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(p. 18) 2 The sources of international law

1. Introduction

International law provides a normative framework for the conduct of interstate relations. In this sense, international society is no exception to the maxim of *ubi societas, ibi jus*: where there is social structure, there is law. The sources of international law define the rules of the system: if a candidate rule is attested by one or more of the recognized 'sources' of international law, then it may be accepted as part of international law. Simultaneously, the diffuse character of the sources highlights the decentralization of international law-making.

The formally recognized sources of international law are reflected in Article 38 of the Statute of the International Court of Justice.[1] These sources are often presented—as in Article 38—as separate, but they influence each other in practice.

It is common for writers to differentiate between formal and material sources of law. Formal sources are those methods for the creation of rules of general application which are legally binding on their addressees. The material sources provide evidence of the existence of rules which, when established, are binding and of general application. In the context of international relations, however, the use of the term 'formal source' is misleading since it conjures up notions associated with the constitutional machinery of law-making within states. No such machinery exists for the creation of international law. Decisions of the International Court, unanimously supported resolutions of the General Assembly concerning matters of law, and important multilateral treaties seeking to codify or develop rules of international law are all significant to varying degrees. Nonetheless they are not binding on states generally. In this sense, 'formal sources' hardly exist in international law. As a substitute, and perhaps as a 'constitutional' equivalent to formal sources, international law works on the basis that the general consent or acceptance of states can create rules of general application. The definition of custom in international law is essentially a statement of this principle, and not a reference to ancient custom as in English law.

In international law, the distinction between formal and material sources is consequently difficult to maintain. The former reduces to a quasi-constitutional principle of inevitable but unhelpful generality. What matters more is the variety of material sources. These are the all-important *evidence* of a normative consensus among states (p. 19) and other relevant actors concerning particular rules or practices. Decisions of the International Court, resolutions of the General Assembly, and 'law-making' multilateral treaties are evidence of the attitude of these actors towards particular rules and of the presence or absence of consensus. Moreover, there is a process of interaction which gives these a status somewhat higher than other 'material sources'. Neither an unratified treaty nor a report of the International Law Commission (ILC) to the General Assembly has any binding force as a matter of treaty law or otherwise. However, such documents stand as candidates for public reaction, approving or not as the case may be. They may approach a threshold of consensus and confront states which wish to oppose their being given normative force.

The law of treaties concerns the content of specific obligations accepted by the parties (states and other persons with treaty-making power), that is, it concerns the incidence of obligations resulting from express agreement. Treaties may be bilateral or multilateral;[2] even if multilateral, the obligations they create may run primarily between the two parties concerned—for example, the sending state and the receiving state in the case of diplomatic relations. For both multilateral and bilateral treaties, the constraints of the treaty form still apply: in principle, treaties neither oblige nor benefit third parties without their consent.[3] Thus, the incidence of particular conventional obligations is a matter distinct from the sources of general international law, which is made by more diffuse processes. Treaties *as such* are a source of obligation and not a source of rules of general application. Treaties

may, however, form an important material source in that they may be reflective of, or come to embody, customary international law.[4]

2. The Statute of the International Court of Justice

Historically, the most important attempt to specify the sources of international law was Article 38 of the Statute of the Permanent Court of International Justice,[5] taken over nearly verbatim[6] as Article 38 of the Statute of the International Court of Justice:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (p. 20)
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 59 provides that decisions 'have no binding force except between the parties and in respect of that particular case'.

These provisions are expressed in terms of the function of the Court. However, they reflect the previous practice of arbitral tribunals, and Article 38 is often put forward as a complete statement of the sources of international law.[7] Yet the article makes no reference to 'sources' and, on close inspection, cannot be regarded as a straightforward enumeration.

The first question is whether paragraph 1 creates a hierarchy of sources. There is no express hierarchy, but the draftsmen stipulated an order, and in one draft the word 'successively' appeared.[8] In practice, subparagraphs (a) and (b) are the most important: we can explain the priority of (a) by the fact that it refers to a source of obligation which will ordinarily prevail as being more specific.[9] But it is unwise to think in terms of hierarchy as dictated by the order (a) to (d) in all cases. Source (a) relates to *obligations*; in some circumstances a treaty does not give rise to a corresponding obligation of a state party, notably when it is contrary to a peremptory norm of international law;[10] and in all cases the *content* of a treaty obligation depends on the interpretation of the treaty, a process governed by international law.[11] A treaty may even be displaced by a subsequent rule of customary international law, at least where its effects are recognized in the subsequent conduct of the parties.[12]

(p. 21) Dating back to 1920, Article 38 might be thought out of date, narrow, and ill-adapted to modern international relations. But in practice it is malleable enough, and its emphasis on general acceptance is right: customary law is not to be confused with the last emanation of will of the General Assembly.

3. International Custom

(A) The concept of custom

Article 38 refers to 'international custom, as evidence of a general practice accepted as law'. The wording is prima facie defective: the existence of a custom[13] is not to be confused with the evidence adduced in its favour; it is the conclusion drawn by someone (a legal adviser, a court, a government, a commentator) as to two related questions: (1) is there a general practice; (2) is it accepted as international law? Judge Read has described customary international law as 'the generalization of the practice of States',[14] and so it is; but the reasons for making the generalization involve an evaluation of whether the practice is fit to be accepted, and is in truth generally accepted, as law.

Although the terms are sometimes used interchangeably, 'custom' and 'usage' are terms of art with different meanings. A usage is a general practice which does not reflect a legal obligation: examples include ceremonial salutes at sea and the practice of granting certain parking privileges to diplomatic vehicles.[15] Such practices are carried on out of courtesy (or 'comity') and are not articulated or claimed as legal requirements. International comity is a species of accommodation: it involves neighbourliness, mutual respect, and the friendly waiver of technicalities.[16] However, particular rules of comity, maintained consistently without reservation, may develop into rules of customary law.[17]

The material sources of custom are manifold and include: diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, (p. 22) official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and accompanying commentary, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in 'all states' form),[18] an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly. The value of these sources varies and will depend on the circumstances.

(B) The elements of custom

(i) Duration and consistency of practice

The question of uniformity and consistency of practice is very much a matter of appreciation. Complete uniformity of practice is not required, but substantial uniformity is, and for this reason in *Anglo-Norwegian Fisheries* the Court refused to accept the existence of a ten-mile rule for the closing line of bays.[19] In *Jurisdictional Immunities of the State*, it rejected the existence of an exception to an established customary rule concerning state immunity based on a lack of uniformity in state practice.[20]

Provided the consistency and generality of a practice are established, the formation of a customary rule requires no particular duration. A long practice is not necessary, an immemorial one even less so: rules relating to airspace and the continental shelf have emerged following a fairly quick maturation period.[21] In *North Sea Continental Shelf*, the Court said:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of the 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.[22]

This sets a high standard, especially in requiring concordant practice by states 'specially affected'.[23] The standard was met for some of the rules concerning the continental shelf articulated in the Truman Proclamation, but not the delimitation rule which the (p. 23) ILC had proposed as a matter of convenience and which was not contained in that Proclamation.[24]

(ii) Generality of practice

Complete consistency is not required; often the real problem is to distinguish mere abstention from protest by a number of states in the face of a practice followed by others. Silence may denote either tacit agreement or a simple lack of interest in the issue. It may be that the Permanent Court in the *Lotus* misjudged the consequences of absence of protest and the significance of fairly general abstention from prosecutions by states other than the flag state.[25] In the event, the Geneva Convention on the High Seas adopted the rule which the Court had rejected—a rare example of the overruling by treaty of a decision of the Court on a point of custom.[26]

In *Fisheries Jurisdiction (UK v Iceland)*, the Court referred to the extension of a fishery zone up to a 12nm limit 'which appears now to be generally accepted' and to 'an increasing and widespread acceptance of the concept of preferential rights for coastal states' in a situation of special dependence on coastal fisheries.[27] But while refusing to 'render judgment *sub specie legis ferendae*, or [to] anticipate the law before the legislator has laid it down',[28] the Court did in fact articulate a rule of preferential coastal state rights, a transitional step towards the Exclusive Economic Zone regime which would be included in the United Nations Convention on the Law of the Sea (UNCLOS).[29]

(iii) 'Accepted as law': Opinio juris sive necessitatis

The Statute of the International Court refers to 'a general practice accepted as law'. Some writers do not consider this psychological element to be required for custom,[30] but something like it must be necessary.[31] It is ordinarily expressed in terms of the Latin neologism *opinio juris sive necessitatis*, a phrase which has, perhaps regrettably, (p. 24) become established.[32] But the idea of normativity—the articulation of a practice as binding—is not new: it is a necessary requirement of a customary rule.

The International Court will often infer the existence of *opinio juris* from a general practice, from scholarly consensus, or from its own or other tribunals' previous determinations.[33] But in a significant minority of cases the Court has displayed greater rigour. Examples include the *Lotus*, where France asserted that the flag state has exclusive criminal jurisdiction over accidents occurring on the high seas. The Permanent Court rejected the French claim:

> Even if the rarity of the judicial decisions to be found among the reported cases were [established] ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand ... there are other circumstances calculated to show that the contrary is true.[34]

Presumably the same principles should apply to both positive conduct and abstention, yet in the *Lotus* the Court was not ready to accept continuous conduct as evidence of a legal duty and required a high standard of proof of *opinio juris*.[35]

Again in *North Sea Continental Shelf* Denmark and the Netherlands argued that the equidistance–special circumstances method of delimiting the continental shelf had become accepted as law by the date of the Convention on the Continental Shelf.[36] The Court declined to presume the existence of *opinio juris* based on the practice as at that date. Nor did it accept that the *subsequent* practice of states based on the Convention had produced a customary rule. However, the decision is not incompatible with the view that existing general practice raises a presumption of *opinio juris*. Before 1958, there was little practice concerning the equidistance principle apart from the records of the ILC, which revealed the experimental aspect of the principle at that time.[37] As to post-1958 practice, the Court's rejection of the argument rested primarily on two (p. 25) factors: (1) Article 6 was directed at agreement and was not of a norm-creating character;[38] (2) the convention having been in force for less than three years, the state practice was inadequate 'to show a general recognition that a rule of law or legal obligation is involved'.[39] But the tenor of the judgment is hostile to the presumption of *opinio juris*.[40]

In *Nicaragua*,[41] the Court expressly referred to *North Sea Continental Shelf* in the following terms:

> In considering the instances of the conduct … the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*'.[42]

Likewise, the Court in *Diallo* took the more exacting approach to custom, and to the requirement of *opinio juris* in particular. The Court noted the inconclusiveness and insufficiency of mere practice:

> The fact … that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.[43]

The choice of approach appears to depend on the character of the issues—that is, the state of the law may be a primary point in contention—and on the discretion of the Court.[44] The approach may depend on whether practice is largely treaty-based (in which case *opinio juris* is sufficient to expand application of the treaty norms as custom), or whether the law on the question is still developing.

(C) The relativity of custom

The term 'general international law' should not be taken to require universal acceptance of a rule by all subjects of international law. True, there are rules of international (p. 26) law which are universally accepted, and the *system* of international law is daily reaffirmed by states in making and responding to claims of right. But the principles of the system—consent, the requirements for custom, the persistent objector—mean that particular rules may have less than universal acceptance, yet still form part of international law. Similarly, a

rule of international law which a state has not expressly or by implication accepted may not be opposable to that state.

(i) The persistent objector

The reduction of custom to a question of special relations is illustrated by the rule that a state may exempt itself from the application of a new customary rule by persistent objection during the norm's formation.[45] Evidence of objection must be clear, and there is a rebuttable presumption of acceptance. Whatever the theoretical underpinnings of the persistent objector principle, it is recognized by international tribunals,[46] in the practice of states,[47] and latterly by the ILC.[48] Indeed, given the majoritarian tendency of international relations the principle is likely to have increased prominence.[49] However, with the increasing emergence of communitarian norms, reflecting the interests of the international community as a whole, the *incidence* of the persistent objector rule may be limited.[50] More common may be disagreement as to the meaning or scope of an accepted rule, as to which the views of particular disputing states will not be decisive.[51] Nonetheless, the persistent objector rule reinforces the principle of state consent in the creation of custom.[52]

(p. 27) (ii) The subsequent objector

In *Anglo-Norwegian Fisheries*, part of the Norwegian argument was that even if the 10nm closing line for bays and certain rules were part of general international law, they did not bind Norway which had 'consistently and unequivocally manifested a refusal to accept them'.[53] The UK admitted the general principle, while denying that Norway had manifested its supposed refusal to accept the rules. Thus, it regarded the question as one of persistent objection. The Court did not deal with the issue in this way, however. Its *ratio* was that Norway had departed from the alleged rules, if they existed, and that other states had acquiesced in this practice. But the Court was not explicit with respect to the role of acquiescence in validating a subsequent contracting-out.[54] Here one must face the problem of change in a customary rule.[55] If a substantial group of states asserts a new rule, the momentum of increased defection, complemented by acquiescence, may result in a new rule,[56] as was the case concerning the continental shelf. If the process is slow and neither the new nor the old rule has an overwhelming majority of adherents, the consequence is a network of special relations based on opposability, acquiescence, and even perhaps historic title. This situation will normally be transitional in character—though in affairs of state, transitions can take some time.

(iii) Bilateral relations and local custom

Some customary norms may be practised only within a particular region, creating a 'local' customary law.[57] Such a norm is reducible to the level of a bilateral relation, as in the *Right of Passage* case.[58] There, Portugal relied on such a custom to establish a right of access to Portuguese enclaves in Indian territory inland from the port of Daman. The Court held:

> It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between two States.[59]

(p. 28) When considering the formation of bilateral custom, general formulae concerning custom will not supplant the need for case-by-case analysis. Where a party seeks to vary the general law on a bilateral basis, the proponent of the special right has to give proof of a sense of obligation on the part of the territorial sovereign. In such circumstances, the notion of *opinio juris* merges into the principle of acquiescence.[60] In *Right of Passage*, the

transit arrangement dated back to the Mughal period, and went unquestioned by the British and later independent Indian governments.

The best known example of a regional custom is that of diplomatic asylum in Latin-America, concerning the right of the embassies of other states to give asylum to political refugees. Specifically, Columbia relied against Peru on 'an alleged regional or local custom peculiar to Latin-American States'.[61] The Court observed:

> 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. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[62]

The Court went on to remark that 'even if such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has on the contrary repudiated it'.[63] Other attempts to establish a norm of local custom before an international court or tribunal have likewise failed.[64]

4. Treaties

Treaties are the most important source of obligation in international law.[65] 'Law-making' treaties, moreover, have a direct influence on the content of general international law, an influence not conveyed adequately by their designation as material sources.

Bilateral treaties may provide evidence of customary rules,[66] and indeed there is no dogmatic distinction between 'law-making' treaties and other treaties. If bilateral (p. 29) treaties, for example those on extradition, are habitually framed in the same way, a court may regard the standard form as law even in the absence of a treaty obligation in that case.[67] However, caution is necessary in evaluating treaties for this purpose.

(A) 'Law-making' treaties

So-called 'law-making' treaties create legal obligations, the one-time observance of which does not discharge the obligation. A treaty for the joint carrying-out of a single enterprise is not law-making, and fulfilment of the treaty's objects will discharge the obligation. By contrast law-making treaties create *general* norms, framed as legal propositions, to govern the conduct of the parties, not necessarily limited to their conduct *inter se*—indeed, the expression of an obligation in universal or 'all states' form is an indication of an intent to create such a general rule. The Declaration of Paris of 1856 (on neutrality in maritime warfare), the Hague Conventions of 1899 and of 1907 (on the law of war and neutrality), the Geneva Protocol of 1925 (on prohibited weapons), the General Treaty for the Renunciation of War of 1928, the Genocide Convention of 1948, and the four Geneva Conventions of 1949 (on the protection of civilians and other groups in time of war) are examples. Moreover, those parts of the UN Charter that do not spell out the constitutional competence of the organization's organs, and other organizational questions, have the same character—notably the principles set out in Article 2 and further articulated in the Friendly Relations Declaration of 1970.[68] UNCLOS is a more recent instance.[69] Although treaties are as such binding only on the parties, the number of parties, the explicit acceptance of these rules by states generally, and, in some cases, the declaratory character of the provisions in question combine to produce a powerful law-creating effect.[70] Non-parties may by their conduct accept the provisions of a convention as representing customary international law.[71] This was the case with Hague Convention IV of 1907[72] and the annexed rules on land

warfare. In special circumstances, even an unratified treaty may be regarded as evidence of generally accepted rules.[73]

In *North Sea Continental Shelf*,[74] the principal issue was whether Germany was bound by the provisions of the Geneva Convention on the Continental Shelf (GCCS) which it had signed but not ratified. The Court concluded that only the first three articles represented emergent or pre-existing customary law.[75] The Court distinguished (p. 30) between those articles which allowed states parties to make reservations and those which did not: the latter, by inference, had a more fundamental status.[76] The Court concluded, further, that the provision on delimitation of shelf areas in Article 6 of the Convention had not become a rule of customary law by virtue of the subsequent practice of states and, in particular, of non-parties.[77] In both *Gulf of Maine*[78] and *Continental Shelf (Libya v Malta)*,[79] considerable weight was accorded to aspects of UNCLOS, although it was not yet in force.

According to Baxter, after *North Sea Continental Shelf* it became clear that 'the treaty-making process may also have unwelcome side-effects': this is the so-called 'Baxter paradox'.[80] In particular, he notes that treaties declaratory or constitutive of custom may 'arrest' its further development and that until 'the treaty is revised or amended, the customary international law will remain the image of the treaty as it was before it was revised'.[81]

(B) Relation of treaties to custom

When norms of treaty origin crystallize into new principles or rules of customary law, the customary norms retain a separate identity even where the two norms may be identical in content. Thus a state which fails to become a party to a law-making treaty may find itself indirectly affected by the norms contained in the treaty—unless its opposition rises to the level of persistent objection. Even then, its position may be awkward: it will be unable to invoke the new rule itself but unable also to secure from other states continued adherence to the old. This was the experience of the US and Japan in continuing to assert a maximum 3 nautical miles (nm) territorial sea once it became clear that most states rejected that standard in favour of 12 nm.[82] More generally, the US has sought to rely on provisions of UNCLOS—for example, in the field of maritime transit—despite its repeated failure to ratify.

In the long run, one significant effect of non-participation in a law-making treaty is inability to invoke its dispute-settlement provisions: a dispute can only arise under a treaty as between parties to the treaty. This may not matter if there is a separate basis for jurisdiction, for example under the Optional Clause or a free-standing dispute-settlement treaty,[83] and if the customary law rule is arguably the same as that (p. 31) contained in the treaty. In *Nicaragua*, the position was unusual: the US relied on an Optional Clause reservation that excluded the Court from applying the Organization of American States (OAS) Charter, under which the dispute arose, in the absence of other affected states. The Court avoided the effect of the jurisdictional reservation by holding that it was free to apply customary international law (the content of which was, it held, the same as the OAS Charter).[84] But this was to confuse jurisdiction and applicable law: states do not cease to have disputes under a treaty merely because the Court has, in consequence, no jurisdiction over those disputes. The views of the dissenting judges on this point are to be preferred.[85]

As a general rule, the requirements of duration, consistency, and generality of practice, as well as *opinio juris*, mean that customary law is often outpaced by specific treaties. But this is not always the case; in the longer term, customary law may be called on to mould and even modify treaty texts which cannot realistically be amended, however desirable amendment might be. A case in point is the law of self-defence as expressed in Article 51 of the UN Charter.[86] This parallels the right of self-defence that existed in customary international law prior to the Charter, but makes no mention of necessity and proportionality. Despite the absence of these terms in Article 51, the International Court has read them in.[87] The principle does not, however, cut both ways, and the requirement in

Article 51 that any exercise of the right be reported to the Security Council has not been imported into custom.[88]

5. General Principles of Law

Article 38(1)(c) of the Statute of the International Court refers to 'the general principles of law recognized by civilized nations'.[89] This source is listed after treaty and custom, both of which depend more immediately on state consent. Nonetheless, these general principles[90] are not considered 'subsidiary means', a term confined to Article 38(1)(d). (p. 32) The formulation appeared in the *compromis* of arbitral tribunals in the nineteenth century, and similar formulae appear in draft instruments on the functioning of tribunals.[91] In the Committee of Jurists drafting the Statute, there was no consensus on the significance of the phrase. Descamps (Belgium) had natural law concepts in mind; his draft referred to 'the rules of international law recognized by the legal conscience of civilized peoples'. Root (US) considered that governments would mistrust a court that relied on subjective concepts associated with principles of justice. However, the Committee realized that the Court must have a certain power to develop and refine such principles. In the end, a joint proposal by Root and Phillimore (UK) was accepted, and this became the text we now have.[92]

Root and Phillimore regarded these principles as rules accepted in the domestic law of all civilized states, and Guggenheim thought that paragraph (c) must be applied in this light.[93] However, Oppenheim's view is preferable: '[t]he intention is to authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, insofar as they are applicable to relations of States.'[94] The latter part of this statement is significant. Tribunals have not adopted a mechanical system of borrowing from domestic law. Rather, they have employed or adapted modes of general legal reasoning as well as comparative law analogies in order to make a coherent body of rules for application by international judicial process. It is difficult for state practice to generate the evolution of the rules of procedure and evidence as well as the substantive law that a court must employ. An international tribunal chooses, edits, and adapts elements from other developed systems. The result is a body of international law the content of which has been influenced by domestic law but which is still its own creation.[95]

(A) General principles of law in the practice of tribunals

(i) Arbitral tribunals

Arbitral tribunals have frequently resorted to analogies from municipal law. In the *Fabiani*[96] case between France and Venezuela, the arbitrator had recourse to municipal public law on the question of state responsibility for the state's agents, including (p. 33) judicial officers, for acts carried out in an official capacity. The arbitrator also relied on general principles of law in assessing damages. The Permanent Court of Arbitration applied the principle of moratory interest on debts in *Russian Indemnity*.[97] Since the Statute of the Permanent Court was concluded in 1920, tribunals not otherwise bound by it have generally treated Article 38(1)(c) as declaratory.[98]

In practice, tribunals show considerable discretion in matters involving general principles. Decisions on the acquisition of territory tend not to reflect domestic derivatives of real property, and municipal analogies may have done more harm than good here. The evolution of the rules on the effect of duress on treaties has not depended on changes in domestic law.[99] In *North Atlantic Fisheries*, the tribunal considered the concept of servitude but refused to apply it.[100] Moreover, in some cases, for example those involving the expropriation of private rights, reference to domestic law might yield uncertain results and the choice of model reveal ideological predilections.

(ii) The International Court and general principles

The Court has used Article 38(1)(c) sparingly. 'General principles' normally enter judicial reasoning without formal reference or label. However, the Court has on occasion referred to general notions of responsibility. In *Chorzów Factory*, the Court observed that 'one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him'.[101] The Court went on to observe that 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.[102] The Court has frequently relied on the principles of acquiescence and estoppel.[103] At (p. 34) other times, references to abuse of rights and to good faith may occur.[104] But the most frequent and successful use of domestic law analogies has been in the field of evidence, procedure, and jurisdiction. Thus, there have been references to the rule that no one can be judge in his own suit,[105] to litispendence,[106] to *res judicata*,[107] to various 'principles governing the judicial process',[108] and to 'the principle universally accepted by international tribunals … to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given'.[109] In *Corfu Channel*, the Court considered circumstantial evidence and remarked that 'this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions'.[110] In his dissenting opinion in *South West Africa (Second Phase)*, Judge Tanaka referred to Article 38(1)(c) of the Court's Statute as a basis for grounding the legal force of human rights concepts and suggested that the provision contains natural law elements.[111] The Court's reasoning in *Barcelona Traction* relied on the general conception of the limited liability company in municipal legal systems,[112] a position repeated in *Diallo*.[113]

(B) General principles of international law

The rubric 'general principles of international law' may alternately refer to rules of customary international law, to general principles of law as in Article 38(1)(c), or to certain logical propositions underlying judicial reasoning on the basis of existing international law. This shows that a rigid categorization of sources is inappropriate. Examples of this type of general principle of international law are the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas. In many cases, these principles may be traced to state practice. However, they are primarily abstractions and have been accepted for so long and so generally as no longer to be *directly* connected to state practice. Certain fundamental principles of international law enjoy heightened normativity as peremptory norms (see chapter 27).

(p. 35) 6. Judicial Decisions

(A) Judicial decisions and precedent in international law

Judicial decisions[114] are not strictly a formal source of law, but in many instances they are regarded as evidence of the law. A coherent body of previous jurisprudence will have important consequences in any given case. Their value, however, stops short of precedent as it is understood in the common law tradition.

Article 38(1)(d) starts with a proviso: '[s]ubject to the provisions of Article 59, judicial decisions … as subsidiary means for the determination of rules of law.' The significance of the word 'subsidiary' is not to be overstated.[115] Article 59 provides that a decision of the Court has 'no binding force except as between the parties and in respect of that particular case'. Lauterpacht argued that Article 59 does not refer to the major question of judicial precedent but to the particular question of intervention.[116] Article 63 provides that if a third state avails itself of the right of intervention, the construction given in the judgment

shall be equally binding on the intervening third state. Lauterpacht concludes that 'Article 59 would thus seem to state directly what Article 63 expresses indirectly'. However, the debate in the Committee of Jurists indicates clearly that Article 59 was not intended merely to express the principle of *res judicata*, but rather to rule out a system of binding precedent.[117] In *Polish Upper Silesia*, the Court said: '[t]he object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes.'[118] In practice, however, it has not treated earlier decisions in such a narrow spirit.[119]

It is true that the Court does not observe a doctrine of precedent, except perhaps on matters of procedure. But it strives to maintain judicial consistency. In *Exchange of Greek and Turkish Populations*, the Court referred to 'the precedent afforded by' the *Wimbledon*, reflecting the principle that treaty obligations do not entail an abandonment of sovereignty.[120] In *Reparation for Injuries*,[121] the Court relied on a pronouncement in a previous advisory opinion[122] for a statement of (p. 36) the principle of effectiveness in interpreting treaties. Such references are often a matter of 'evidence' of the law, but the Court aims for consistency and thus employs the technique of distinguishing previous decisions.[123] In *Peace Treaties*, for example, the questions submitted to the Court concerned the interpretation of dispute-settlement clauses in the peace treaties with Bulgaria, Hungary, and Romania. In fact, the request arose from other parties' allegations against these three states of breaches of treaty provisions on the maintenance of human rights, allegations of substance. The Court rejected arguments that it lacked the power to provide an opinion. It said:

> Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the *Eastern Carelia* case.[124]

Attempts have sometimes been made to have the Court depart explicitly from an earlier decision: the Court has either declined to do so[125] or has bypassed the point entirely.[126] But there is no doubt as to the Court's power to depart from or qualify the effect of an earlier decision, something which it is more inclined to do tacitly.[127] The position may be different when there is a line of concordant decisions (a *jurisprudence constante*), in which case reversal is not to be expected.[128]

(p. 37) (B) Decisions of international tribunals

The literature contains frequent reference to decisions of arbitral tribunals. The quality of such decisions varies considerably. However, certain arbitral awards have made notable contributions to the development of the law.[129]

Much depends on the status of the tribunal and of its members, and on the conditions under which it conducts its work. The judgment of the International Military Tribunal for the Trial of German Major War Criminals,[130] the decisions of the Iran–United States Claims Tribunal, and the decisions of the International Criminal Tribunal for the Former Yugoslavia, among others, contain significant findings on issues of law. The International Court has referred to arbitral decisions on many occasions;[131] it also refers compendiously to the jurisprudence of international arbitration.[132]

(C) Decisions of the international court and its predecessor

In theory, the Court applies the law and does not make it, and Article 59 of the Statute reflects a feeling on the part of the drafters that the Court was intended to settle disputes as they came to it rather than to shape the law. Yet a decision, especially if unanimous or almost unanimous, may play a catalytic role in the development of the law. The early decisions and advisory opinions in *Reparation for Injuries*, *Reservations*, and *Anglo-Norwegian Fisheries* had a decisive influence. However, some discretion is called for in handling decisions. The much-criticized *Lotus* decision for instance, the outcome of the casting vote of the President, was rejected by the ILC, a position endorsed in 1958 and again in 1982.[133] At its third session, the ILC refused (p. 38) to accept the principles emerging from the *Reservations* advisory opinion (a stance which was reversed at its fourteenth session).[134] Moreover, it may display a lack of caution to extract general propositions from opinions and judgments devoted to a specific problem or to the settlement of a dispute entangled with the special relations of two states.[135]

In practice, open defiance of the Court's authority by other courts and tribunals is rare.[136] Although its judgments are only binding between the parties, and not binding at all in the case of an advisory opinion, the Court's uninterrupted history, stated preference for consistency, and wide jurisdiction *ratione materiae* have resulted in its pronouncements on issues of substance being given great weight.

Moreover, the Court has proved influential in defining the procedural law of international courts and tribunals, such that some commentators have now begun to refer to 'a common law of international adjudication'.[137] Whilst it is correct that in international law 'every tribunal is a self-contained system (unless otherwise provided)',[138] the Court's lengthy period of operation—throughout much of which it was the only international tribunal of any significance—has enabled it to lay down a body of procedural case law which was and is a natural source of guidance for other bodies.

(D) Decisions of national courts

Article 38(1)(d) of the Statute of the International Court is not limited to international decisions. Decisions of national courts also have value.[139] Some decisions provide indirect evidence of the practice of the forum state on the question involved.[140] Others involve an independent investigation of a point of law and a consideration of available sources, and thus may offer a careful exposition of the law. Municipal judicial decisions have been an important source of material on the recognition of governments and states, state succession, state and diplomatic immunity, extradition, war crimes, belligerent occupation, and the concept of a 'state of war'.[141] However, the value of these decisions varies considerably; individual decisions may present a narrow, parochial (p. 39) outlook or rest on an inadequate use of sources. A further problem arises from the sheer number of domestic decisions touching on international law. While the most significant of these may be widely publicized,[142] others go unnoticed.

7. Other Material Sources

(A) Conclusions of international conferences

The 'final act' or other statement of conclusions of a conference of states may be a form of multilateral treaty, but, even if it is an instrument recording decisions not adopted unanimously, the result may constitute cogent evidence of the state of the law on the subject. Even before the necessary ratifications are received, a convention embodied in a Final Act and expressed as a codification of existing principles may be influential.[143]

(B) Resolutions of the general assembly

General Assembly resolutions are not binding on member states except on certain UN organizational matters. However, when they are concerned with general norms of international law, acceptance by all or most members constitutes *evidence* of the opinions of governments in what is the widest forum for the expression of such opinions.[144] Even when resolutions are framed as general principles, they can provide a basis for the progressive development of the law and, if substantially unanimous, for the speedy consolidation of customary rules. Examples of important 'law-making' resolutions include the General Assembly's Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal;[145] the Declaration on the Granting of Independence to Colonial Countries and Peoples;[146] the Declaration on Permanent Sovereignty over Natural Resources;[147] the Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space;[148] the Rio Declaration on Environment and Development;[149] and the UN Declaration on the Rights of Indigenous Peoples.[150] In some cases, a resolution may have effect as an authoritative (p. 40) interpretation and application of the principles of the Charter: this is true notably of the Friendly Relations Declaration of 1970.[151] But each resolution must be assessed in the light of all the circumstances, including other available evidence of the states' opinions on the point or points in issue.

(C) The writings of publicists

The Statute of the International Court includes, among the 'subsidiary means for the determination of rules of law', 'the teachings of the most highly qualified publicists of the various nations' or, in the French text, '*la doctrine*'.[152] The phrase 'most highly qualified' is —fortunately or otherwise—not given a restrictive effect, but authority naturally affects weight. In some areas, individual writers have had a formative influence. However, subjective factors enter into any assessment of juristic opinion and individual writers will tend to reflect national and other prejudices; further, some publicists see themselves to be propagating new and better views rather than providing a presentation of the existing law, a tendency the more widespread given increasing specialization.

Whatever the grounds for caution, the opinions of publicists enjoy wide use. Arbitral tribunals and national courts make sometimes copious reference to jurists' writings. National courts are generally unfamiliar with state practice and are ready to rely on secondary sources as a substitute. Ostensibly, the International Court might seem to make little or no use of jurists' writings.[153] However, this is because of the process of collective drafting of judgments, and the need to avoid an invidious selection of citations. The fact that the Court makes use of writers' work is evidenced by dissenting and separate opinions,[154] in which the 'workings' are set out in more detail, and which reflect the Court's actual methods. There are many references to writers in pleadings before the Court.

(p. 41) (D) Codification and the work of the international law commission

A source analogous to the writings of publicists, and at least as authoritative, is the work of the ILC, including its articles and commentaries, reports, and secretariat memoranda. Also in the same category are the bases of discussion of the 1930 Hague Codification Conference, and (to a lesser extent) the reports and resolutions of the Institute of International Law and other expert bodies.

Narrowly defined, codification involves the comprehensive setting down of the *lex lata* and the approval of the resulting text by a law-determining agency. The process has been carried out historically at international conferences, beginning with the First and Second Hague Peace Conferences of 1899 and 1907, and by groups of experts whose drafts were the subjects of conferences sponsored by the League of Nations or by the American states. However, the ILC, created as a subsidiary organ of the General Assembly in 1947 on the

basis of Article 13(1)(a) of the Charter, has had more success in the process of codification than the League bodies had.[155] Its membership combines technical qualities and civil service experience, so that its drafts may reflect solutions acceptable to governments. Moreover, it reflects a variety of political and regional standpoints. In practice, the ILC has found it impossible to maintain a strict separation of its tasks of codification and of 'progressive development' of the law. Its work on various topics, notably the law of the sea, has provided the basis for successful conferences of plenipotentiaries and for the resulting multilateral conventions. In 2001, it adopted its Articles on Responsibility of States for Internationally Wrongful Acts following nearly four decades of work, but expressed the view that there was no immediate need to convene a conference for their adoption as a treaty.[156] They have been relied upon extensively by international courts and tribunals as an authoritative statement of the law on state responsibility.[157]

8. Other Considerations Applicable in Judicial Reasoning

(A) Equity in the jurisprudence of the international court

'Equity' refers to considerations of fairness and reasonableness often necessary for the application of settled rules of law. Equity is not itself a source of law, yet it may be an important factor in the process of decision-making. Equity may play a significant role in supplementing the law, or may unobtrusively enter judicial reasoning. In *Diversion of Water from the River Meuse*, Judge Hudson applied the principle that equality is (p. 42) equity, and stated as a corollary that a state requesting the interpretation of a treaty must itself have fulfilled its treaty obligations. He observed that under 'Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply'.[158] For its part, the Court focused on the interpretation of the relevant treaty.

In *North Sea Continental Shelf*,[159] the Court had to resort to the formulation of equitable principles concerning the lateral delimitation of adjacent areas of the continental shelf. This was a consequence of its opinion that GCCS Article 6 did not represent customary law. In *Fisheries Jurisdiction (UK v Iceland)*, the International Court outlined an 'equitable solution' to the differences over fishing rights and directed the parties to negotiate accordingly.[160] In *Frontier Dispute (Burkina Faso v Mali)*, the Chamber of the Court applied the principle of 'equity *infra legem*' to the division of a frontier pool.[161] More recently, the Court employed 'equitable considerations' to quantify a claim for compensation in the *Diallo* case.[162]

Reference should also be made to Article 38(2),[163] which provides: '[t]his provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.' The power of decision *ex aequo et bono* involves elements of compromise and conciliation, whereas equity in the general sense ('equity *infra legem*') finds application as part of the normal judicial function. In *Free Zones*, the Permanent Court, under an agreement between France and Switzerland, was asked to settle the questions involved in the execution of a provision in the Treaty of Versailles.[164] While the Court had to decide on the future customs regime of the zones, the agreement contained no reference to any decision *ex aequo et bono*. Switzerland argued that the Court should work on the basis of existing rights, and, by a technical majority including the vote of the President, the Court agreed. It said:

> … even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be

> derived from a clear and explicit provision to the effect, which is not to be found in the Special Agreement …[165]

(p. 43) The majority doubted the Court's power to give decisions *ex aequo et bono*, but it would be unwise to draw general conclusions since much turned on the nature of the agreement. Additionally, the majority regarded the power to decide cases *ex aequo et bono* as distinct from the notion of equity. However, the terminology is not well settled. The drafters of the General Act of Geneva of 1928[166] apparently regarded a settlement *ex aequo et bono* as synonymous with equity. The converse, where 'equity' refers to settlement *ex aequo et bono*, has arisen in some arbitration agreements. On occasion, equity is treated as the equivalent of general principles of law.[167]

(B) Considerations of humanity

Considerations of humanity will depend on the judge's subjective appreciation, a factor which cannot be excluded. However, these considerations may relate to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite analogy. Such criteria are connected with general principles of law and equity, and need no particular justification. References to principles or laws of humanity appear in preambles to conventions,[168] in General Assembly resolutions,[169] and in diplomatic practice. The classic reference is a passage from *Corfu Channel*,[170] in which the Court relied on certain 'general and well-recognized principles', including 'elementary considerations of humanity, even more exacting in peace than in war'. On occasions, the provisions of the UN Charter concerning the protection of human rights and fundamental freedoms have seen use as a basis for the legal status of considerations of humanity.[171]

(C) 'Legitimate interests'

In particular contexts, the applicability of rules of law may depend on criteria of good faith, reasonableness, and the like. Legitimate interests, including economic interests, may in these circumstances be taken into account. Recognition of legitimate interests explains the extent of acquiescence in the face of claims to the continental shelf and to fishing zones. In this type of situation, it is, of course, acquiescence and recognition (p. 44) that provide the formal bases for the development of the new rules. In *Anglo-Norwegian Fisheries*, the Court did not purport to be doing anything other than applying existing rules, but it had to justify this special application of the normal rules to the Norwegian coastline. In doing so, it referred to 'certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage'.[172] It also referred to traditional fishing rights buttressed by 'the vital needs of the population' in determining particular baselines.[173]

Judge McNair, dissenting, expressed disquiet:

> In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.[174]

This caution is justified, but the law is inevitably bound up with the accommodation of different interests, and the application of rules usually requires an element of appreciation.

9. Conclusion

Article 38 of the Statute has generated much debate, and there are perennial questions; for example, as to how it can be applied to produce a definitive result, as to how established rules of customary international law can change, and as to the implications for the stability of the legal order of such notions as the persistent objector. Yet, at a practical level, results are achieved which attract broad support; the content of rules does change and develop,

and persistent objection occurs without the system dissolving in a miasma of bilateral relations. Materially, international law is now overwhelmingly developed by treaty, yet treaties depend upon customary law for their binding character, their interpretation, and often for their effect. Indeed, every decision by a state (the state is itself a customary law phenomenon) not to enter into a treaty is an appeal to custom as the default rule, just as every reference to a treaty provision not in force for the state in question is an appeal to the generating capacity of custom amidst texts. Article 38 works because it has to.

Footnotes:

1 26 June 1945, 892 UNTS 119.

2 The Vienna Convention on the Law of Treaties (VCLT), 22 May 1969, 1155 UNTS 331, does not define 'bilateral' or 'multilateral'. Article 60(1) assumes that a bilateral treaty is between two parties. Likewise, Arts 40–1, 55, 58, 60, 69, and 70 assume that a multilateral treaty is between three or more. Further: Crawford (2006) 319 Hague *Recueil* 326.

3 VCLT, Art 34.

4 Thirlway, *The Sources of International Law* (2014) 129–32.

5 16 December 1920, 112 BFSP 317.

6 The clause in the first paragraph 'whose function is to decide in accordance with international law' was added in 1946 in order to emphasize that the application of the enumerated sources was the application of international law: Thirlway (2014) 5–6.

7 Generally: Hudson, *The Permanent Court of International Justice* (1943) 601–12; Pellet in Zimmermann et al (eds), *The Statute of the International Court of Justice* (2012) 731. Also: Revised General Act for the Pacific Settlement of International Disputes, 28 April 1949, 71 UNTS 101, Art 28; ILC Model Rules on Arbitral Procedure, Art 10, ILC *Ybk* 1958/II, 78, 83; Scelle, ILC *Ybk* 1958/II, 1, 8. Article 38 has often been incorporated textually or by reference in the *compromis* of other tribunals.

8 Akehurst (1974–5) 47 *BY* 273, 274–5; Thirlway (2014) 133. But see *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase, ICJ Reports 1966 p 6, 300 (Judge Tanaka, diss). In general: Villiger, *Customary International Law and Treaties* (2nd edn, 1997); Charney in Delbrück (ed), *New Trends in International Lawmaking* (1997) 171; Meron (2003) 301 Hague *Recueil* 9, 373.

9 In accordance with the *lex specialis* principle: see Fragmentation of International Law, Report of the Study Group of the ILC, A/CN/4/L.702, 18 July 2006, esp 8–11; Vranes (2006) 17 *EJIL* 395. Cf d'Aspremont in Fitzmaurice & Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (2013) 3, 20. For special custom as a *lex specialis*: *Right of Passage over Indian Territory (Portugal v India)*, ICJ Reports 1960 p 6, 39–40.

10 Indeed, this is the *definition* of a peremptory norm, at least according to VCLT, Art 53. Further: chapter 27. As to a conflict between peremptory norms and customary law, see *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ Reports 2012 p 99, 140. Further: Boudreault (2012) 25 *LJIL*1003.

11 Cf VCLT, Arts 31–3. Further: chapter 16.

12 *Air Transport Services Agreement* (1963) 38 ILR 182, 248–55.

13 Séfériadès (1936) 43 *RGDIP* 129; de Visscher (1955) 59 *RGDIP* 353; Lauterpacht, *Development* (1958) 368–93; D'Amato, *The Concept of Custom in International Law* (1972); Akehurst (1974–5) 47 *BY* 1; Wolfke, *Custom in Present International Law* (2nd edn, 1993); Perreau-Saussine & Murphy (eds), *The Nature of Customary Law* (2007); Orakhelashvili (2008) 68 *ZaöRV* 69; d'Aspremont, *Formalism and the Sources of International Law* (2011)

162–70; Kammerhofer, *Uncertainty in International Law* (2011) 59–85; Crawford, *Chance, Order, Change* (2014) 48; Thirlway (2014) 53; Bradley (ed), *Custom's Future* (2016). For approaches to custom that draw on economic theory: Goldsmith & Posner (1999) 66 *U Chic LR* 1113; Norman & Trachtman (2005) 99 *AJIL* 541; Lepard, *Customary International Law* (2010). For the ILC's Draft Conclusions on Identification of Customary International Law, see Report of the ILC, A/71/10, 18 August 2016, 74.

14 *Fisheries (UK v Norway)*, ICJ Reports 1951 p 116, 191 (Judge Read).

15 *Parking Privileges for Diplomats* (1971) 70 ILR 396; Roberts (ed), *Satow's Diplomatic Practice* (6th edn, 2009) para 9.15.

16 See the *Alabama* (1872) in Moore, 1 *Int Arb* 653; *The Paquete Habana*, 175 US 677, 693–4 (1900); *Parking Privileges for Diplomats* (1971) 70 ILR 396, 402–4; Dodge (2015) 115 *CLR* 2071.

17 E.g. some diplomatic tax exemptions were originally granted as a matter of comity but are now consolidated as legal requirements in the Vienna Convention on Diplomatic Relations (VCDR), 18 April 1961, 500 UNTS 95, Art 36. See further: Roberts (6th edn, 2009) paras 8.4–8.5.

18 E.g. references to 'every State' or 'all States' in UNCLOS, Arts 3, 17, 79, 87, etc.

19 ICJ Reports 1951 p 116, 131.

20 ICJ Reports 2012 p 99, 126–35.

21 On the rapid evolution of key rules concerning the continental shelf: Crawford & Viles in Crawford, *Selected Essays* (2002) 69.

22 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)*, ICJ Reports 1969 p 3, 43. See further: ILC Draft Conclusions on Identification of Customary International Law, Report of the ILC, A/71/10, 18 August 2016, Draft Conclusion 8(2), 96.

23 See Heller (2018) 112 *AJIL* 191; Yeini, ibid, 244.

24 (1946) 40 *AJIL Supp* 45. For the Court's reasons for rejecting the 'equidistance/special circumstances' rule, see ICJ Reports 1969 p 6, 43–6. For maritime delimitation, see further chapter 12.

25 *SS Lotus* (1927) PCIJ Ser A No 10, 16; cf Lauterpacht (1958) 384–6. Also *The Paquete Habana*, 175 US 677 (1900).

26 29 April 1958, 450 UNTS 11, Art 11; UNCLOS, Art 97.

27 Merits, ICJ Reports 1974 p 3, 23–6. For reliance on the practice of a limited number of states, see *SS Wimbledon* (1923) PCIJ Ser A No 1, 15, 25–8.

28 Merits, ICJ Reports 1974 p 3, 23–4.

29 UNCLOS, Part V, and further: chapter 11.

30 See Guggenheim, 1 *Études Scelle* (1950) 275. For Kelsen, *opinio juris* is a fiction to disguise the creative powers of the judge: Kelsen (1939) 1 *RITD* 253. Cf Kelsen, *Principles of International Law* (2nd edn, 1967) 450–1. But analytically the judge is in no different position than any other evaluator of custom, except that the judge's decision may bind the parties (ICJ Statute, Art 59).

31 Further: Kirgis (1987) 81 *AJIL* 146, arguing that custom operates on a 'sliding scale', along which the level of *opinio juris* required to substantiate an assertion of custom is directly relative to the manifestation of state practice. Also Roberts (2001) 95 *AJIL* 757.

32 Lit, ‘an opinion of law or necessity’. The first appearance of the term seems to have been in von Liszt, *Das Völkerrecht* (1st edn, 1898) 6; von Liszt, *Das Völkerrecht* (3rd edn, 1925) 16; also Rivier, *Principes de droit des gens* (1896) 35, who refers to the idea but does not use the term. It is implicit in the judgment in *SS Lotus* (1927) PCIJ Ser A No 10, 28, but was not actually used by the Court until *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 43–4; thence (spuriously) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, ICJ Reports 1986 p 14, 96–8. Cf Mendelson (1995) 66 *BY* 177, 194; Dahlman (2012) 81 *Nordic JIL* 327, 330.

33 *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 44; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v US)*, ICJ Reports 1984 p 246, 293–4; *Nicaragua*, ICJ Reports 1986 p 14, 108–9; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 p 226, 254–5; *Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ Reports 2005 p 168, 226–7, 242; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2006 p 136, 171–2; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010 p 14, 82. Also: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No 17 (2011) 150 ILR 244, 281.

34 (1927) PCIJ Ser A No 10, 28; also ibid, 60 (Judge Nyholm, diss); 97 (Judge Altamira, diss).

35 For criticism: Lauterpacht (1958) 386. See, however, MacGibbon (1957) 33 *BY* 115, 131.

36 29 April 1958, 499 UNTS 311.

37 ICJ Reports 1969 p 3, 28, 32–41.

38 Ibid, 41–2.

39 Ibid, 43.

40 Ibid, 43–5. For contemporary comment: Baxter (1970) 129 Hague *Recueil* 31, 67–9; D’Amato (1970) 64 *AJIL* 892; Marek (1970) 6 *RBDI* 44. Also *Nuclear Tests (Australia v France)*, ICJ Reports 1974 p 253, 305–6 (Judge Petrén).

41 ICJ Reports 1986 p 14, citing ICJ Reports 1969 p 6, 44.

42 ICJ Reports 1986 p 14, 108–9. Also ibid, 97–8, 97–103, 106–8.

43 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, ICJ Reports 2007 p 582, 615.

44 For criticism of the Court’s sometimes unpredictable approach to identifying customary rules, see Yee (2016) 7 *JIDS* 472, 479–87.

45 The principle was recognized by both parties, and by the Court, in *Anglo-Norwegian Fisheries*, ICJ Reports 1951 p 116, 131. Also: *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 26–7, 131 (Judge Ammoun); 235, 238 (Judge Lachs, diss); 247 (Judge ad hoc Sørensen, diss); *Asylum (Colombia v Peru)*, ICJ Reports 1950 p 266, 277–8; and cf the central finding of non-opposability of exclusive fisheries zone claims in *Fisheries Jurisdiction (UK v Iceland)*, Merits, ICJ Reports 1974 p 3, 29–31.

46 Examples include the US and Japan’s refusal to accept territorial sea claims of more than 3nm (O’Connell, 1–2 *The International Law of the Sea* (ed Shearer, 1982) 156, 163–4), and the refusal of the People’s Republic of China to accept the restrictive doctrine of sovereign immunity (*Democratic Republic of Congo v FG Hemisphere Associates (No 1)* Hong Kong Court of Final Appeal, 147 ILR 376).

[47] Green, *The Persistent Objector Rule in International Law* (2016) 49. Cf D'Amato (2014) 108 *AJIL* 650, 668.

[48] For the ILC's Draft Conclusions on Identification of Customary International Law, see Report of the ILC, A/71/10, 18 August 2016, 74.

[49] See esp Charney (1985) 56 *BY* 1; Charney (1993) 87 *AJIL* 529. Further: Fitzmaurice (1957) 92 Hague *Recueil* 5, 99–101; Waldock (1962) 106 Hague *Recueil* 5, 49–53; Schachter (1982) 178 Hague *Recueil* 21, 36–8; Elias, 'Persistent Objector' (2006) *MPEPIL*; Quince, *The Persistent Objector and Customary International Law* (2010); Dumberry (2010) 59 *ICLQ* 779; Green (2016) 260.

[50] *Seabed Advisory Opinion* (2011) 150 ILR 244, 307, referring to the obligations of states in general with respect to activities in the deep seabed.

[51] E.g. the disagreement between the US and many other states as to the definition of torture: US reservation upon ratification of the Convention against Torture, 21 October 1994, and objections by Finland, 27 February 1996; Netherlands, 26 February 1996; Sweden, 27 February 1996; Germany, 26 February 1996. Cf further criticism in Report of the Committee against Torture, A/55/44 (2000) paras 179–80; Murphy, 1 *US Digest* (2002) 279–80, 289–98; Nowak & McArthur (eds), *The United Nations Convention against Torture* (2008) paras A1:10, 20, 24–5, 50–4.

[52] For further practical benefits of the persistent objector rule, see Green (2016) 257.

[53] ICJ Reports 1951 p 116.

[54] The dictum requiring explanation is: 'In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.' ICJ Reports 1951 p 116, 131. See Fitzmaurice (1957) 92 Hague *Recueil* 5, 99–101; Sørensen (1960) 101 Hague *Recueil* 5, 43–7.

[55] E.g. *Lauritzen v Chile* (1956) 23 ILR 708, 710–12. See Green (2016) 138–43, 234.

[56] Since a delict cannot be justified on the basis of a desire to change the law, the question of *opinio juris* arises in a special form. In the early stages of change this can amount to little more than a plea of good faith. For a recent attempt to argue a change to an established customary rule, see Italy's arguments in *Jurisdictional Immunities of the State*, ICJ Reports 2012 p 99, 126.

[57] Cf commentary to Draft Conclusion 16 of ILC Draft Conclusions on Identification of Customary International Law, Report of the ILC, A/71/10, 18 August 2016, 114.

[58] ICJ Reports 1960 p 6, 39–43; cf 62–3 (Judge Wellington Koo); 82–4 (Judge Armand-Ugon, diss); 110 (Judge Spender, diss). Also: *Jurisdiction of the European Commission of the Danube* (1927) PCIJ Ser B No 14, 6, 114 (Deputy-Judge Negulesco, diss); *Nottebohm (Liechtenstein v Guatemala)*, Second Phase, ICJ Reports 1955 p 4, 30 (Judge Klaestead, diss).

[59] ICJ Reports 1960 p 6, 39.

[60] Generally: D'Amato (1969) 63 *AJIL* 211; Antunes, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement* (2000); Antunes, 'Acquiescence' (2006) *MPEPIL*.

[61] *Asylum*, ICJ Reports 1950 p 266, 276.

[62] Ibid, 276–7.

[63] Ibid, 277–8.

64 E.g. *Rights of Nationals of the United States of America in Morocco (France v US)*, ICJ Reports 1952 p 176, 199–200, citing *Asylum*, ICJ Reports 1950 p 266, 276–7. Also: Lauterpacht (1958) 388–92.

65 Generally: Corten & Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011); Hollis (ed), *The Oxford Guide to Treaties* (2012); Aust, *Modern Treaty Law and Practice* (3rd edn, 2013); Tams, Tzanakopoulos, & Zimmermann (eds), *Research Handbook on the Law of Treaties* (2014); Thirlway (2014) 31; Bjorge, *The Evolutionary Interpretation of Treaties* (2014); Kolb, *The Law of Treaties* (2016). See further: chapter 16.

66 See *SS Wimbledon* (1923) PCIJ Ser A No 1, 25; *Panevezys–Saldutiskis Railway* (1939) PCIJ Ser A/B No 76, 51–2 (Judge Erich); *Nottebohm*, ICJ Reports 1955 p 4, 22–3. See also Baxter (1970) 129 Hague *Recueil* 27, 75–91. Cf Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (2016) 171.

67 Cf *Re Tribble* (1953) 20 ILR 366; *N v Public Prosecutor of the Canton of Aargau* (1953) 20 ILR 363.

68 GA Res 2625(XXV), 24 October 1970, as to which see Arangio-Ruiz (1972) 137 Hague *Recueil* 419.

69 10 December 1982, 1833 UNTS 3.

70 McNair (1961) 216–18 describes Art 2, paras 3–4 of the Charter as the 'nearest approach to legislation by the whole community of States that has yet been realised'.

71 There must be evidence of consent to the extension of the rule, particularly if the rule is found in a regional convention: *European Human Rights Convention* (1955) 22 ILR 608, 610. Cf the treatment of a European regional convention in *Pulp Mills*, ICJ Reports 2010 p 14, 82–7.

72 E.g. *In re Goering* (1946) 13 ILR 203.

73 See *Nottebohm*, Second Phase, ICJ Reports 1955 p 4, 23; *Namibia Advisory Opinion*, ICJ Reports 1971 p 16, 47. Cf *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 41–3; Baxter (1970) 129 Hague *Recueil* 27, 61.

74 ICJ Reports 1969 p 3.

75 Ibid, 32–41, 86–9 (Judge Padilla Nervo); 102–6, 123–4 (Judge Ammoun).

76 ICJ Reports 1969 p 3, 39–40 (majority); 182 (Judge Tanaka, diss); 198 (Judge Morelli, diss); 223–5 (Judge Lachs, diss); 248 (Judge Sørensen, diss). Cf Baxter (1970) 129 Hague *Recueil* 27, 47–51.

77 *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 41–5. As to the effect of subsequent practice on the interpretation of treaties, see ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties and commentaries thereto, Report of the ILC, A/71/10, 18 August 2016, 118.

78 ICJ Reports 1982 p 246, 294–5.

79 ICJ Reports 1985 p 13, 29–34.

80 Baxter (1970) 129 Hague *Recueil* 27, 92. Further: Baxter (1965–6) 41 *BY* 275.

81 Baxter (1970) 97. See Crawford, *Chance, Order, Change* (2014) 90–112 for a full discussion.

82 *Nicaragua*, ICJ Reports 1986 p 14, 92–6, 152–4 (President Nagendra Singh); 182–4 (Judge Ago); 204–8 (Judge Ni); 216–19 (Judge Oda, diss); 302–6 (Judge Schwebel, diss); 529–36 (Judge Jennings, diss).

83 E.g. American Treaty on Pacific Settlement, 30 April 1948, 30 UNTS 55; European Convention for the Pacific Settlement of Disputes, 29 April 1957, 320 UNTS 243.

84 *Nicaragua*, ICJ Reports 1986 p 14, 92–6, 152–4 (President Nagendra Singh).

85 Ibid, 216–19 (Judge Oda, diss); 302–6 (Judge Schwebel, diss); 529–36 (Judge Jennings, diss). Further: Crawford, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)' (2006) *MPEPIL*.

86 Jia (2010) 9 *Chin JIL* 81, 98–100; Crawford, *Chance, Order, Change* (2014) 110. On self-defence in international law: Alder, *The Inherent Right of Self-Defence in International Law* (2013) and chapter 33.

87 *Nuclear Weapons*, ICJ Reports 1996 p 226, 244–5.

88 *Nicaragua*, ICJ Reports 1986 p 14, 105.

89 The adjective 'civilized' was introduced by the Committee of Jurists in 1920. The Committee apparently considered all nations 'civilized', though it is easy to see how that term could possess an unfortunate, even colonialist, connotation. 'It can be firmly admitted that, for the time being, all States must be considered as "civilized nations"': Pellet in Zimmermann et al (2012) 836–7.

90 Generally: Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); Fitzmaurice (1957) 92 Hague *Recueil* 1; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2nd edn, 1987); Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008); Ellis (2011) 22 *EJIL* 949; Gaja, 'General Principles of Law' (2013) *MPEPIL*; Thirlway (2014) 92; Pineschi (ed), *General Principles of Law* (2015).

91 See Art 7 (on general principles of justice and equity) of Convention XII Relative to the Establishment of an International Prize Court, 18 October 1907, 3 NRG 3rd Ser 688 (never entered into force). Also: European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 222, Art 7(2), providing for 'the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations'.

92 Descamps, *Procès-verbaux* (1920) 316, 335, 344.

93 Guggenheim (1958) 94 Hague *Recueil* 6, 78.

94 1 Oppenheim, para 12.

95 See Tunkin (1958) 95 Hague *Recueil* 5, 23–6; de Visscher, *Theory and Reality in Public International Law* (3rd edn, 1968) 400–2. Cf *South West Africa*, ICJ Reports 1950 p 128, 158 (Judge McNair, diss).

96 (1902) 10 RIAA 83. The claim was based on denial of justice by the Venezuelan courts.

97 (1912) 1 HCR 297. See also *Sarropoulos v Bulgarian State* (1927) 4 ILR 245.

98 See e.g. *US v Germany* (1923) 2 ILR 367; *Romania v Germany* (1927) 4 ILR 542; *Lena Goldfields* (1930) 5 ILR 3; *Greek Powder & Cartridge Co v German Federal Republic* (1958) 25 ILR 544, 545; *Arbitration between Newfoundland and Labrador and Nova Scotia* (2002) 128 ILR 425, 534–5; *Feldman v Mexico* (2002) 126 ILR 26, 42; *Waste Management v Mexico* (2002) 132 ILR 146, 171–2; *Abyei Arbitration* (2009) 144 ILR 348, 504.

99 Nineteenth-century writers took the view that duress directed against the state had no vitiating effect. Since 1920, the contrary view has been accepted, under the influence not of

domestic analogy but of developments in the law relating to the use of force: VCLT, Arts 51–2, and further: chapters 16, 33.

100 (1910) 1 HCR 141.

101 *Factory at Chorzów*, Jurisdiction (1927) PCIJ Ser A No 9, 31.

102 *Factory at Chorzów*, Merits (1928) PCIJ Ser A No 17, 29.

103 *Legal Status of Eastern Greenland* (1933) PCIJ Ser A/B No 53, 52–4, 62, 69; *Arbitral Award Made by the King of Spain (Honduras v Nicaragua)*, ICJ Reports 1960 p 192, 209, 213; *Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Reports 1962 p 6, 23, 31–2, 39–51 (Judge Alfaro). Also ibid, 26, where the Court said: 'It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error.' Further: *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain)*, Preliminary Objections, ICJ Reports 1964 p 6, 24–5; *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 26; *Gulf of Maine*, ICJ Reports 1984 p 246, 308–9; *Cameroon v Nigeria*, Preliminary Objections, ICJ Reports 1998 p 275, 303–4; *Legality of Use of Force (Serbia and Montenegro v Canada)*, Preliminary Objections, ICJ Reports 2004 p 429, 444–7. On acquiescence and estoppel, see: chapter 18.

104 E.g. *Free Zones of Upper Savoy and the District of Gex* (1930) PCIJ Ser A No 24, 12; (1932) PCIJ Ser A/B No 46, 167. For individual judges' use of analogies: Lauterpacht (1958) 167. Also *Right of Passage*, ICJ Reports 1960 p 6, 66–7 (Judge Wellington Koo); 90 (Judge Moreno Quintana, diss); 107 (Judge Spender, diss); 136 (Judge ad hoc Fernandes, diss).

105 *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (1925) PCIJ Ser B No 12, 32.

106 *Certain German Interests in Polish Upper Silesia*, Preliminary Objections (1925) PCIJ Ser A No 6, 20.

107 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports 1954 p 47, 53.

108 *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, ICJ Reports 1973 p 166, 177, 181, 210; *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal*, ICJ Reports 1982 p 325, 338–40, 345, 356.

109 *Electricity Co of Sofia and Bulgaria* (1939) PCIJ, Interim Measures of Protection, Ser A/B No 79, 199.

110 ICJ Reports 1949 p 4, 18. Also: *Right of Passage*, Preliminary Objections, ICJ Reports 1957 p 125, 141–2; *German Interests* (1925) PCIJ Ser A No 6, 19.

111 ICJ Reports 1966 p 6, 294–9 (Judge Tanaka, diss).

112 *Barcelona Traction*, ICJ Reports 1970 p 3, 33–5.

113 *Diallo*, ICJ Reports 2010 p 639, 675.

114 Generally: Lauterpacht (1958) 8–22. Further: Pellet in Zimmermann et al (2012) 854–68.

115 Fitzmaurice in *Symbolae Verzijl* (1958) 153, 174 (criticizing the classification).

116 Lauterpacht (1958) 8.

117 See Descamps (1920) 332, 336, 584. Also: Sørensen (1946) 161; Hudson (1943) 207; Waldock (1962) 106 Hague *Recueil* 5, 91.

118 *German Interests* (1926) PCIJ Ser A No 7, 19.

119 Generally: Lauterpacht (1931) 12 *BY* 31, 60; Lauterpacht (1958) 9–20. Further: Shahabuddeen, *Precedent in the World Court* (1996); Brown, *A Common Law of International Adjudication* (2007); Brown in Zimmermann et al (2012) 1417; Hernández, *The International Court of Justice and the Judicial Function* (2014) 156; Shaw, *Rosenne's Law and Practice of the International Court: 1920*–2015 (5th edn, 2016) 1609–15. See also *Diallo*, ICJ Reports 2010 p 639, 664, where the Court referred expressly to the case law of other international courts and treaty bodies.

120 *Exchange of Greek and Turkish Populations* (1925) PCIJ Ser B No 10, 21.

121 *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949 p 174, 182–3.

122 *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer* (1926) PCIJ Ser B No 13, 7, 18.

123 Also: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, ICJ Reports 1950 p 65, 89 (Judge Winiarski, diss); 103 (Judge Zoričič, diss); 106 (Judge Krylov, diss); *South West Africa*, Preliminary Objections, ICJ Reports 1962 p 319, 328, 345; *Northern Cameroons*, Preliminary Objections, ICJ Reports 1963 p 15, 27–8, 29–30, 37; *Aerial Incident of 27 July 1955 (Israel v Bulgaria)*, ICJ Reports 1959 p 127, 192 (Judges Lauterpacht, Wellington Koo, & Spender, diss); *South West Africa*, Second Phase, ICJ Reports 1966 p 6, 240–1 (Judge Koretsky, diss); *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 44, 47–9; 101–2, 121, 131, 138 (Judge Ammoun); 210 (Judge Morelli, diss); 223, 225, 229, 231–3, 236, 238 (Judge Lachs, diss); 243–4, 247 (Judge Sørensen, diss); *Namibia*, ICJ Reports 1971 p 16, 26–7, 53–4; *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1073, 1076, 1097–100; *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 353–4, 359, 415–16, 420–1, 440–7, 453.

124 *Peace Treaties*, First Phase, ICJ Reports 1950 p 65, 72, referring to *Eastern Carelia* (1923) PCIJ Ser B No 5, 27. See Lauterpacht (1958) 352–7, for criticism of the distinction between procedure and substance. *Eastern Carelia* was also distinguished in *Namibia*, ICJ Reports 1971 p 16, 23, and in *Wall*, ICJ Reports 2004 p 136, 161–2.

125 E.g. *Cameroon v Nigeria*, Preliminary Objections, ICJ Reports 1998 p 275, 291, following the decision in *Right of Passage*, Preliminary Objections, ICJ Reports 1957 p 125, 146, on the immediate effect of an Optional Clause declaration.

126 E.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, ICJ Reports 2008 p 412, 434–5, avoiding applying the decision in *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections, ICJ Reports 2004 p 279, 318–24, on the interpretation of Art 35(2) of the Statute.

127 E.g. the development of obligations *erga omnes* in *Barcelona Traction*, Jurisdiction, ICJ Reports 1970 p 3, 32, tacitly reversing *South West Africa*, ICJ Reports 1966 p 6, in which standing was denied to Liberia and Ethiopia.

128 Whether a change in the jurisprudence is sufficiently established can itself be controversial: cf *Marshall Islands v UK*, Preliminary Objections, ICJ Reports 2016 p 833, 859–60 (President Abraham, sep op); 1095–101 (Judge Crawford, diss).

129 E.g. *The Alabama* (1872) in Moore, 1 *Int Arb* 653; *Behring Sea Fisheries* (1893) in Moore, 1 *Int Arb* 755.

130 *In re Goering* (1946) 13 ILR 203.

131 E.g. *Polish Postal Service in Danzig* (1925) PCIJ Ser B No 11, 30 (referring to *Pious Funds of the Californias* (1902) 9 RIAA 11); *SS Lotus* (1927) PCIJ Ser A No 10, 26 (referring to *Costa Rica Packet* in Moore, 5 *Int Arb* 4948); *Legal Status of Eastern Greenland* (1933) PCIJ Ser A/B No 53, 45–6 (referring to *Island of Palmas* (1928) 2 RIAA 828); *Nottebohm*, Preliminary Objections, ICJ Reports 1953 p 113, 119 ('since the *Alabama* case, it has been generally recognized, following the earlier precedents, that in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction'); *Gulf of Maine*, ICJ Reports 1984 p 246, 302–3, 324 (referring to *Anglo–French Continental Shelf* (1979) 54 ILR 6); *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, ICJ Reports 1992 p 351, 387 (referring to the Swiss Federal Council's award in *Certain Boundary Questions between Colombia and Venezuela* (1922) 1 RIAA 228); *Pedra Branca/Pulau Batu Puteh (Malaysia v Singapore)*, ICJ Reports 2008 p 12, 32 (referring to the *Meerauge Arbitration (Austria v Hungary)* (1902) 8 *RDI* 2nd Ser, 207), 80 (referring to *Territorial Sovereignty and Scope of the Dispute (Eritrea v Yemen)* (1998) 22 RIAA 209); *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, ICJ Reports 2009 p 61, 109 (referring to *Eritrea/Yemen (Maritime Delimitation)* (1999) 22 RIAA 367), 125 (referring to *Barbados v Trinidad and Tobago* (2006) 27 RIAA 214).

132 *Factory at Chorzów*, Jurisdiction (1927) PCIJ Ser A No 9, 31; *Factory at Chorzów* (1928) PCIJ Ser A No 17, 31, 47; *Anglo-Norwegian Fisheries*, ICJ Reports 1951 p 116, 131. Also: *Peter Pázmány University* (1933) PCIJ Ser A/B No 61, 243 (consistent practice of mixed arbitral tribunals); *Barcelona Traction*, Second Phase, ICJ Reports 1970 p 30, 40. The Court has also referred generally to decisions of other tribunals without specific reference to arbitral tribunals. E.g. *Legal Status of Eastern Greenland* (1933) PCIJ Ser A/B No 53, 46; *Reparation for Injuries*, ICJ Reports 1949 p 174, 186.

133 See Geneva Convention on the High Seas, 29 April 1958, 450 UNTS 82, Art 11; ILC *Ybk* 1982/II, 41–2.

134 ILC *Ybk* 1951/I, 366–78; ILC *Ybk* 1962/I, 229–31, 288–90.

135 On *Genocide*: McNair (1961) 167–8. On *Nottebohm*: Flegenheimer (1958) 25 ILR 91, 148–50.

136 Cf the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadić* (1999) 124 ILR 61, 98–121, which disagreed with the International Court's requirement of effective control when attributing the conduct of private actors to a state under the rules of state responsibility, as laid down in *Nicaragua*, ICJ Reports 1986 p 14, 61–5. The ICJ reasserted its view in *Bosnian Genocide*, ICJ Reports 2007 p 43, 209–11. Further: Cassese (2007) 18 *EJIL* 649.

137 Generally: Brown, *A Common Law of International Adjudication* (2007).

138 *Prosecutor v Tadić* (1995) 105 ILR 419, 458.

139 Generally: Lauterpacht (1929) 10 *BY* 65. Further: Falk, *The Role of Domestic Courts in the International Legal Order* (1964); Nollkaemper, *National Courts and the International Rule of Law* (2011).

140 See *Jurisdictional Immunities of the State*, ICJ Reports 2012 p 99, 123 (noting that '[s]tate practice of particular significance is to be found in the judgments of national courts …').

141 See *The Scotia*, 81 US 170 (1871); *The Paquete Habana*, 175 US 677 (1900); *The Zamora* [1916] 2 AC 77; *Gibbs v Rodríguez* (1951) 18 ILR 661; *Lauritzen v Government of Chile* (1956) 23 ILR 708.

142 E.g. *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 104 ILR 460; *Reference re Secession of Quebec* (1998) 115 ILR 536; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147; *Gaddafi* (2000) 125 ILR 490; *Sosa v Alvarez-Machain*, 542 US 692 (2004); *Hamdan v Rumsfeld*, 548 US 557 (2006). See generally the cases in the ILR and the ILDC.

143 See *Re Cámpora* (1957) 24 ILR 518, *Namibia*, ICJ Reports 1971 p 16, 47.

144 *Nicaragua*, ICJ Reports 1986 p 14, 98–104, 107–8.

145 GA Res 95(I), 11 December 1946, adopted unanimously.

146 GA Res 1514(XV), 14 December 1960 (89–0:9).

147 GA Res 1803(XVII), 14 December 1962 (87–2:12). Cf *Congo v Uganda*, ICJ Reports 2005 p 168, 251 (para 244).

148 GA Res 1962(XVIII), 13 December 1963, adopted unanimously.

149 GA Res 47/190, 22 December 1992, adopted without a vote.

150 GA Res 61/295, 13 September 2007 (144–4:11).

151 Declaration on Principles of International Law Concerning Friendly Relations, GA Res 2625(XXV), 24 October 1970, adopted without vote.

152 Generally: Lauterpacht (1958) 23–5; Allott (1971) 45 *BY* 79; Cheng (ed), *International Law* (1982); Jennings in Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (1996) 413; Rosenne, *The Perplexities of Modern International Law* (2004) 51–3; Wood, 'Teachings of the Most Highly Qualified Publicists' (2010) *MPEPIL*; Thirlway (2014) 126.

153 But see *SS Wimbledon* (1923) PCIJ Ser A No 1, 28 ('general opinion'); *German Settlers in Poland* (1923) PCIJ Ser B No 6, 6, 36 ('almost universal opinion'); *Question of Jaworzina* (1923) PCIJ Ser B No 8, 37 ('*doctrine constante*'); *German Interests*, Preliminary Objections (1925) PCIJ Ser A No 6, 20 ('the "teachings of legal authorities"', 'the jurisprudence of the principal countries'); *SS Lotus* (1927) PCIJ Ser A No 10, 26 ('teachings of publicists', 'all or nearly all writers'); *Nottebohm*, Second Phase, ICJ Reports 1955 p 4, 22 ('the writings of publicists'). Also: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Reports 2007 p 43, 125, referring to Lemkin, *Axis Rule in Occupied Europe* (1944) 79. This is the only occasion where the Court has referred to an individual author by name.

154 *Diversion of Water from the Meuse* (1937) PCIJ Ser A/B No 70, 76–7 (Judge Hudson); *South West Africa*, ICJ Reports 1950 p 128, 146–9 (Judge McNair); *Peace Treaties*, Second Phase, ICJ Reports 1950 p 221, 235 (Judge Read, diss); *Asylum*, ICJ Reports 1950 p 266, 335–7 (Judge Azevedo, diss); *Temple*, ICJ Reports 1962 p 6, 39–41 (Vice-President Alfaro); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997 p 7, 88–119 (Judge Weeramantry); *Pulp Mills*, ICJ Reports 2010 p 14, 110, 113–14 (Judges Al-Khasawneh & Simma, diss).

155 GA Res 174(II), 21 November 1947. On the ILC's work: Briggs, *The International Law Commission* (1965); Morton, *The International Law Commission of the United Nations* (2000); Pronto & Wood, *The International Law Commission 1999–2009* (2010); United Nations, *The Work of the International Law Commission* (8th edn, 2012); Rao, 'International Law Commission' (2017) *MPEPIL*.

156 ILC *Ybk* 2001/II, 31.

157 Also: Crawford, *State Responsibility* (2013) 43–4. Further: chapters 25–7.

158 *Diversion of Water from the Meuse* (1937) PCIJ Ser A/B No 70, 73 (Judge Hudson). Also *SS Wimbledon* (1923) PCIJ Ser A No 1, 32 (on the currency in which the damages are to be paid). Instances of equity in arbitral jurisprudence include *Orinoco Steamship Co* (1910) 1 HCR 228; *Norwegian Shipowners* (1922) 1 ILR 189; *Eastern Extension, Australasia and China Telegraph Co, Ltd* (1923) 6 RIAA 112; *Trail Smelter* (1941) 9 ILR 315.

159 ICJ Reports 1969 p 3, 46–52, 131–5 (Judge Ammoun); 165–8 (Vice-President Koretsky, diss); 192–6 (Judge Tanaka, diss); 207–9 (Judge Morelli, diss); 257 (Judge Sørensen, diss).

160 Merits, ICJ Reports 1974 p 3, 30–5.

161 ICJ Reports 1986 p 554, 631–3. Also: *Review of UNAT Judgment No 273*, ICJ Reports 1982 p 325, 536–7 (Judge Schwebel, diss).

162 ICJ Reports 2012 p 324, 334–5.

163 Judge Kellogg thought otherwise but was in error. *Free Zones*, Second Phase (1930) PCIJ Ser A No 24, 39–40 (Judge Kellogg). See *North Sea Continental Shelf*, ICJ Reports 1969 p 3, 48.

164 *Free Zones* (1930) PCIJ Ser A No 24, 4. Cf the earlier phase (1929) PCIJ Ser A No 22. Also: Lauterpacht, *Function of Law* (1933) 318; Lauterpacht (1958) 213–17.

165 *Free Zones* (1930) PCIJ Ser A No 24, 10.

166 General Act for the Pacific Settlement of International Disputes, 26 September 1928, 93 LNTS 343, Art 28. The provision was copied in other treaties.

167 E.g. *Norwegian Shipowners* (1922) 1 ILR 189, 370. Further: Thirlway (2014) 104.

168 See especially Preamble to the Hague Convention Concerning the Laws and Customs of War on Land, 18 October 1907, 36 Stat 2227: ‘Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.’ This is known as the Martens clause (he was the Russian legal adviser).

169 E.g. Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons, GA Res 1653(XVI), 24 November 1961.

170 ICJ Reports 1949 p 4, 22. The statement referred to Albania’s duty to warn of the presence of mines in its waters. See also *Nicaragua*, ICJ Reports 1986 p 14, 112–14; Thirlway (1990) 61 *BY* 1, 6–13.

171 In *South West Africa*, Second Phase, ICJ Reports 1966 p 6, 34, the Court held that humanitarian considerations were not decisive. But see ibid, 252–3, 270, 294–9 (Judge Tanaka, diss).

172 ICJ Reports 1951 p 116, 133. Also ibid, 128: ‘In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.’ Further: Fitzmaurice (1953) 30 *BY* 1, 69–70; Fitzmaurice (1957) 92 Hague *Recueil* 5, 112–16; Thirlway (1990) 61 *BY* 1, 13–20.

173 ICJ Reports 1951 p 116, 142.

174 Ibid, 169 (Judge McNair, diss).