutions adopted by the General Assembly and the Security Council of the United Nations.[42]

States' municipal laws may in certain circumstances form the basis of customary rules. In the *Scotia* case decided by the US Supreme Court in 1871,[43] a British ship had sunk an American vessel on the high seas. The Court held that British navigational procedures established by an Act of Parliament formed the basis of the relevant international custom since other states had legislated in virtually identical terms. Accordingly, the American vessel, in not displaying the correct lights, was at fault. The view has also been expressed that mere claims as distinct from actual physical acts cannot constitute state practice. This is based on the precept that 'until it [a state] takes enforcement action, the claim has little value as a prediction of what the state will actually do'.[44] But as has been demonstrated this is decidedly a minority view.[45] Claims and conventions of states in various contexts have been adduced as evidence of state practice and it is logical that this should be so,[46] though the weight to be attached to such claims, may, of course, vary according to the circumstances. This

[40] The *Reparation* case, ICJ Reports, 1949, p. 174; 16 AD, p. 318. See also the *Reservations to the Genocide Convention* case, ICJ Reports, 1951, pp. 15, 25; 18 ILR, p. 364.

[41] *Yearbook of the ILC*, 1950, vol. II, pp. 368–72. See also Akehurst, 'Custom as a Source', p. 12.

[42] See the Court's advisory opinion in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 171; 129 ILR, pp. 37, 89–90.

[43] 14 Wallace 170 (1871). See also the *Nottebohm* case, ICJ Reports, 1955, pp. 4, 22; 22 ILR, p. 349, and the *Paquete Habana* case, 175 US 677 (1900).

[44] D'Amato, *Concept of Custom*, pp. 88 and 50–1. See also Judge Read (dissenting), the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 191; 18 ILR, pp. 86, 132.

[45] Akehurst, 'Custom as a Source', pp. 2–3. See also Thirlway, *International Customary Law*, p. 58.

[46] E.g. the *Asylum* case, ICJ Reports, 1950, pp. 266, 277; 17 ILR, p. 280; the *Rights of US Nationals in Morocco* case, ICJ Reports, 1952, pp. 176, 200, 209; 19 ILR, p. 255, and the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 32–3, 47 and 53; 41 ILR, p. 29. See also the *Fisheries Jurisdiction* cases, ICJ Reports, 1974, pp. 3, 47, 56–8, 81–8, 119–20, 135 and 161; 55 ILR, p. 238.

approach is clearly the correct one since the process of claims and counter-claims is one recognised method by which states communicate to each other their perceptions of the status of international rules and norms. In this sense they operate in the same way as physical acts. Whether *in abstracto* or with regard to a particular situation, they constitute the raw material out of which may be fashioned rules of international law.[47] It is suggested that the formulation that 'state practice covers any act or statements by a state from which views about customary law may be inferred',[48] is substantially correct. However, it should be noted that not all elements of practice are equal in their weight and the value to be given to state conduct will depend upon its nature and provenance.

Opinio juris[49]

Once one has established the existence of a specified usage, it becomes necessary to consider how the state views its own behaviour. Is it to be regarded as a moral or political or legal act or statement? The *opinio juris*, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certain way because they are convinced it is binding upon them to do so.

The Permanent Court of International Justice expressed this point of view when it dealt with the *Lotus* case.[50] The issue at hand concerned a collision on the high seas (where international law applies) between the *Lotus*, a French ship, and the *Boz-Kourt*, a Turkish ship. Several people aboard the latter ship were drowned and Turkey alleged negligence by the French officer of the watch. When the *Lotus* reached Istanbul, the French officer was arrested on a charge of manslaughter and the case turned on whether Turkey had jurisdiction to try him. Among the various

[47] But see Thirlway, *International Customary Law*, pp. 58–9.

[48] Akehurst, 'Custom as a Source', p. 10. This would also include omissions and silence by states: *ibid.*

[49] *Ibid.*, pp. 31–42, and D'Amato, *Concept of Custom*, pp. 66–72. See also Pellet, 'Article 38', p. 753; Mendelson, 'Formation', p. 245; Bos, *Methodology*, pp. 236 ff.; P. Haggenmacher, 'Des Deux Éléments du Droit Coutumier dans la Pratique de la Cour Internationale', 91 *Revue Générale de Droit International Public*, 1985, p. 5; O. Elias, 'The Nature of the Subjective Element in Customary International Law', 44 ICLQ, 1995, p. 501; I. M. Lobo de Souza, 'The Role of State Consent in the Customary Process', 44 ICLQ, 1995, p. 521, and B. Cheng, '*Opinio Juris:* A Key Concept in International Law that is Much Misunderstood' in *International Law in the Post-Cold War World* (eds. S. Yee and W. Tieya), London, 2001, p. 56.

[50] PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

arguments adduced, the French maintained that there existed a rule of customary law to the effect that the flag state of the accused (France) had exclusive jurisdiction in such cases and that accordingly the national state of the victim (Turkey) was barred from trying him. To justify this, France referred to the absence of previous criminal prosecutions by such states in similar situations and from this deduced tacit consent in the practice which therefore became a legal custom.

The Court rejected this and declared that even if such a practice of abstention from instituting criminal proceedings could be proved in fact, it would not amount to a custom. It held that 'only if such abstention were based on their [the states] being conscious of a duty to abstain would it be possible to speak of an international custom'.[51] Thus the essential ingredient of obligation was lacking and the practice remained a practice, nothing more.

A similar approach occurred in the *North Sea Continental Shelf* cases.[52] In the general process of delimiting the continental shelf of the North Sea in pursuance of oil and gas exploration, lines were drawn dividing the whole area into national spheres. However, West Germany could not agree with either Holland or Denmark over the respective boundary lines and the matter came before the International Court of Justice.

Article 6 of the Geneva Convention on the Continental Shelf of 1958 provided that where agreement could not be reached, and unless special circumstances justified a different approach, the boundary line was to be determined in accordance with the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured. This would mean a series of lines drawn at the point where Germany met Holland on the one side and Denmark on the other and projected outwards into the North Sea. However, because Germany's coastline is concave, such equidistant lines would converge and enclose a relatively small triangle of the North Sea. The Federal Republic had signed but not ratified the 1958 Geneva Convention and was therefore not bound by its terms. The question thus was whether a case could be made out that the 'equidistance–special circumstances principle' had been absorbed into customary law and was accordingly binding upon Germany.

The Court concluded in the negative and held that the provision in the Geneva Convention did not reflect an already existing custom. It was

[51] PCIJ, Series A, No. 10, 1927, p. 28; 4 AD, p. 159.
[52] ICJ Reports, 1969, p. 3; 41 ILR, p. 29.

emphasised that when the International Law Commission had considered this point in the draft treaty which formed the basis of discussion at Geneva, the principle of equidistance had been proposed with considerable hesitation, somewhat on an experimental basis and not at all as an emerging rule of customary international law.[53] The issue then turned on whether practice subsequent to the Convention had created a customary rule. The Court answered in the negative and declared that although time was not of itself a decisive factor (only three years had elapsed before the proceedings were brought):

> 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.[54]

This approach was maintained by the Court in the *Nicaragua* case[55] and express reference was made to the *North Sea Continental Shelf* cases. The Court noted that:

> 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*.'[56]

It is thus clear that the Court has adopted and maintained a high threshold with regard to the overt proving of the subjective constituent of customary law formation.

The great problem connected with the *opinio juris* is that if it calls for behaviour in accordance with law, how can new customary rules be created since that obviously requires action different from or

[53] ICJ Reports, 1969, pp. 32–41.
[54] *Ibid.*, p. 43. See also e.g. the *Asylum* case, ICJ Reports, 1950, pp. 266, 277; 17 ILR, p. 280, and the *Right of Passage* case, ICJ Reports, 1960, pp. 6, 42–3; 31 ILR, pp. 23, 55.
[55] ICJ Reports, 1986, p. 14; 76 ILR, p. 349.
[56] ICJ Reports, 1986, pp. 108–9; 76 ILR, pp. 442–3, citing ICJ Reports, 1969, p. 44; 41 ILR, p. 73.

contrary to what until then is regarded as law? If a country claims a three-mile territorial sea in the belief that this is legal, how can the rule be changed in customary law to allow claims of, for example, twelve miles, since that cannot also be in accordance with prevailing law?[57] Obviously if one takes a restricted view of the psychological aspects, then logically the law will become stultified and this demonstrably has not happened.

Thus, one has to treat the matter in terms of a process whereby states behave in a certain way in the belief that such behaviour is law or is becoming law. It will then depend upon how other states react as to whether this process of legislation is accepted or rejected. It follows that rigid definitions as to legality have to be modified to see whether the legitimating stamp of state activity can be provided or not. If a state proclaims a twelve-mile limit to its territorial sea in the belief that although the three-mile limit has been accepted law, the circumstances are so altering that a twelve-mile limit might now be treated as becoming law, it is vindicated if other states follow suit and a new rule of customary law is established. If other states reject the proposition, then the projected rule withers away and the original rule stands, reinforced by state practice and common acceptance. As the Court itself noted in the *Nicaragua* case,[58] '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law'. The difficulty in this kind of approach is that it is sometimes hard to pinpoint exactly when one rule supersedes another, but that is a complication inherent in the nature of custom. Change is rarely smooth but rather spasmodic.

This means taking a more flexible view of the *opinio juris* and tying it more firmly with the overt manifestations of a custom into the context of national and international behaviour. This should be done to accommodate the idea of an action which, while contrary to law, contains the germ of a new law and relates to the difficulty of actually proving that a state, in behaving a certain way, does so in the belief that it is in accordance with the law. An extreme expression of this approach is to infer or deduce the *opinio juris* from the material acts. Judge Tanaka, in his Dissenting Opinion in the *North Sea Continental Shelf* cases, remarked that there was:

[57] See Akehurst, 'Custom as a Source', pp. 32–4 for attempts made to deny or minimise the need for *opinio juris*.

[58] ICJ Reports, 1986, pp. 14, 109; 76 ILR, pp. 349, 443.

> no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice.[59]

However, states must be made aware that when one state takes a course of action, it does so because it regards it as within the confines of international law, and not as, for example, purely a political or moral gesture. There has to be an aspect of legality about the behaviour and the acting state will have to confirm that this is so, so that the international community can easily distinguish legal from non-legal practices. This is essential to the development and presentation of a legal framework amongst the states.[60]

Faced with the difficulty in practice of proving the existence of the *opinio juris*, increasing reference has been made to conduct within international organisations. This is so particularly with regard to the United Nations. The International Court of Justice has in a number of cases utilised General Assembly resolutions as confirming the existence of the *opinio juris*, focusing on the content of the resolution or resolutions in question and the conditions of their adoption.[61] The key, however, is the attitude taken by the states concerned, whether as parties to a particular treaty or as participants in the adoption of a UN resolution.[62] The Court has also referred to major codification conventions

[59] ICJ Reports, 1969, pp. 3, 176; 41 ILR, pp. 29, 171. Lauterpacht wrote that one should regard all uniform conduct of governments as evidencing the *opinio juris*, except where the conduct in question was not accompanied by such intention: *The Development of International Law*, p. 580; but cf. Cheng, 'Custom: The Future', p. 36, and Cheng, 'United Nations Resolutions', pp. 530–2.

[60] Note D'Amato's view that to become a custom, a practice has to be preceded or accompanied by the 'articulation' of a rule, which will put states on notice than an action etc. will have legal implications: *Concept of Custom*, p. 75. Cf. Akehurst, 'Custom as a Source', pp. 35–6, who also puts forward his view that 'the practice of states needs to be accompanied by *statements* that something is already law before it can become law': such statements need not be beliefs as to the truths of the given situation, *ibid.*, p. 37. Akehurst also draws a distinction between permissive rules, which do not require express statements as to *opinio juris*, and duty-imposing rules, which do: *ibid.*, pp. 37–8.

[61] See e.g. the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 254–5; 110 ILR, p. 163. See also the *Western Sahara* case, ICJ Reports, 1975, pp. 31–3; the *East Timor* case, ICJ Reports, 1995, pp. 90, 102; 105 ILR, p. 226; the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 100, 101 and 106; 76 ILR, p. 349; and the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 171–2; 129 ILR, pp. 37, 89–90.

[62] See the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 99–100.

for the same purpose,[63] and to the work of the International Law Commission.[64]

Protest, acquiescence and change in customary law[65]

Customary law is thus established by virtue of a pattern of claim, absence of protest by states particularly interested in the matter at hand and acquiescence by other states.[66] Together with related notions such as recognition, admissions and estoppel, such conduct or abstinence from conduct forms part of a complex framework within which legal principles are created and deemed applicable to states.[67]

The Chamber of the International Court in the *Gulf of Maine* case defined acquiescence as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent' and as founded upon the principles of good faith and equity.[68] Generally, where states are seen to acquiesce[69] in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate.[70]

Some writers have maintained that acquiescence can amount to consent to a customary rule and that the absence of protest implies agreement.

[63] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 28–32 with regard to the 1958 Continental Shelf Convention and e.g. among many cases, *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 429–30 with regard to the Vienna Convention on the Law of Treaties, 1969.

[64] See e.g. the *Gabčíkovo–Nagymaros* case, ICJ Reports, 1997, pp. 7, 38–42 and 46; 116 ILR, pp. 1, 47–51 and 55.

[65] See H. Lauterpacht, 'Sovereignty over Submarine Areas', 27 BYIL, 1950, p. 376; I. MacGibbon, 'Some Observations on the Part of Protest in International Law', 29 BYIL, 1953, p. 293, and MacGibbon, 'Customary International Law and Acquiescence', 33 BYIL, 1957, p. 115; Wolfke, *Custom*, pp. 157–65, and I. Sinclair, 'Estoppel and Acquiescence' in *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 104.

[66] See, for a good example, the decision of the International Court in the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 601; 97 ILR, pp. 266, 517, with regard to the joint sovereignty over the historic waters of the Gulf of Fonseca beyond the territorial sea of the three coastal states.

[67] See e.g. Sinclair, 'Estoppel and Acquiescence', p. 104 and below, chapter 10, p. 515.

[68] ICJ Reports, 1984, pp. 246, 305; 71 ILR, p. 74.

[69] Note that the Court has stated that 'the idea of acquiescence . . . presupposes freedom of will', *Burkina Faso/Mali*, ICJ Reports, 1986, pp. 554, 597; 80 ILR, p. 459.

[70] See e.g. *Grand-Duchy of Luxembourg* v. *Cie. Luxembourgeoise de Télédiffusion*, 91 ILR, pp. 281, 286.

In other words where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule. This means that actual protests are called for to break the legitimising process.[71]

In the *Lotus* case, the Court held that 'only if such abstention were based on their [the states] being conscious of having a duty to abstain would it be possible to speak of an international custom'.[72] Thus, one cannot infer a rule prohibiting certain action merely because states do not indulge in that activity. But the question of not reacting when a state behaves a certain way is a slightly different one. It would seem that where a new rule is created in new fields of international law, for example space law, acquiescence by other states is to be regarded as reinforcing the rule whether it stems from actual agreement or lack of interest depending always upon the particular circumstances of the case. Acquiescence in a new rule which deviates from an established custom is more problematic.

The decision in the *Anglo-Norwegian Fisheries* case[73] may appear to suggest that where a state acts contrary to an established customary rule and other states acquiesce in this, then that state is to be treated as not bound by the original rule. The Court noted that 'in any event the . . . rule would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempt to apply it to the Norwegian coast'.[74] In other words, a state opposing the existence of a custom from its inception would not be bound by it, but the problem of one or more states seeking to dissent from recognised customs by adverse behaviour coupled with the acquiescence or non-reaction of other states remains unsettled.

States fail to protest for very many reasons. A state might not wish to give offence gratuitously or it might wish to reinforce political ties or other diplomatic and political considerations may be relevant. It could be that to protest over every single act with which a state does not agree would be an excessive requirement. It is, therefore, unrealistic to expect every state

[71] See e.g. MacGibbon, 'Customary International Law', p. 131, and H. S. McDougal *et al.*, *Studies in World Public Order*, New Haven, 1960, pp. 763–72.

[72] PCIJ, Series A, No. 10, 1927, p. 28; 4 ILR, p. 159.

[73] ICJ Reports, 1951, p. 116; 18 ILR, p. 86.

[74] ICJ Reports, 1951, p. 131; 18 ILR, p. 93. See also the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 26–7; 41 ILR, pp. 29, 55–6, and the *Asylum* case, ICJ Reports, 1950, pp. 266, 277–8; 17 ILR, pp. 280, 285.

to react to every single act of every other state. If one accepted that a failure to protest validated a derogation from an established custom in every case then scores of special relationships would emerge between different states depending upon acquiescence and protest. In many cases a protest might be purely formal or part of diplomatic manoeuvring designed to exert pressure in a totally different field and thus not intended to alter legal relationships.

Where a new rule which contradicts a prior rule is maintained by a large number of states, the protests of a few states would not overrule it, and the abstention from reaction by other countries would merely reinforce it. Constant protest on the part of a particular state when reinforced by the acquiescence of other states might create a recognised exception to the rule, but it will depend to a great extent on the facts of the situation and the views of the international community. Behaviour contrary to a custom contains within itself the seeds of a new rule and if it is endorsed by other nations, the previous law will disappear and be replaced, or alternatively there could be a period of time during which the two customs co-exist until one of them is generally accepted,[75] as was the position for many years with regard to the limits of the territorial sea.[76] It follows from the above, therefore, that customary rules are binding upon all states except for such states as have dissented from the start of that custom.[77] This raises the question of new states and custom, for the logic of the traditional approach would be for such states to be bound by all existing customs as at the date of independence. The opposite view, based upon the consent theory of law, would permit such states to choose which customs to adhere to at that stage, irrespective of the attitude of other states.[78] However, since such an approach could prove highly disruptive, the proviso is often made that by entering into relations without reservation with other states, new states signify their acceptance of the totality of international law.[79]

[75] See also protests generally: Akehurst, 'Custom as a Source', pp. 38–42.

[76] See below, chapter 11, p. 568.

[77] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 38, 130; 41 ILR, pp. 29, 67, 137, and *The Third US Restatement of Foreign Relations Law*, St Paul, 1987, vol. I, pp. 25–6. See also T. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard International Law Journal*, 1985, p. 457, and J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 BYIL, 1985, p. 1.

[78] See e.g. Tunkin, *Theory of International Law*, p. 129.

[79] *Ibid.*

Regional and local custom[80]

It is possible for rules to develop which will bind only a set group of states, such as those in Latin America,[81] or indeed just two states.[82] Such an approach may be seen as part of the need for 'respect for regional legal traditions'.[83]

In the *Asylum* case,[84] the International Court of Justice discussed the Colombian claim of a regional or local custom peculiar to the Latin American states, which would validate its position over the granting of asylum. The Court declared that the 'party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party'.[85] It found that such a custom could not be proved because of uncertain and contradictory evidence.

In such cases, the standard of proof required, especially as regards the obligation accepted by the party against whom the local custom is maintained, is higher than in cases where an ordinary or general custom is alleged.

In the *Right of Passage over Indian Territory* case,[86] Portugal claimed that there existed a right of passage over Indian territory as between the Portuguese enclaves, and this was upheld by the International Court of Justice over India's objections that no local custom could be established between only two states. The Court declared that it was satisfied that there had in the past existed a constant and uniform practice allowing free passage and that the 'practice was accepted as law by the parties and has given rise to a right and a correlative obligation'.[87] More generally, the Court stated that 'Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as

[80] See Akehurst, 'Custom as a Source', pp. 29–31; Thirlway, 'Supplement', p. 105; Pellet, 'Article 38', p. 762; D'Amato, *Concept of Custom*, chapter 8; G. Cohen-Jonathan, 'La Coutume Locale', AFDI, 1961, p. 133, and Wolfke, *Custom*, pp. 88–90. Local custom is sometimes referred to as regional or special custom.

[81] See e.g. H. Gros Espiel, 'La Doctrine du Droit International en Amérique Latine avant la Première Conférence Panaméricaine', 3 *Journal of the History of International Law*, 2001, p. 1.

[82] Note the claim by Honduras in the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 597; 97 ILR, pp. 266, 513 that a 'trilateral local custom of the nature of a convention' could establish a condominium arrangement.

[83] See the *Eritrea/Yemen (Maritime Delimitation)* case, 119 ILR, pp. 417, 448.

[84] ICJ Reports, 1950, p. 266; 17 ILR, p. 280.

[85] ICJ Reports, 1950, p. 276; 17 ILR, p. 284.

[86] ICJ Reports, 1960, p. 6; 31 ILR, p. 23.

[87] ICJ Reports, 1960, p. 40; 31 ILR, p. 53. See Wolfke, *Custom*, p. 90.

governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.'[88]

Such local customs therefore depend upon a particular activity by one state being accepted by the other state (or states) as an expression of a legal obligation or right. While in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule.[89] This is because local customs are an exception to the general nature of customary law, which involves a fairly flexible approach to law-making by all states, and instead constitutes a reminder of the former theory of consent whereby states are bound only by what they assent to. Exceptions may prove the rule, but they need greater proof than the rule to establish themselves.

Treaties[90]

In contrast with the process of creating law through custom, treaties (or international conventions) are a more modern and more deliberate method.[91] Article 38 refers to 'international conventions, whether general or particular, establishing rules expressly recognised by the contracting states'. Treaties will be considered in more detail in chapter 16 but in this survey of the sources of international law reference must be made to the role of international conventions.

Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants.[92] All these terms refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and

[88] ICJ Reports, 1960, p. 44. [89] See Cohen-Jonathan, 'La Coutume Locale'.

[90] See generally A. D. McNair, *The Law of Treaties*, Oxford, 1961; Pellet, 'Article 38', p. 736, and A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007. See further below, chapter 16.

[91] *Oppenheim's International Law* emphasises that 'not only is custom the original source of international law, but treaties are a source the validity and modalities of which themselves derive from custom', p. 31.

[92] See e.g. UKMIL, 70 BYIL, 1999, p. 404.

arrangements are laid out which the parties oblige themselves to carry out.[93]

The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding (*pacta sunt servanda*). Treaties may be divided into 'law-making' treaties, which are intended to have universal or general relevance, and 'treaty-contracts', which apply only as between two or a small number of states. Such a distinction is intended to reflect the general or local applicability of a particular treaty and the range of obligations imposed. It cannot be regarded as hard and fast and there are many grey areas of overlap and uncertainty.[94]

Treaties are express agreements and are a form of substitute legislation undertaken by states. They bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system. The number of treaties entered into has expanded over the last century, witness the growing number of volumes of the United Nations Treaty Series or the United Kingdom Treaty Series. They fulfil a vital role in international relations.

As governmental controls increase and the technological and communications revolutions affect international life, the number of issues which require some form of inter-state regulation multiplies.

For many writers, treaties constitute the most important sources of international law as they require the express consent of the contracting parties. Treaties are thus seen as superior to custom, which is regarded in any event as a form of tacit agreement.[95] As examples of important treaties one may mention the Charter of the United Nations, the Geneva Conventions on the treatment of prisoners and the protection of civilians and the Vienna Convention on Diplomatic Relations. All kinds of agreements exist, ranging from the regulation of outer space exploration to the control of drugs and the creation of international financial and development institutions. It would be impossible to telephone abroad or post a

[93] See the Vienna Convention on the Law of Treaties, 1969. Article 2(1)a defines a treaty for the purposes of the Convention as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. See further below, p. 117 with regard to non-binding international agreements.

[94] See Virally, 'Sources', p. 126; Sørensen, Les Sources, pp. 58 ff., and Tunkin, *Theory of International Law*, pp. 93–5.

[95] Tunkin, *Theory of International Law*, pp. 91–113. See also R. Müllerson, 'Sources of International Law: New Tendencies in Soviet Thinking', 83 AJIL, 1989, pp. 494, 501–9, and Danilenko, 'Theory', p. 9.

letter overseas or take an aeroplane to other countries without the various international agreements that have laid down the necessary, recognised conditions of operation.

It follows from the essence of an international treaty that, like a contract, it sets down a series of propositions which are then regarded as binding upon the parties. How then is it possible to treat conventions as sources of international law, over and above the obligations imposed upon the contracting parties? It is in this context that one can understand the term 'law-making treaties'. They are intended to have an effect *generally*, not restrictively, and they are to be contrasted with those treaties which merely regulate limited issues between a few states. Law-making treaties are those agreements whereby states elaborate their perception of international law upon any given topic or establish new rules which are to guide them for the future in their international conduct. Such law-making treaties, of necessity, require the participation of a large number of states to emphasise this effect, and may produce rules that will bind all.[96] They constitute normative treaties, agreements that prescribe rules of conduct to be followed. Examples of such treaties may include the Antarctic Treaty and the Genocide Convention. There are also many agreements which declare the existing law or codify existing customary rules, such as the Vienna Convention on Diplomatic Relations of 1961.

Parties that do not sign and ratify the particular treaty in question are not bound by its terms. This is a general rule and was illustrated in the *North Sea Continental Shelf* cases[97] where West Germany had not ratified the relevant Convention and was therefore under no obligation to heed its terms. However, where treaties reflect customary law then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule or rules of customary international law. Similarly, non-parties may come to accept that provisions in a particular treaty can generate customary law, depending always upon the nature of the agreement, the number of participants and other relevant factors.

[96] But this may depend upon the attitude of other states. This does not constitute a form of international legislation: see e.g. *Oppenheim's International Law*, p. 32; the *Reparation* case, ICJ Reports, 1949, p. 185; 16 AD, p. 318, and the *Namibia* case, ICJ Reports, 1971, p. 56; 49 ILR, p. 2. See also Brownlie, *Principles*, pp. 12–14, and R. Baxter, 'Treaties and Custom', 129 HR, 1970, p. 27. See also O. Schachter, 'Entangled Treaty and Custom' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 717, and Y. Dinstein, 'The Interaction Between Customary International Law and Treaties', 322 HR, 2006, p. 247.

[97] ICJ Reports, 1969, pp. 3, 25; 41 ILR, pp. 29, 54.

The possibility that a provision in a treaty may constitute the basis of a rule which, when coupled with the *opinio juris*, can lead to the creation of a binding custom governing all states, not just those party to the original treaty, was considered by the International Court of Justice in the *North Sea Continental Shelf* cases[98] and regarded as one of the recognised methods of formulating new rules of customary international law. The Court, however, declared that the particular provision had to be 'of a fundamentally norm-creating character',[99] that is, capable of forming the basis of a general rule of law. What exactly this amounts to will probably vary according to the time and place, but it does confirm that treaty provisions may lead to custom providing other states, parties and non-parties to the treaty fulfil the necessary conditions of compatible behaviour and *opinio juris*. It has been argued that this possibility may be extended so that generalisable treaty provisions may of themselves, without the requirement to demonstrate the *opinio juris* and with little passage of time, generate *ipso facto* customary rules.[100] This, while recognising the importance of treaties, particularly in the human rights field, containing potential norm-creating provisions, is clearly going too far. The danger would be of a small number of states legislating for all, unless dissenting states actually entered into contrary treaties.[101] This would constitute too radical a departure for the current process of law-formation within the international community.

It is now established that even where a treaty rule comes into being covering the same ground as a customary rule, the latter will not be simply absorbed within the former but will maintain its separate existence. The Court in the *Nicaragua* case[102] did not accept the argument of the US that the norms of customary international law concerned with self-defence had been 'subsumed' and 'supervened' by article 51 of the United Nations Charter. It was emphasised that 'even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the

[98] ICJ Reports, 1969, p. 41; 41 ILR, p. 71. The Court stressed that this method of creating new customs was not to be lightly regarded as having been attained, *ibid.*

[99] But see the minority opinions, ICJ Reports, 1969, pp. 56, 156–8, 163, 169, 172–80, 197–200, 221–32 and 241–7; 41 ILR, p. 85. See also the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 295; 71 ILR, pp. 74, 122, and the *Libya/Malta Continental Shelf* case, ICJ Reports, 1985, pp. 13, 29–34; 81 ILR, pp. 239, 261–6.

[100] See D'Amato, *Concept of Custom*, p. 104, and D'Amato, 'The Concept of Human Rights in International Law', 82 *Columbia Law Review*, 1982, pp. 1110, 1129–47. See also Akehurst, 'Custom as a Source', pp. 42–52.

[101] D'Amato, 'Concept of Human Rights', p. 1146.

[102] ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as distinct from the treaty norm'.[103] The Court concluded that 'it will therefore be clear that customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content'.[104] The effect of this in the instant case was that the Court was able to examine the rule as established under customary law, whereas due to an American reservation, it was unable to analyse the treaty-based obligation.

Of course, two rules with the same content may be subject to different principles with regard to their interpretation and application; thus the approach of the Court as well as being theoretically correct is of practical value also. In many cases, such dual source of existence of a rule may well suggest that the two versions are not in fact identical, as in the case of self-defence under customary law and article 51 of the Charter, but it will always depend upon the particular circumstances.[105]

Certain treaties attempt to establish a 'regime' which will, of necessity, also extend to non-parties.[106] The United Nations Charter, for example, in its creation of a definitive framework for the preservation of international peace and security, declares in article 2(6) that 'the organisation shall ensure that states which are not members of the United Nations act in accordance with these Principles [listed in article 2] so far as may be necessary for the maintenance of international peace and security'. One can also point to the 1947 General Agreement on Tariffs and Trade (GATT) which set up a common code of conduct in international trade and has had an important effect on non-party states as well, being now transmuted into the World Trade Organisation.

On the same theme, treaties may be constitutive in that they create international institutions and act as constitutions for them, outlining their proposed powers and duties.

'Treaty-contracts' on the other hand are not law-making instruments in themselves since they are between only small numbers of states and on a limited topic, but may provide evidence of customary rules. For example, a series of bilateral treaties containing a similar rule may be evidence of the existence of that rule in customary law, although this proposition needs to

[103] ICJ Reports, 1986, pp. 94–5; 76 ILR, pp. 428–9. See also W. Czaplinski, 'Sources of International Law in the *Nicaragua* Case', 38 ICLQ, 1989, p. 151.
[104] ICJ Reports, 1986, p. 96; 76 ILR, p. 430.
[105] See further below, chapter 20, p. 1131.
[106] See further below, chapter 16, p. 928.

be approached with some caution in view of the fact that bilateral treaties by their very nature often reflect discrete circumstances.[107]

General principles of law[108]

In any system of law, a situation may very well arise where the court in considering a case before it realises that there is no law covering exactly that point, neither parliamentary statute nor judicial precedent. In such instances the judge will proceed to deduce a rule that will be relevant, by analogy from already existing rules or directly from the general principles that guide the legal system, whether they be referred to as emanating from justice, equity or considerations of public policy. Such a situation is perhaps even more likely to arise in international law because of the relative underdevelopment of the system in relation to the needs with which it is faced.

There are fewer decided cases in international law than in a municipal system and no method of legislating to provide rules to govern new situations.[109] It is for such a reason that the provision of 'the general principles of law recognised by civilised nations'[110] was inserted into article 38 as a source of law, to close the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*.[111] The

[107] See further below, p. 686, with regard to extradition treaties and below, p. 837, with regard to bilateral investment treaties.

[108] See e.g. B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, 1953; A. D. McNair, 'The General Principles of Law Recognised by Civilised Nations', 33 BYIL, 1957, p. 1; H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927; G. Herczegh, *General Principles of Law and the International Legal Order*, Budapest, 1969; O. Schachter, *International Law in Theory and Practice*, Dordrecht, 1991, pp. 50–5; O. Corten, *L'Utilisation du 'Raisonnable' par le Juge International*, Brussels, 1997; B. Vitanyi, 'Les Positions Doctrinales Concernant le Sens de la Notion de "Principes Généraux de Droit Reconnus par les Nations Civilisées"', 86 *Revue Générale de Droit International Public*, 1982, p. 48; H. Waldock, 'General Course on Public International Law', 106 HR, 1962, p. 54; Pellet, 'Article 38', p. 764; Thirlway, 'Supplement', p. 108; M. Sørensen, 'Principes de Droit International', 101 HR, 1960, p. 16, and V. Degan, 'General Principles of Law', 3 Finnish YIL, 1992, p. 1.

[109] Note that the International Court has regarded the terms 'principles' and 'rules' as essentially the same within international law: the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 288–90. Introducing the adjective 'general', however, shifts the meaning to a broader concept.

[110] The additional clause relating to recognition by 'civilised nations' is regarded today as redundant: see e.g. Pellet, 'Article 38', p. 769.

[111] See e.g. J. Stone, *Of Law and Nations*, London, 1974, chapter 3; H. Lauterpacht, 'Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Legal Order',

question of gaps in the system is an important one. It is important to appreciate that while there may not always be an immediate and obvious rule applicable to every international situation, 'every international situation is capable of being determined *as a matter of law*'.[112]

There are various opinions as to what the general principles of law concept is intended to refer. Some writers regard it as an affirmation of Natural Law concepts, which are deemed to underlie the system of international law and constitute the method for testing the validity of the positive (i.e. man-made) rules.[113] Other writers, particularly positivists, treat it as a sub-heading under treaty and customary law and incapable of adding anything new to international law unless it reflects the consent of states. Soviet writers like Tunkin subscribed to this approach and regarded the 'general principles of law' as reiterating the fundamental precepts of international law, for example, the law of peaceful co-existence, which have already been set out in treaty and custom law.[114]

Between these two approaches, most writers are prepared to accept that the general principles do constitute a separate source of law but of fairly limited scope, and this is reflected in the decisions of the Permanent Court of International Justice and the International Court of Justice. It is not clear, however, in all cases, whether what is involved is a general principle of law appearing in municipal systems or a general principle of international law. But perhaps this is not a terribly serious problem since both municipal legal concepts and those derived from existing international practice can be defined as falling within the recognised catchment area.[115]

Symbolae Verzijl, 1958, p. 196; Pellet, 'Article 38', p. 704; H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL, 1988, p. 76, and Thirlway, 'Supplement', p. 44, and P. Weil, 'The Court Cannot Conclude Definitively . . . ? *Non Liquet* Revisited', 36 *Columbia Journal of Transnational Law*, 1997, p. 109. See also the *North Sea Continental Shelf* cases, ICJ Reports, 1969, p. 46; 41 ILR, p. 29, and the *Nicaragua* case, ICJ Reports, 1986, p. 135; 76 ILR, p. 349.

[112] *Oppenheim's International Law*, p. 13. See, however, the conclusion of the International Court that it was unable to state whether there was a rule of international law prohibiting or permitting the threat or use of nuclear weapons by a state in self-defence where its very survival was at stake: the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 244; 110 ILR, pp. 163, 194. Cf. the Dissenting Opinion of Judge Higgins, *ibid.*; 110 ILR, pp. 532 ff. See also *Eritrea/Yemen* (First Phase), 114 ILR, pp. 1, 119 and 121–2.

[113] See e.g. Lauterpacht, *Private Law Sources*. See also Waldock, 'General Course', p. 54; C. W. Jenks, *The Common Law of Mankind*, London, 1958, p. 169, and Judge Tanaka (dissenting), *South-West Africa* case, (Second Phase), ICJ Reports, 1966, pp. 6, 294–9; 37 ILR, pp. 243, 455–9.

[114] Tunkin, *Theory of International Law*, chapter 7.

[115] See Brownlie, *Principles*, p. 16 , and Virally, 'Sources', pp. 144–8.

While the reservoir from which one can draw contains the legal operations of 190 or so states, it does not follow that judges have to be experts in every legal system. There are certain common themes that run through the many different orders. Anglo-American common law has influenced a number of states throughout the world, as have the French and Germanic systems. There are many common elements in the law in Latin America, and most Afro-Asian states have borrowed heavily from the European experience in their efforts to modernise the structure administering the state and westernise economic and other enterprises.[116]

Reference will now be made to some of the leading cases in this field to illustrate how this problem has been addressed.

In the *Chorzów Factory* case in 1928,[117] which followed the seizure of a nitrate factory in Upper Silesia by Poland, the Permanent Court of International Justice declared that 'it is a general conception of law that every violation of an engagement involves an obligation to make reparation'. The Court also regarded it as:

> a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law.

The most fertile fields, however, for the implementation of municipal law analogies have been those of procedure, evidence and the machinery of the judicial process. In the *German Settlers in Poland* case,[118] the Court, approaching the matter from the negative point of view,[119] declared that 'private rights acquired under existing law do not cease on a change of sovereignty . . . It can hardly be maintained that, although the law survived, private rights acquired under it perished. Such a contention

[116] See generally, R. David and J. Brierley, *Major Legal Systems in the World Today*, 2nd edn, London, 1978. Note that the Tribunal in *AMCO* v. *Republic of Indonesia* stated that while a practice or legal provisions common to a number of nations would be an important source of international law, the French concepts of administrative unilateral acts or administrative contracts were not such practices or legal provisions: 89 ILR, pp. 366, 461.

[117] PCIJ, Series A, No. 17, 1928, p. 29; 4 AD, p. 258. See also the Chile–United States Commission decision with regard to the deaths of Letelier and Moffitt: 31 ILM, 1982, pp. 1, 9; 88 ILR, p. 727.

[118] PCIJ, Series B, No. 6, p. 36.

[119] See also the *South-West Africa* cases, ICJ Reports, 1966, pp. 3, 47; 37 ILR, pp. 243, 280–1, for a statement that the notion of *actio popularis* was not part of international law as such nor able to be regarded as imported by the concept of general principles of law.

is based on no principle and would be contrary to an almost universal opinion and practice.'[120] The International Court of Justice in the *Corfu Channel* case,[121] when referring to circumstantial evidence, pointed out that 'this indirect evidence is admitted in all systems of law and its use is recognised by international decisions'. International judicial reference has also been made to the concept of *res judicata*, that is that the decision in the circumstances is final, binding and without appeal.[122]

In the *Administrative Tribunal* case,[123] the Court dealt with the problem of the dismissal of members of the United Nations Secretariat staff and whether the General Assembly had the right to refuse to give effect to awards to them made by the relevant Tribunal. In giving its negative reply, the Court emphasised that:

> according to a well-established and generally recognised principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute.[124]

The question of *res judicata* was discussed in some detail in the *Genocide Convention (Bosnia and Herzegovina* v. *Serbia and Montenegro)* case,[125] where the issue focused on the meaning of the 1996 decision of the Court rejecting preliminary objections to jurisdiction.[126] The Court emphasised that the principle 'signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. That principle signifies that the decisions of the Court are not

[120] See also the *Certain German Interests in Polish Upper Silesia* case, PCIJ, Series A, No. 7, p. 42, and the *Free Zones of Upper Savoy and the District of Gex* case, PCIJ, Series A/B, No. 46, p. 167.

[121] ICJ Reports, 1949, pp. 4, 18; 16 AD, pp. 155, 157.

[122] The *Corfu Channel* case, ICJ Reports, 1949, p. 248.

[123] ICJ Reports, 1954, p. 47; 21 ILR, p. 310.

[124] ICJ Reports, 1954, p. 53; 21 ILR, p. 314, and the *Laguna del Desierto (Argentina/Chile)* case, 113 ILR, pp. 1, 43, where it was stated that 'A judgment having the authority of *res judicata* is judicially binding on the Parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the jurisprudence, which regards the authority of *res judicata* as a universal and absolute principle of international law.' See also *AMCO* v. *Republic of Indonesia*, 89 ILR, pp. 366, 558; Cheng, *General Principles*, chapter 17; S. Rosenne, *The Law and Practice of the International Court, 1920–2005*, 4th edn, Leiden, 2006, pp. 1598 ff.; M. Shahabuddeen, *Precedent in the International Court*, Cambridge, 1996, pp. 30 and 168, and I. Scobbie, '*Res Judicata*, Precedent and the International Court', 20 Australian YIL, 2000, p. 299.

[125] ICJ Reports, 2007, para. 113.

[126] ICJ Reports, 1996, p. 595; 115 ILR, p. 110.

only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose.'[127] The Court noted that two purposes, one general and one specific, underpinned the principle of *res judicata*, internationally as well as nationally. The first referred to the stability of legal relations that requires that litigation come to an end. The second was that it is in the interest of each party that an issue which has already been adjudicated in favour of that party not be argued again. It was emphasised that depriving a litigant of the benefit of a judgment it had already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes. The Court noted that the principle applied equally to preliminary objections judgments and merits judgments and that since jurisdiction had been established by virtue of the 1996 judgment, it was not open to a party to assert in current proceedings that, at the date the earlier judgment was given, the Court had no power to give it, because one of the parties could now be seen to have been unable to come before it. This would be to call in question the force as *res judicata* of the operative clause of the judgment.[128]

Further, the Court in the preliminary objections phase of the *Right of Passage* case[129] stated that:

> it is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seized of a dispute, unilateral action by the respondent state in terminating its Declaration [i.e. accepting the jurisdiction of the Court], in whole or in part, cannot divest the Court of jurisdiction.

The Court has also considered the principle of estoppel which provides that a party that has acquiesced in a particular situation cannot then proceed to challenge it. In the *Temple* case[130] the International Court of Justice applied the doctrine, but in the *Serbian Loans* case[131] in 1929, in which French bondholders were demanding payment in gold francs as against paper money upon a series of Serbian loans, the Court declared the principle inapplicable.

As the International Court noted in the *ELSI* case,[132] there were limitations upon the process of inferring an estoppel in all circumstances, since

[127] *Ibid.*, at para. 115. [128] *Ibid.*, at paras. 116–23.
[129] ICJ Reports, 1957, pp. 125, 141–2; 24 ILR, pp. 840, 842–3.
[130] ICJ Reports, 1962, pp. 6, 23, 31 and 32; 33 ILR, pp. 48, 62, 69–70.
[131] PCIJ, Series A, No. 20; 5 AD, p. 466.
[132] ICJ Reports, 1989, pp. 15, 44; 84 ILR, pp. 311, 350.

'although it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges'.[133] The meaning of estoppel was confirmed in *Cameroon* v. *Nigeria*,[134] where the Court emphasised that 'An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice.'

Another example of a general principle was provided by the Arbitration Tribunal in the *AMCO* v. *Republic of Indonesia* case,[135] where it was stated that 'the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and *lucrum cessans* is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law'. Another principle would be that of respect for acquired rights.[136] One crucial general principle of international law is that of *pacta sunt servanda*, or the idea that international agreements are binding. The law of treaties rests inexorably upon this principle since the whole concept of binding international agreements can only rest upon the presupposition that such instruments are commonly accepted as possessing that quality.[137]

Perhaps the most important general principle, underpinning many international legal rules, is that of good faith.[138] This principle is enshrined

[133] See also the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, pp. 52 ff.; 6 AD, pp. 95, 100–2; the decision of the Eritrea/Ethiopia Boundary Commission of 13 April 2002, 130 ILR, pp. 1, 35–6; and the *Saiga (No. 2)* case, 120 ILR, pp. 143, 230; Brownlie, *Principles*, p. 615, and H. Thirlway, 'The Law and Procedure of the International Court of Justice, 1960–89 (Part One)', 60 BYIL, 1989, pp. 4, 29. See also below, chapter 10, p. 515.

[134] ICJ Reports, 1998, pp. 275, 303.

[135] 89 ILR, pp. 366, 504.

[136] See, for example, the *German Interests in Polish Upper Silesia* case, PCIJ, Series A, No. 7, 1926, p. 22; *Starrett Housing Corporation* v. *Iran* 85 ILR p. 34; the *Shufeld* claim, 5 AD, p. 179, and *AMCO* v. *Republic of Indonesia* 89 ILR, pp. 366, 496. See further below, p. 830.

[137] See Brownlie, *Principles*, pp. 591–2, and McNair, *Law of Treaties*, vol. I, chapter 30. See also article 26 of the Vienna Convention on the Law of Treaties, 1969, and *AMCO* v. *Republic of Indonesia* 89 ILR, pp. 366, 495–7.

[138] *Oppenheim's International Law* notes that this is 'of overriding importance', p. 38. See E. Zoller, *Bonne Foi en Droit International Public*, Paris, 1977; R. Kolb, *La Bonne Foie en Droit International Public*, Paris, 2000; Thirlway, 'Law and Procedure of the ICJ (Part One)' pp. 3, 7 ff., and Thirlway, 'Supplement', p. 7; and G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, 1986, vol. I, p. 183 and vol. II, p. 609.

in the United Nations Charter, which provides in article 2(2) that 'all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter', and the elaboration of this provision in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States adopted by the General Assembly in resolution 2625 (XXV), 1970, referred to the obligations upon states to fulfil in good faith their obligations resulting from international law generally, including treaties. It therefore constitutes an indispensable part of the rules of international law generally.[139]

The International Court declared in the *Nuclear Tests* cases[140] that:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral obligation.

Nevertheless, the Court has made the point that good faith as a concept is 'not in itself a source of obligation where none would otherwise exist'.[141] The principle of good faith, therefore, is a background principle informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised.[142] As the International Court has noted, the principle of good faith relates 'only to the fulfilment of existing obligations'.[143] A further principle to be noted is that of *ex injuria jus non oritur*, which

[139] See also Case T-115/94, *Opel Austria Gmbh* v. *Republic of Austria*, 22 January 1997.

[140] ICJ Reports, 1974, pp. 253, 267; 57 ILR, pp. 398, 412.

[141] The *Border and Transborder Armed Actions* case (*Nicaragua* v. *Honduras*), ICJ Reports, 1988, p. 105; 84 ILR, p. 218. See also Judge Ajibolo's Separate Opinion in the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 71–4; 100 ILR, pp. 1, 69–72, and the statement by the Inter-American Court of Human Rights in the *Re-introduction of the Death Penalty in Peru* case, 16 *Human Rights Law Journal*, 1995, pp. 9, 13.

[142] See also the *Fisheries Jurisdiction* cases, ICJ Reports, 1974, pp. 3, 33; 55 ILR, pp. 238, 268; the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 46–7; 41 ILR, pp. 29, 76; the *Lac Lannoux* case, 24 ILR, p. 119, and the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 264 ff.; 110 ILR, pp. 163, 214–15. Note also Principles 19 and 27 of the Rio Declaration on Environment and Development, 1992, 31 ILM, 1992, p. 876.

[143] *Cameroon* v. *Nigeria*, ICJ Reports, 1998, pp. 275, 304.

posits that facts flowing from wrongful conduct cannot determine the law.[144]

Thus it follows that it is the Court which has the discretion as to which principles of law to apply in the circumstances of the particular case under consideration, and it will do this upon the basis of the inability of customary and treaty law to provide the required solution. In this context, one must consider the *Barcelona Traction* case[145] between Belgium and Spain. The International Court of Justice relied heavily upon the municipal law concept of the limited liability company and emphasised that if the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort.[146]

However, international law did not refer to the municipal law of a particular state, but rather to the rules generally accepted by municipal legal systems which, in this case, recognise the idea of the limited company.

Equity and international law[147]

Apart from the recourse to the procedures and institutions of municipal legal systems to reinforce international law, it is also possible to see in a

[144] See e.g. the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 76; 116 ILR, p. 1, and the *Brcko* case, 36 ILM, 1997, pp. 396, 422.

[145] ICJ Reports, 1970, p. 3; 46 ILR, p. 178.

[146] ICJ Reports, 1970, p. 37; 46 ILR, p. 211. See also generally the *Abu Dhabi* arbitration, 1 ICLQ, 1952, p. 247; 18 ILR, p. 44, and *Texaco* v. *Libya* 53 ILR, p. 389.

[147] See M. Akehurst, 'Equity and General Principles of Law', 25 ICLQ, 1976, p. 801; B. Cheng, 'Justice and Equity in International Law', 8 *Current Legal Problems*, 1955, p. 185; V. Degan, *L'Equité et le Droit International*, Paris, 1970; C. de Visscher, *De l'Equité dans le Réglement Arbitral ou Judiciaire des Litiges de Droit International Public*, Paris, 1972; E. Lauterpacht, 'Equity, Evasion, Equivocation and Evolution in International Law', *Proceedings of the American Branch of the ILA*, 1977–8, p. 33, and E. Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge, 1991, pp. 117–52; R. Y. Jennings, 'Equity and Equitable Principles', *Annuaire Suisse de Droit International*, 1986, p. 38; *Oppenheim's International Law*, p. 43; R. Higgins, *Problems and Process*, Oxford, 1994, chapter 13; M. Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes*, The Hague, 1993; S. Rosenne, 'Equitable Principles and the Compulsory Jurisdiction of International Tribunals', *Festschrift für Rudolf Bindschedler*, Berne, 1980, p. 410, and Rosenne, 'The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law' in *Forty Years International Court of Justice: Jurisdiction, Equality and Equity* (eds. A. Bloed and P. Van Dijk), Dordrecht, 1988, p. 108; Pirotte, 'La Notion d'Équité dans la Jurisprudence Récente de la CIJ', 77 *Revue Générale de Droit International Public*, 1973, p. 131; Chattopadhyay, 'Equity in International Law: Its Growth and Development',

number of cases references to equity[148] as a set of principles constituting the values of the system. The most famous decision on these lines was that of Judge Hudson in the *Diversion of Water from the Meuse* case[149] in 1937 regarding a dispute between Holland and Belgium. Hudson pointed out that what are regarded as principles of equity have long been treated as part of international law and applied by the courts. 'Under article 38 of the Statute', he declared, '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.' However, one must be very cautious in interpreting this, although on the broadest level it is possible to see equity (on an analogy with domestic law) as constituting a creative charge in legal development, producing the dynamic changes in the system rendered inflexible by the strict application of rules.[150]

The concept of equity[151] has been referred to in several cases. In the *Rann of Kutch Arbitration* between India and Pakistan in 1968[152] the Tribunal agreed that equity formed part of international law and that accordingly the parties could rely on such principles in the presentation of their cases.[153] The International Court of Justice in the *North*

5 *Georgia Journal of International and Comparative Law*, 1975, p. 381; R. Lapidoth, 'Equity in International Law', 22 *Israel Law Review*, 1987, p. 161; Schachter, *International Law*, p. 49; A. V. Lowe, 'The Role of Equity in International Law', 12 Australian YIL, 1992, p. 54; P. Weil, 'L'Équité dans la Jurisprudence de la Cour International de Justice' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 121; Pellet, 'Article 38', p. 723; Thirlway, 'Law and Procedure of the ICJ (Part One)', p. 49, and Thirlway, 'Supplement', p. 26. Note especially Judge Weeramantry's study of equity in the *Jan Mayen (Denmark* v. *Norway)* case, ICJ Reports, 1993, pp. 38, 211; 99 ILR, pp. 395, 579.

148 Equity generally may be understood in the contexts of adapting law to particular areas or choosing between several different interpretations of the law (equity *infra legem*), filling gaps in the law (equity *praetor legem*) and as a reason for not applying unjust laws (equity *contra legem*): see Akehurst, 'Equity', and Judge Weeramantry, the *Jan Mayen* case, ICJ Reports, 1993, pp. 38, 226–34; 99 ILR, pp. 395, 594–602. See also below, chapter 17, for the extensive use of equity in the context of state succession.

149 PCIJ, Series A/B, No. 70, pp. 73, 77; 8 AD, pp. 444, 450.

150 See e.g. Judge Weeramantry, the *Jan Mayen (Denmark* v. *Norway)* case, ICJ Reports, 1993, pp. 38, 217; 99 ILR, pp. 395, 585. Cf. Judge Schwebel's Separate Opinion, ICJ Reports, 1993, p. 118; 99 ILR, p. 486.

151 Note that the International Court in the *Tunisia /Libya Continental Shelf* case, ICJ Reports, 1982, pp. 18, 60; 67 ILR, pp. 4, 53, declared that 'equity as a legal concept is a direct emanation of the idea of justice'. However, see G. Abi-Saab's reference to the International Court's 'flight into equity' in 'The ICJ as a World Court' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, pp. 3, 11.

152 50 ILR, p. 2.

153 *Ibid.*, p. 18. In deciding the course of the boundary in two deep inlets, the Tribunal had recourse to the concept of equity: *ibid.*, p. 520.

Sea Continental Shelf cases directed a final delimitation between the parties – West Germany, Holland and Denmark – 'in accordance with equitable principles'[154] and discussed the relevance to equity in its consideration of the *Barcelona Traction* case.[155] Judge Tanaka, however, has argued for a wider interpretation in his Dissenting Opinion in the Second Phase of the *South-West Africa* cases[156] and has treated the broad concept as a source of human rights ideas.[157]

However, what is really in question here is the use of equitable principles in the context of a rule requiring such an approach. The relevant courts are not applying principles of abstract justice to the cases,[158] but rather deriving equitable principles and solutions from the applicable law.[159] The Court declared in the *Libya/Malta* case[160] that 'the justice of which equity is an emanation, is not an abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it also looks beyond it to principles of more general application'.

Equity has been used by the courts as a way of mitigating certain inequities, not as a method of refashioning nature to the detriment of legal rules.[161] Its existence, therefore, as a separate and distinct source of law is at best highly controversial. As the International Court noted in the *Tunisia/Libya Continental Shelf* case,[162]

[154] ICJ Reports, 1969, pp. 3, 53; 41 ILR, pp. 29, 83. Equity was used in the case in order to exclude the use of the equidistance method in the particular circumstances: *ibid.*, pp. 48–50; 41 ILR, pp. 78–80.

[155] ICJ Reports, 1970, p. 3; 46 ILR, p. 178. See also the *Burkina Faso* v. *Mali* case, ICJ Reports, 1986, pp. 554, 631–3; 80 ILR, pp. 459, 532–5.

[156] ICJ Reports, 1966, pp. 6, 294–9; 37 ILR, pp. 243, 455–9. See also the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 22; 16 AD, p. 155.

[157] See also *AMCO* v. *Republic of Indonesia* 89 ILR, pp. 366, 522–3.

[158] The International Court of Justice may under article 38(2) of its Statute decide a case *ex aequo et bono* if the parties agree, but it has never done so: see e.g. Pellet, 'Article 38', p. 730.

[159] See the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 47; 41 ILR, pp. 29, 76, and the *Fisheries Jurisdiction* cases, ICJ Reports, 1974, pp. 3, 33; 55 ILR, pp. 238, 268. The Court reaffirmed in the *Libya/Malta* case, ICJ Reports, 1985, pp. 13, 40; 81 ILR, pp. 238, 272, 'the principle that there can be no question of distributive justice'.

[160] ICJ Reports, 1985, pp. 13, 39; 81 ILR, pp. 238, 271.

[161] See the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 49–50; 41 ILR, pp. 29, 78–80, and the *Anglo-French Continental Shelf* case, Cmnd 7438, 1978, pp. 116–17; 54 ILR, pp. 6, 123–4. See also the *Tunisia/Libya Continental Shelf* case, ICJ Reports, 1982, pp. 18, 60; 67 ILR, pp. 4, 53, and the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 313–14 and 325–30; 71 ILR, pp. 74, 140–1 and 152–7.

[162] ICJ Reports, 1982, pp. 18, 60; 67 ILR, pp. 4, 53.

> it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[163]

The use of equitable principles, however, has been particularly marked in the 1982 Law of the Sea Convention. Article 59, for example, provides that conflicts between coastal and other states regarding the exclusive economic zone are to be resolved 'on the basis of equity', while by article 74 delimitation of the zone between states with opposite or adjacent coasts is to be effected by agreement on the basis of international law in order to achieve an equitable solution. A similar provision applies by article 83 to the delimitation of the continental shelf.[164] These provisions possess flexibility, which is important, but are also somewhat uncertain. Precisely how any particular dispute may be resolved, and the way in which that is likely to happen and the principles to be used are far from clear and an element of unpredictability may have been introduced.[165] The Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997,[166] also lays great emphasis upon the concept of equity. Article 5, for example, provides that watercourse states shall utilise an international watercourse in an equitable and reasonable manner both in their own territories and in participating generally in the use, development and protection of such a watercourse.

Equity may also be used in certain situations in the delimitation of non-maritime boundaries. Where there is no evidence as to where a boundary line lies, an international tribunal may resort to equity. In the case of *Burkina Faso/Republic of Mali*,[167] for example, the Court noted with regard

[163] See generally R. Y. Jennings, 'The Principles Governing Marine Boundaries' in *Festschrift für Karl Doehring*, Berlin, 1989, p. 408, and M. Bedjaoui, 'L"énigme" des "principes équitables" dans le Droit des Délimitations Maritimes', *Revista Español de Derecho Internacional*, 1990, p. 376.

[164] See also article 140 providing for the equitable sharing of financial and other benefits derived from activities in the deep sea-bed area.

[165] However, see *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 443, where the Court declared that its jurisprudence showed that in maritime delimitation disputes, 'equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation'. See further below, chapter 11, p. 590.

[166] Based on the Draft Articles of the International Law Commission: see the Report of the International Law Commission on the Work of its Forty-Sixth Session, A/49/10, 1994, pp. 197, 218 ff.

[167] ICJ Reports, 1986, pp. 554, 633; 80 ILR, pp. 459, 535.

to the pool of Soum, that 'it must recognise that Soum is a frontier pool; and that in the absence of any precise indication in the texts of the position of the frontier line, the line should divide the pool of Soum in an equitable manner'. This would be done by dividing the pool equally. Although equity did not always mean equality, where there are no special circumstances the latter is generally the best expression of the former.[168] The Court also emphasised that 'to resort to the concept of equity in order to modify an established frontier would be quite unjustified'.[169]

Although generalised principles or concepts that may be termed community value-judgements inform and pervade the political and therefore the legal orders in the broadest sense, they do not themselves constitute as such binding legal norms. This can only happen if they have been accepted as legal norms by the international community through the mechanisms and techniques of international law creation. Nevertheless, 'elementary principles of humanity' may lie at the base of such norms and help justify their existence in the broadest sense, and may indeed perform a valuable role in endowing such norms with an additional force within the system. The International Court has, for example, emphasised in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion[170] that at the heart of the rules and principles concerning international humanitarian law lies the 'overriding consideration of humanity'.

Judicial decisions[171]

Although these are, in the words of article 38, to be utilised as a subsidiary means for the determination of rules of law rather than as an actual source of law, judicial decisions can be of immense importance. While by virtue of

[168] *Ibid.*

[169] *Ibid.* See also the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 514–15, and the *Brcko* case, 36 ILM, 1997, pp. 396, 427 ff. However, note that in the latter case, the Arbitral Tribunal was expressly authorised to apply 'relevant legal and equitable principles': see article V of Annex 2 of the Dayton Accords, 1995, *ibid.*, p. 400. See also J. M. Sorel, 'L'Arbitrage sur la Zona de Brcko Tragi-comédie en Trois Actes et un Épilogue à Suivre', AFDI, 1997, p. 253.

[170] ICJ Reports, 1996, pp. 226, 257, 262–3; 110 ILR, pp. 163, 207, 212–13. See also the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 22; 16 AD, p. 155. See further below, chapter 21, p. 1187.

[171] See e.g. Lauterpacht, *Development of International Law*; Waldock, 'General Course', and Schwarzenberger, *International Law*, pp. 30 ff. See also Thirlway, 'Law and Procedure of the ICJ (Part Two)', pp. 3, 127, and Thirlway, 'Supplement', p. 114; Pellet, 'Article 38', p. 784, and P. Cahier, 'Le Rôle du Juge dans l'Élaboration du Droit International' in *Theory of International Law at the Threshold of the 21st Century* (ed. J. Makerczyk), The Hague, 1996, p. 353.

article 59 of the Statute of the International Court of Justice the decisions of the Court have no binding force except as between the parties and in respect of the case under consideration, the Court has striven to follow its previous judgments and insert a measure of certainty within the process: so that while the doctrine of precedent as it is known in the common law, whereby the rulings of certain courts must be followed by other courts, does not exist in international law, one still finds that states in disputes and textbook writers quote judgments of the Permanent Court and the International Court of Justice as authoritative decisions.

The International Court of Justice itself will closely examine its previous decisions and will carefully distinguish those cases which it feels should not be applied to the problem being studied.[172] But just as English judges, for example, create law in the process of interpreting it, so the judges of the International Court of Justice sometimes do a little more than merely 'determine' it. One of the most outstanding instances of this occurred in the *Anglo-Norwegian Fisheries* case,[173] with its statement of the criteria for the recognition of baselines from which to measure the territorial sea, which was later enshrined in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

Other examples include the *Reparation* case,[174] which recognised the legal personality of international institutions in certain cases, the *Genocide* case,[175] which dealt with reservations to treaties, the *Nottebohm* case,[176] which considered the role and characteristics of nationality and the range of cases concerning maritime delimitation.[177]

Of course, it does not follow that a decision of the Court will be invariably accepted in later discussions and formulations of the law. One example of this is part of the decision in the *Lotus* case,[178] which was criticised and later abandoned in the Geneva Conventions on the Law of the Sea. But this is comparatively unusual and the practice of the Court is to examine its own relevant case-law with considerable attention and to depart from it rarely.[179] At the very least, it will constitute the starting point of analysis, so that, for example, the Court noted in the *Cameroon*

[172] See further Shahabuddeen, *Precedent.*
[173] ICJ Reports, 1951, p. 116; 18 ILR, p. 86. See further below, chapter 11, p. 558.
[174] ICJ Reports, 1949, p. 174; 16 AD, p. 318. See further below, chapter 23, p. 1296.
[175] ICJ Reports, 1951, p. 15; 18 ILR, p. 364.
[176] ICJ Reports, 1955, p. 4; 22 ILR, p. 349.
[177] See e.g. Thirlway, 'Supplement', p. 116, and see below, chapter 11, p. 590.
[178] PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 5. See below, p. 618.
[179] See e.g. *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 93; *Liechtenstein* v. *Germany*, ICJ Reports, 2005, p. 6 and the *Construction of a Wall* advisory opinion, ICJ Reports, 2004, pp. 135, 154–6; 129 ILR, pp. 37, 71–4.

v. *Nigeria* case that 'the real question is whether, in this case, there is cause not to follow the reasoning and conclusion of earlier cases'.[180]

In addition to the Permanent Court and the International Court of Justice, the phrase 'judicial decisions' also encompasses international arbitral awards and the rulings of national courts. There have been many international arbitral tribunals, such as the Permanent Court of Arbitration created by the Hague Conferences of 1899 and 1907 and the various mixed-claims tribunals, including the Iran–US Claims Tribunal, and, although they differ from the international courts in some ways, many of their decisions have been extremely significant in the development of international law. This can be seen in the existence and number of the Reports of International Arbitral Awards published since 1948 by the United Nations.

One leading example is the *Alabama Claims* arbitration,[181] which marked the opening of a new era in the peaceful settlement of international disputes, in which increasing use was made of judicial and arbitration methods in resolving conflicts. This case involved a vessel built on Merseyside to the specifications of the Confederate States, which succeeded in capturing some seventy Federal ships during the American Civil War. The United States sought compensation after the war for the depredations of the *Alabama* and other ships and this was accepted by the Tribunal. Britain had infringed the rules of neutrality and was accordingly obliged to pay damages to the United States. Another illustration of the impact of arbitral awards is the *Island of Palmas* case[182] which has proved of immense significance to the subject of territorial sovereignty and will be discussed in chapter 10. In addition, the growing significance of the case-law of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda needs to be noted. As a consequence, it is not rare for international courts of one type or another to cite each other's decisions, sometimes as support[183] and sometimes to disagree.[184]

[180] ICJ Reports, 1998, pp. 275, 292.

[181] J. B. Moore, *International Arbitrations*, New York, 1898, vol. I, p. 653.

[182] 2 RIAA, p. 829; 4 AD, p. 3. See also the *Beagle Channel* award, HMSO, 1977; 52 ILR, p. 93, and the *Anglo-French Continental Shelf* case, Cmnd 7438, 1978; 54 ILR, p. 6.

[183] See e.g. the references in the *Saiga (No. 2)* case, International Tribunal for the Law of the Sea, judgment of 1 July 1999, paras. 133–4; 120 ILR, p. 143, to the *Gabčíkovo–Nagymaros* case, ICJ Reports, 1997, p. 7.

[184] For example, the views expressed in the International Criminal Tribunal for the Former Yugoslavia's decision in the *Tadić* case (IT-94-1-A, paras. 115 ff; 124 ILR, p. 61) disapproving of the approach adopted by the ICJ in the *Nicaragua* case, ICJ Reports, 1986,

As has already been seen, the decisions of municipal courts[185] may provide evidence of the existence of a customary rule. They may also constitute evidence of the actual practice of states which, while not a description of the law as it has been held to apply, nevertheless affords examples of how states actually behave, in other words the essence of the material act which is so necessary in establishing a rule of customary law.[186] British and American writers, in particular, tend to refer fairly extensively to decisions of national courts.

One may, finally, also point to decisions by the highest courts of federal states, like Switzerland and the United States, in their resolution of conflicts between the component units of such countries, as relevant to the development of international law rules in such fields as boundary disputes. A boundary disagreement between two US states which is settled by the Supreme Court is in many ways analogous to the International Court of Justice considering a frontier dispute between two independent states, and as such provides valuable material for international law.[187]

Writers[188]

Article 38 includes as a subsidiary means for the determination of rules of law, 'the teachings of the most highly qualified publicists of the various nations'.

Historically, of course, the influence of academic writers on the development of international law has been marked. In the heyday of Natural Law it was analyses and juristic opinions that were crucial, while the role of state practice and court decisions was of less value. Writers such as Gentili, Grotius, Pufendorf, Bynkershoek and Vattel were the supreme authorities of the sixteenth to eighteenth centuries and determined the scope, form and content of international law.[189]

p. 14, with regard to the test for state responsibility in respect of paramilitary units. The International Court indeed reaffirmed its approach in the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, paras. 402 ff.

185 See e.g. *Thirty Hogsheads of Sugar, Bentzon* v. *Boyle* 9 Cranch 191 (1815); the *Paquete Habana* 175 US 677 (1900) and the *Scotia* 14 Wallace 170 (1871). See also the *Lotus* case, PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153. For further examples in the fields of state and diplomatic immunities particularly, see below, chapter 13.

186 See e.g. *Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 24; 128 ILR, pp. 60, 80.

187 See e.g. *Vermont* v. *New Hampshire* 289 US 593 (1933) and *Iowa* v. *Illinois* 147 US 1 (1893).

188 See e.g. Parry, *British Digest*, pp. 103–5 and Lauterpacht, *Development of International Law*, pp. 23–5. See also R. Y. Jennings, 'International Lawyers and the Progressive Development of International Law' in Makerczyk, *Theory of International Law at the Threshold of the 21st Century*, 1996, p. 325, and Pellet, 'Article 38', p. 790.

189 See above, chapter 1.

With the rise of positivism and the consequent emphasis upon state sovereignty, treaties and custom assumed the dominant position in the exposition of the rules of the international system, and the importance of legalistic writings began to decline. Thus, one finds that textbooks are used as a method of discovering what the law is on any particular point rather than as the fount or source of actual rules. There are still some writers who have had a formative impact upon the evolution of particular laws, for example Gidel on the law of the sea,[190] and others whose general works on international law tend to be referred to virtually as classics, for example Oppenheim and Rousseau, but the general influence of textbook writers has somewhat declined.

Nevertheless, books are important as a way of arranging and putting into focus the structure and form of international law and of elucidating the nature, history and practice of the rules of law. Academic writings also have a useful role to play in stimulating thought about the values and aims of international law as well as pointing out the defects that exist within the system, and making suggestions as to the future.

Because of the lack of supreme authorities and institutions in the international legal order, the responsibility is all the greater upon the publicists of the various nations to inject an element of coherence and order into the subject as well as to question the direction and purposes of the rules.

States in their presentation of claims, national law officials in their opinions to their governments, the various international judicial and arbitral bodies in considering their decisions, and the judges of municipal courts when the need arises, all consult and quote the writings of the leading juristic authorities.[191]

Of course, the claim can be made, and often is, that textbook writers merely reflect and reinforce national prejudices,[192] but it is an allegation which has been exaggerated. It should not lead us to dismiss the value of writers, but rather to assess correctly the writer within his particular environment.

Other possible sources of international law

In the discussion of the various sources of law prescribed by the Statute of the International Court of Justice, it might have been noted that there is a

[190] *Droit International Public de la Mer*, Chateauroux, 3 vols., 1932–4.
[191] See Brownlie, *Principles*, pp. 23–4.
[192] See e.g. Huber in the *Spanish Zone of Morocco* case, 2 RIAA, pp. 615, 640; 2 AD, pp. 157, 164 (note). See also Carty, *Decay of International Law?*, pp. 128–31.

distinction between, on the one hand, actual sources of rules, that is those devices capable of instituting new rules such as law-making treaties, customary law and many decisions of the International Court of Justice since they cannot be confined to the category of merely determining or elucidating the law, and on the other hand those practices and devices which afford evidence of the existence of rules, such as juristic writings, many treaty-contracts and some judicial decisions both at the international and municipal level. In fact, each source is capable, to some extent, of both developing new law and identifying existing law. This results partly from the disorganised state of international law and partly from the terms of article 38 itself.

A similar confusion between law-making, law-determining and law-evidencing can be discerned in the discussion of the various other methods of developing law that have emerged since the conclusion of the Second World War. Foremost among the issues that have arisen and one that reflects the growth in the importance of the Third World states and the gradual de-Europeanisation of the world order is the question of the standing of the resolutions and declarations of the General Assembly of the United Nations.[193]

Unlike the UN Security Council, which has the competence to adopt resolutions under articles 24 and 25 of the UN Charter binding on all member states of the organisation,[194] resolutions of the Assembly are generally not legally binding and are merely recommendatory, putting forward opinions on various issues with varying degrees of majority

[193] See e.g. O. Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague, 1966; D. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations', 32 BYIL, 1955–6, p. 97; J. Castañeda, *Legal Effects of United Nations Resolutions*, New York, 1969, and R. A. Falk, 'On the Quasi-Legislative Competence of the General Assembly', 60 AJIL, 1966, p. 782. See also A. Cassese, *International Law in a Divided World*, London, 1986, pp. 192–5; M. Virally, 'La Valeur Juridique des Recommendations des Organisations Internationales', AFDI, 1956, p. 69; B. Sloan, 'The Binding Force of a Recommendation of the General Assembly of the United Nations', 25 BYIL, 1948, p. 1, and Sloan, 'General Assembly Resolutions Revisited (40 Years After)', 58 BYIL, 1987, p. 39; Thirlway, 'Law and Procedure of the ICJ (Part One)', p. 6; O. Schachter, 'United Nations Law', 88 AJIL, 1994, p. 1; A. Pellet, 'La Formation du Droit International dans le Cadre des Nations Unies', 6 EJIL, 1995, p. 401, and Pellet, 'Article 38', p. 711; and S. Schwebel, 'United Nations Resolutions, Recent Arbitral Awards and Customary International Law' in *Realism in Law-Making* (eds. M. Bos and H. Siblesz), Dordrecht, 1986, p. 203. See also Judge Weeramantry's Dissenting Opinion in the *East Timor* case, ICJ Reports, 1995, pp. 90, 185; 105 ILR, pp. 226, 326.

[194] See e.g. the *Namibia* case, ICJ Reports, 1971, pp. 16, 54; 49 ILR, p. 29 and the *Lockerbie* case, ICJ Reports, 1992, pp. 3, 15; 94 ILR, p. 478. See further below, chapter 22.

support.[195] This is the classic position and reflects the intention that the Assembly was to be basically a parliamentary advisory body with the binding decisions being taken by the Security Council.

Nowadays, the situation is somewhat more complex. The Assembly has produced a great number of highly important resolutions and declarations and it was inevitable that these should have some impact upon the direction adopted by modern international law. The way states vote in the General Assembly and the explanations given upon such occasions constitute evidence of state practice and state understanding as to the law. Where a particular country has consistently voted in favour of, for example, the abolition of apartheid, it could not afterwards deny the existence of a usage condemning racial discrimination and it may even be that that usage is for that state converted into a binding custom.

The Court in the *Nicaragua* case tentatively expressed the view that the *opinio juris* requirement could be derived from the circumstances surrounding the adoption and application of a General Assembly resolution. It noted that the relevant

> *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties [i.e. the US and Nicaragua] and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.[196]

The effect of consent to resolutions such as this one 'may be understood as acceptance of the validity of the rule or set of rules declared by the resolution by themselves'.[197] This comment, however, may well have referred solely to the situation where the resolution in question defines or elucidates an existing treaty (i.e. Charter) commitment.

Where the vast majority of states consistently vote for resolutions and declarations on a topic, that amounts to a state practice and a binding rule may very well emerge provided that the requisite *opinio juris* can be proved. For example, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted with no opposition and only nine abstentions and followed a series of resolutions

[195] Some resolutions of a more administrative nature are binding: see e.g. article 17 of the UN Charter.
[196] ICJ Reports, 1986, pp. 14, 99–100; 76 ILR, pp. 349, 433–4.
[197] ICJ Reports, 1986, p. 100; 76 ILR, p. 434.

in general and specific terms attacking colonialism and calling for the self-determination of the remaining colonies, has, it would seem, marked the transmutation of the concept of self-determination from a political and moral principle to a legal right and consequent obligation, particularly taken in conjunction with the 1970 Declaration on Principles of International Law.[198]

Declarations such as that on the Legal Principles Governing Activities of States in the Exploration and Use of Outer Space (1963) can also be regarded as examples of state practices which are leading to, or have led to, a binding rule of customary law. As well as constituting state practice, it may be possible to use such resolutions as evidence of the existence of or evolution towards an *opinio juris* without which a custom cannot arise. Apart from that, resolutions can be understood as authoritative interpretations by the Assembly of the various principles of the United Nations Charter depending on the circumstances.[199]

Accordingly, such resolutions are able to speed up the process of the legalisation of a state practice and thus enable a speedier adaptation of customary law to the conditions of modern life. The presence of representatives of virtually all of the states of the world in the General Assembly enormously enhances the value of that organ in general political terms and in terms of the generation of state practice that may or may not lead to binding custom. As the International Court noted, for example, in the *Nicaragua* case,[200] 'the wording of certain General Assembly declarations adopted by states demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law'. The Court put the issue the following way in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion:[201]

> The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a General Assembly resolution, it is necesary to look at its content and

[198] See further below, chapter 5, p. 251.

[199] See e.g. O. Schachter, 'Interpretation of the Charter in the Political Organs of the United Nations' in *Law, States and International Order*, 1964, p. 269; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford, 1963, and M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, chapter 2.

[200] ICJ Reports, 1986, pp. 14, 102; 76 ILR, pp. 349, 436.

[201] ICJ Reports, 1996, pp. 226, 254–5; 110 ILR, pp. 163, 204–5.