

## Sources of International Law

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### A. Introduction

#### 1. *Notion*

- 1 The term 'source of law' may mean different things. It may refer to either historical, ethical, social, or other bases for a legal rule, or it may refer to legal rules as such (Abi Saab 31). The notion will be used here in the latter sense.
- 2 Speaking of 'sources of international law' presupposes that there exist legal, ie binding, rules in → *international law*. This view is not uncontested and, apart from that, those who take that view advance different reasons why international law consists of binding rules.

#### 2. *Binding Nature of International Law*

- 3 Generally speaking, those who argue that international law is binding rest their claim on one of two arguments: they either refer to the consent expressed by those → *subjects of international law* being bound (Oppenheim 332), or they ascertain that the norm in question reflects accepted meta-legal principles such as justice, equity, and fairness (→ *Equity in International Law*).
- 4 This contribution takes the position that, ultimately, no individual source of international law (treaty law, customary international law, general principles, etc) is founded on one of these two justifications alone. Neither can, for example, international treaties provide for a long-term sustainable order among States, notwithstanding the consent of the States involved, if they do not also mirror the principles of justice, equity, and fairness. Nor is it possible to establish an international order on justice, equity, and fairness alone, however defined, if the subjects of international law do not consent thereto. The delicate balance between these two foundations of international law has to be achieved for each source of international law at the moment of its establishment and it has to be upheld over time. A variety of mechanisms are available in international law to gain consent, uphold consent, or to ensure that a norm under consideration meets the principles of fairness, equity, and justice. Reservations to international treaties; objections to the establishment of a rule of customary international law; the review of existing international treaties; the drafting of subsequent ones;

the modification of treaty as well as customary law through subsequent practice; the establishment of peremptory norms of international law (*ius cogens*); and the development of non-binding rules such as resolutions and declarations of international organizations and international conferences having an impact on the progressive development of international law should be seen from this point of view. It is decisive to take into account that the sources of international law constitute a unity, and together form the corpus of international law. Whereas some sources may predominantly be based upon consent (eg international treaties), others may be more open to meta-legal and general considerations derived from ethics, reasonableness, and logic (principles of international law) (see also → *Ethos, Ethics and Morality in International Relations*; → *Reasonableness in International Law*). Therefore, the corpus of international law comprising all sources is based upon consent as well as meta-legal rules and general considerations. In that respect, the individual sources of international law complement each other as far as their substance but also, and more prominently, as far as their foundation is concerned.

- 5 Those who deny the binding nature of international law (amongst others Posner and Goldsmith; Bolton) argue that international law serves more as a set of guidelines than legal rules. They advance several reasons, from the lack of a central law-making power and the lack of efficient enforcement mechanisms, to the assumption that States act—and should act—only in the furtherance of self-interest, thus denying the existence of → *community interest[s]*. This approach is neither new nor innovative. It can be traced back to Hans Morgenthau and Carl Schmitt. Although some of their criticism of international law is well-founded, they fail to explain why subjects of international law conclude international treaties and why they try to justify any alleged deviation from a commitment entered into. They also fail to appreciate that the States—even the most powerful ones—are in favour of establishing a world order which has a stabilizing effect on world affairs. And finally, they cannot rebut the argument of Louis Henkin that ‘almost all nations observe all principles of international law and almost all of their obligations almost all of the times’ (at 47).
- 6 This contribution is based on the premise that international law is constituted by legally binding norms, stemming from different sources. The term ‘sources’ refers to two different, albeit interrelated, issues, namely, the process and procedure through which binding rules of international law and the rules of international law as such are generated. The process character of international law is being emphasized not with the aim to question the legally binding nature of international law but to indicate that international law is in permanent flux, even though it is meant to have and does have a stabilizing effect on international relations.

## **B. Identification of Sources of International Law**

- 7 Unlike national laws where the sources of law are usually specified in a norm superior to laws and regulations, usually a constitution, no such norm exists in international law (Shaw 66). Some consider this a deficiency of international law (Posner and Goldsmith). This criticism has its foundation in an emphasis of national law as the only model for a legal order; a view that disregards the fact that the legal rules governing the relationship between subjects of international law may have to follow different principles.
- 8 However, statutes of → *international courts and tribunals* specify the sources of international law they may use. Notably, an international court or tribunal may not have the competence to invoke international law *in toto* but rather a part thereof. For example, according to Art. 293 UN Convention on the Law of the Sea, international courts and tribunals having jurisdiction under Part XV Section 2 of the Convention shall apply the Convention and other rules of international law not incompatible with the Convention. In other words, the international courts and tribunals concerned are not free to apply international law in its totality, at least theoretically.
- 9 According to Art. 38 (1) ICJ Statute, the sources to be applied by the → *International Court of Justice (ICJ)*, whose function it is to decide in accordance with international law such legal disputes as are submitted to it, are:

- a) international → *treaties*, whether general or particular, establishing rules recognized by the contesting States Parties to a dispute before the ICJ;
  - b) → *customary international law* as evidence of a general practice accepted as law;
  - c) the → *general principles of law* recognized by → *civilized nations*; and
  - d) subject to the provisions of Art. 59 ICJ Statute, judicial decisions and → *teachings of the most highly qualified publicists* (Art. 38 (1) ICJ Statute). It is evident from the wording of Art. 38 (1) (d) ICJ Statute that the latter are of a subsidiary nature only. They do not actually qualify as sources of law but rather as means to establish the existence of sources of law.
- 10 This provision identifies the sources which the ICJ is meant to apply in deciding a dispute submitted to it; it is also referred to as establishing the authentic list of the sources of international law (Thirlway). Although this view may find some justification in the Chapeau to Art. 38 ICJ Statute, it disregards the objective of this provision. It is the States concerned that eventually decide what constitutes international law (Higgins 18). If this approach is being followed, Art. 38 ICJ Statute states in a merely declaratory manner which sources of international law existed when this provision was drafted (Abi Saab). In addition to the sources listed, other sources exist, such as binding decisions of international organizations and unilateral acts. Therefore, Art. 38 (1) ICJ Statute does not provide for a complete list of sources of international law the ICJ may use, and in effect has used, in its jurisprudence.
- 11 Art. 38 (1) (a)–(c) ICJ Statute do not establish a hierarchy of the sources, although international courts and tribunals will, as a matter of convenience, invoke international treaties first. Apart from those provisions which are considered *ius cogens*, no such hierarchy exists. It is easily conceivable that the same matter is governed by treaty as well as customary international law and that these rules coexist or that customary international law is supplementing treaty law. The relationship between the sources is to be established on a case-by-case basis by having recourse to the established international law principles of interpretation, such as the *lex specialis derogat legi generali* rule or the *lex posterior derogat legi priori* rule (ILC).

## C. Law-Making Process in International Law

### 1. Introduction

- 12 In general, international law lacks a central law-making power equivalent to the one in national legal systems. The characteristic feature of international law is that its main addressees are also the ones who create international law. Therefore, international law has elements of self-commitment as well as contractual elements, although it would be a simplification to qualify international law only or even predominantly from these two points of view. As already indicated, international law is not only based upon the consent of the States concerned but reflects and has to reflect principles such as justice, equity, and fairness. Such principles are—as can be taken from the evolution of the → *international community* since the end of World War II—not static but develop progressively as required. Whereas traditionally, international law was considered as a legal system co-ordinating activities of States, it has developed under the aegis of the United Nations into a legal regime which is increasingly dominated by the principle of co-operation (→ *Co-operation, International Law of*). Some areas of international law, in particular the ones on economic relations or on the protection of the environment, are governed by the principle of solidarity (→ *Solidarity, Principle of*). The latter goes beyond the principle of co-operation in that it requires the subjects of international law not only to co-operate amongst each other but also to take into consideration the interest of others and to be guided by the interests of the international community as such. This, as well as the international → *human rights* regime which influences other areas of international law, has an impact on the interpretation of international treaties and on the development of the sources of international law in general.
- 13 It has already been stated that international law is not static but should also be considered as a process, which means it is in a process of establishment, modification, or conformation. This process should be seen as a unity; all modifications of one of the sources of international law should be understood and assessed from its impact upon international law as such (Besson 170).

### 2. The Making of Treaties

- 14 The drafting and adoption of international treaties is tailored to the objective of achieving consent amongst the parties concerned. International treaties are developed in a contractual and thus consensual manner, although it would be misleading to consider international treaties from the point of view of contracts only. In particular, multilateral treaties

designed to accommodate community interests are meant to establish an international legal order. The international law on treaties is further guided by the aim to preserve the stability of international treaties once accepted and, as far as multilateral treaties of a general nature are concerned, to achieve the maximum participation of parties in the legal regimes established by each of them.

- 15 In international law treaties fulfil the function laws have under national law, as they set, besides other sources, law. It has been suggested that international treaties are not a source of law but only a source of legal obligations amongst the parties (Fitzmaurice; see also *Abi Saab*). This view, however, focuses on bilateral treaties and, even as far as those are concerned, fails to acknowledge their contribution to the corpus of international law at large. In law-making treaties, the contribution to the corpus of international law outweighs the obligation owed to other parties. In fact, the rights of other parties in such treaties, for example, human rights treaties, are mechanisms of enforcement rather than substantial rights. Their emphasis is on giving the parties to such treaty regimes standing within the implementation and enforcement schemes provided by such treaties.
- 16 The generation of international law is often referred to as law-making process (Besson 164). However, it has to be borne in mind that a law-making process which is equivalent to such a process under national law does not exist in international law, except in a few instances (denied by Posner 28). Only rarely do international organizations exercise law-making power (for details see Alvarez [2005]). International treaties are drafted by their potential addressees and the potential addressees have to express their consent to be bound, for example, by ratification, accession, or in other forms envisaged in Arts 11 et seq → *Vienna Convention on the Law of Treaties (1969)*. Their basis of → *legitimacy* and the basis for them being binding is, accordingly, firstly the consent of the States concerned. In contrast thereto, in the municipal system, laws are enacted by the competent institutions in a settled law-making procedure and they are also binding on subjects who have not participated in their creation, since the acting institutions are empowered to enact binding rules. Hence, the procedure for drafting international treaties and national laws bears no similarities. Nevertheless, one can hardly deny that international treaties have equivalent functions in international relations to laws in a municipal legal system.
- 17 The procedure of drafting international treaties is designed so as to generate consent among the participating States or other subjects of international law. Generally speaking, the whole process may be divided into four stages: first, the process of negotiating an international treaty and reaching a preliminary consent among the representatives of the States involved on the text (adoption of the treaty); second, the process during which the consent reached on the international plane is confirmed on the national level; and third, the expression of consent internationally. The fourth stage is the implementation of the international treaty, its interpretation, and its modification through revision, amendments, protocols, or other instruments and through subsequent practice.
- 18 As far as the first stage is concerned, the drafting of bilateral agreements and of multilateral agreements differs. With respect to bilateral treaties, both sides will normally come with their drafts or positions prepared and try to find a compromise in the bilateral meeting or meetings. The situation is much more complex at multilateral conferences, in particular at conferences in which virtually all States participate. Here, the potential solutions are too numerous for the participants to foresee all of them. Historically, multilateral treaties were adopted by unanimity. According to Art. 9 Vienna Convention on the Law of Treaties—a default rule—a draft may be adopted by a two-thirds majority. On the one hand, this provides for some flexibility, especially since it precludes that one State can impede the acceptance of a draft. On the other hand, the two-thirds majority rule may lead to the adoption of a treaty against a minority, perhaps just that group of States whose interests are particularly affected. The alternative has become, at many international conferences, in particular the ones undertaken under the auspices of the UN, to apply the → *consensus* rule. This means an agreement is adopted if no participant challenges the consensus reached by insisting on a formal vote. In fact, this does not mean that every participant fully agrees with the result achieved but that it considers its objections not to be serious enough to challenge the result as such. Very often this procedure is combined with a majority vote system. If a participant objects, the text will be accepted by the required majority. The consensus principle has significantly changed the negotiation techniques. It has strengthened the position of the chairpersons in charge. The consensus principle further encourages States to form interest groups. This means, in effect, that at multilateral conferences the integration of the individual objectives or claims of States into one, namely the draft treaty, takes place on several subsequent levels—interest groups, regional groups, subject-oriented committees—until the final decision is reached. Finally, the consensus principle leads to ‘package deals’, which means trade-offs. Therefore, multilateral treaties are not as firmly based upon consent as bilateral treaties. The States participating therein are guided by other considerations besides their individual interests. Regional allegiances or overarching interest group policies may have an impact upon the decision of a State to accept the result achieved.
- 19 After the conclusion of the negotiating process on the international level, the draft is submitted to the municipal acceptance procedure. The national procedures vary widely, in particular to the extent the parliamentary bodies are

involved. As a matter of principle, States are free as to how to organize the national procedure of approval, in particular to the extent that the national parliament is to be involved. Only rarely does an international treaty require a particular action to be taken on the national level, although it is in the interest of international law to strengthen the basis of the national legitimacy of the commitments entered into by the States. Equally, international law does not regulate how States Parties to a treaty ensure that the commitments are implemented on the national level if such implementation is required. These are two lacunae which may result in weakening the legitimacy of international treaty law and render its implementation less effective.

- 20 Once the national procedure of accepting an international treaty is complete, the consent to be bound is expressed; in the case of a bilateral treaty to the other party and in the case of a multilateral treaty to the community of States Parties of this particular treaty represented by a → *depositary*.
- 21 International treaties, once adopted, are not static; they are living instruments which develop through interpretation, and they may be amended, revised, or supplemented by subsequent instruments. They may also be changed through subsequent practice in accordance with Art. 31 (3) (b) Vienna Convention on the Law of Treaties. In particular, the latter mechanism constitutes a flexible mode to adjust international treaties to new facts or considerations.

### 3. The Development of Customary International Law

- 22 At the outset, international law was mainly constituted by customary international law. Under the aegis of the UN, a multitude of international treaties have been concluded, prompting some authors to express doubts concerning the remaining relevance of customary international law (Friedman 121–3). Others, however, emphasize that customary international law remains of high significance. They argue that, first, the development and adjustment of customary international law is more flexible than the development of treaty law; and second, customary international law is, by its very nature, universal, whereas treaty law binds the parties to these treaties only (D'Amato 12). This does not exclude the possibility of regional or even bilateral customary law. The development of customary international law reflects the characteristics of the international community understood as a legal community. It has the advantage that all States may share in the formulation of new rules and that customary international law can be modified, changed, or amended through this international community more easily than is possible for treaty law (Shaw 70). Certainly, customary international law is less precise than most treaty law but such a lack of precision also constitutes an amount of flexibility. In particular, it may be more easily and more quickly responsive to new factual developments.
- 23 The term 'customary international law' may refer to both the generation of law and the result of that process. While there is agreement concerning the process nature of customary international law, its foundation and binding nature have been the subject of a long-standing controversy. One theory, that was particularly endorsed by Soviet writers, is that customary law is based upon a tacit agreement (Tunkin). This implies that customary international law depends on the will of States, as does treaty law. This, however, is a fiction which is rather difficult to sustain. According to a different approach, the binding nature of customary international law has its basis in the longstanding practice of States, allowing one to expect that this practice will continue (Kelsen). A third group argues that customary international law develops spontaneously from within the international community and derives its legitimacy from the fact that such rules are needed for the well-being of the international community (Ago). This is reminiscent of natural law approaches.
- 24 Apart from this controversy, it is accepted that customary international law consists of two elements: → *State practice* and *opinio iuris*. Art. 38 ICJ Statute refers to 'international uniform custom, as evidence of a general practice accepted as law'. This formulation, however, is unsatisfactory (Van Hoof 87). It is generally accepted that custom is applied, and it is practice which serves as evidence for custom (Higgins 18). Still, it remains controversial whether the emphasis lies on State practice or on *opinio iuris*, what constitutes State practice, and how the *opinio iuris* is to be expressed.
- 25 It is well established that both practice and *opinio iuris* are necessary to establish customary international law. This, however, does not imply that customary international law has a voluntative basis similar to international treaties. *Opinio iuris*, the belief that a certain conduct is required or permitted under international law, is in fact a conviction that such conduct is just, fair, or reasonable and for that reason is required under law. Such meta-legal or general legal considerations differ from the consent expressed in respect of treaty-based commitments. *Opinio iuris* develops in response to an assessment of foreign or own conduct. Only if this assessment leads to a positive result, namely that such conduct is to be considered as legally required, the necessary *opinio iuris* will form. If the assessment leads to a negative result it will not materialize; rather, the practice will be countered on legal grounds or at least will not be accepted. Therefore, every *opinio iuris* is the result of a value judgment, an element which is not inherent in (or at least not prominent in) expressing consent to an international treaty.

- 26 Practice usually manifests itself in activities or omissions attributable to particular subjects of international law, mostly of States. These activities may have an internal character or may be exercised on the international level (Degan 149). International treaties can reflect a State practice relevant for the formulation of customary international law. The conclusion, for example, of numerous investment treaties may be seen to establish customary international law. However, one may also argue that if States feel the necessity to conclude such international agreements, they do not believe that the practice so far existing is a reflection of an obligation to that extent. Still, the practice of States is nowhere better reflected than in treaties. Also, judgments of international courts or tribunals are considered as being of relevance for the development of customary international law. This is so for two reasons. First, judgments of international courts or tribunals may refer to certain norms as being customary international law. As such, they do not create customary international law but they identify and formulate it, and to that extent they are a source of reference. Apart from that, judgments of international courts or tribunals may also contribute to customary international law. Custom may develop amongst States, but equally in international organizations. This does not mean to say that a custom develops directly from, for example, resolutions of the UN General Assembly; but it cannot be denied that a frequent repetition of certain principles by UN organs, in particular the General Assembly, may, over time, amount to custom.
- 27 One of the elements which is considered to be of particular relevance for a practice is that such practice was carried on for a certain period of time (density and uniformity of the practice; Degan 150 et seq). It has been argued that custom may come about rather quickly or even instantly (Cheng). The law of → *outer space* has been named as an example. The same may happen in response to widespread moral outrage regarding crimes committed in conflicts, such as those in Rwanda and Yugoslavia, that brought about the rapid formation of a set of customary international law rules concerning crimes committed in internal conflicts.
- 28 Non-governmental organizations have no impact on the formulation of customary international law as long as their actions are not directly attributable to States. However, to the extent that such actors are engaged in the work of international organizations, they can at least indirectly influence the formulation of customary international law. The → *International Committee of the Red Cross (ICRC)* is an exception, though; it has contributed significantly to the development of customary international law.
- 29 Not every usage transforms into customary international law, but only that which is carried by an *opinio iuris*. This has been emphasized by the jurisprudence of the ICJ (see for example in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* paras 66 et seq; → *Nuclear Weapons Advisory Opinions*). As indicated above, *opinio iuris* constitutes a value-based assessment of a certain practice which leads to the conclusion that this practice is required by law.
- 30 It is subject to much debate how customary international law can be changed or modified. Does the breach of a customary international law rule lead to the abolition of the rule, or even to the creation of a new one? This has been argued (Higgins 19) on the grounds that customary international law is a process. But it is more than simply a process—customary international law also has a stabilizing effect through which it contributes to the establishment of an international legal order. This stabilizing function derives from established practice and the accompanying belief that the practice is accepted as law—*opinio iuris*. In the situation of a breach, an established practice is lacking, as is the belief that such practice is required by law. The breach of an established norm may trigger the development of new customary international law only if other States follow such an example and a corresponding *opinio iuris* develops. Until such development comes to a conclusion, the deviation from a norm of customary international law remains a breach. It is relevant to note at this point that the breach of a norm of international law may actually be the first step of reconciling law with reality. What is essential, though, is that this development cannot be achieved by one State alone but only if other States join in (or do not object to) this practice and develop a corresponding *opinio iuris*. This is what constitutes the responsiveness of customary international law towards new developments, may they be factual or changes of attitudes.
- 31 Customary international law is frequently codified in treaties; customary law and treaty law then continue to exist side-by-side. This has the advantage that identical or at least similar rules are applied to States Parties and non-States Parties. However, it may happen that the customary international law rules change over time, whereas the treaty rules remain unchanged. In the past, this has caused some debate regarding the interpretation of the right to → *self-defence*. Some argue that due to the increase of potential actors in armed conflicts, the scope of the right of self-defence under customary international law has changed.
- 32 To conclude, it may be reiterated that customary international law is more than just a process since it has a stabilizing effect on international relations. It does not depend upon the will of States or other subjects of international law but upon their value-based assessment that such practice is required by law. The practice of one may be followed by others and a corresponding *opinio iuris* may form, developing such practice into customary international law. The situation

may also be reversed; a political opinion may have formed, for example, in a resolution of the UN General Assembly or at a Summit, followed by corresponding practice while the political opinion mutates into an *opinio iuris*. What is essential is that all States may and do contribute to the development and shaping of customary international law, including those who express reservations. Although this participation is governed by the principle of equality of States, it is nevertheless evident that, as the ICJ expressed in the judgment on the → *North Sea Continental Shelf Cases* (at paras 73–4), those States particularly affected by potential new rules of customary international law have a particular impact on the development or the non-development of a particular rule of customary international law (Virally). As such, customary international law is particularly suited to constitute a counterweight against and supplement to consent-based international treaties.

#### 4. The Development of General Principles

- 33 The term 'principle', generally speaking, may signify one of two things. It may either refer to meta-legal principles—ie principles generated within a philosophical or ethical discourse and then introduced into a normative system (Accioli 33 et seq)—or it may refer to principles inherent in or developed from a particular body of law or law in general. In the following, only the latter will be dealt with.
- 34 International and regional courts and tribunals make use of principles as an interpretative tool or as a source of concrete obligations. These two functions cannot be separated clearly.
- 35 Principles may be derived from municipal law, from general considerations, or, by generalizing, from a particular treaty regime. The development and recognition of such principles does not depend on the will of States and all States equally contributing to their development. These principles may, in particular, introduce overarching considerations into international law and, as such, may supplement international treaty law, in particular by influencing the interpretation of the latter.
- 36 Art. 38 (1) (c) ICJ Statute establishes that general principles derived from municipal law are sources of international law. The ICJ only sporadically referred to general principles in its judgments or advisory opinions. In none of these did the general principles referred to by the parties become a basis for the reasoning of the Court.
- 37 On the other hand, the ICJ frequently made use of principles derived from general considerations as well as principles derived from a particular treaty regime. As to the former, reference may be made to its judgment in the → *Corfu Channel Case*. Here the ICJ found that the Albanian authorities were under the obligation to make known the existence of a minefield in their territorial waters and to warn the approaching ships of the imminent danger. The ICJ said: 'Such obligations are based...on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel Case [Judgment] [Merits]* 22). One of the prime examples for a principle derived from legal relations in general is the principle of → *good faith (bona fide)* which, in the view of the ICJ, governs the creation and performance of legal obligations (*Nuclear Tests [Australia v France] [Judgment]* 268 and *Nuclear Tests [New Zealand v France] [Judgment]* 473; → *Nuclear Tests Cases*).
- 38 On numerous occasions, the ICJ has had recourse to principles derived from particular treaty regimes. An early example is the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* where the ICJ noted that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation' (at 23; → *Genocide Convention, Reservations [Advisory Opinion]*). In the jurisprudence of the Court, frequent references have been made to the principles enshrined in Art. 2 → *United Nations Charter*. In the → *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, particular use was made of a treaty-based principle. The Court considered whether principles set out in the Treaty of Friendship and Co-operation between Djibouti and France of 1977 would inform the way in which the obligations under the Convention on Mutual Assistance in Criminal Matters of 1986 were to be interpreted (*[Judgment]* paras 104–114). Here, principles were used to bridge the gap between two separate treaties concluded between the same parties.
- 39 Principles of law complement other sources of international law in various ways; they guide the interpretation of international treaties and, due to their abstract formulation, are the gateway for progressive interpretation. As the jurisprudence of the ICJ demonstrates, principles of international law may connect treaty regimes. They may be the

starting point for the evolution of a new rule of customary international law and they have frequently had an influence on the interpretation of the latter. Principles of law have even been used as a basis for the development of new rights and obligations. In general, they may, and indeed have, become the motor of a progressive development of international law.

### **5. The Contribution of International Organizations**

- 40 International organizations are playing an increasing role in the establishment of an international normative order (Alvarez [2002] 218 et seq). Their functions vary considerably. While they may only have the role of an initiator and a facilitator of treaty-making conferences, sometimes they exercise truly legislative tasks.
- 41 Even in those cases where international organizations only initiate legislative processes, which are then taken over by the participating States, their influence is not to be underestimated. Their technical expertise may give them—notably the respective secretariats—a significant influence concerning the issues and the outcome of the norm-creating process. So far, very few international organizations have prescriptive functions such as the → *International Civil Aviation Organization (ICAO)*, concerning the regulation of flights over the → *high seas*, or the → *International Seabed Authority (ISA)*, which promulgates regulations on deep seabed mining. It has been suggested, in particular in respect of the protection of the international environment, to establish authoritative institutions exercising quasi-governmental functions concerning global problems.
- 42 One may also speak of a ‘norm-creating function’ of the UN Security Council. Some decisions of the Security Council taken under Chapter VII of the UN Charter are of a normative nature since they regulate the relations amongst their addressees; provide for the establishment of institutions, such as international criminal courts, including the legal framework in which they function; and even create a regulatory order. The latter is true, for example, for Security Council Resolution S/687 (1991) of 3 April 1991, setting out the conditions for a ceasefire in the war against Iraq (see also UNSC Res 1373 [2001] ‘Threats to International Peace and Security Caused by Terrorist Acts’ [28 September 2001] SCOR [1 January 2001–31 July 2002] 291; UNSC Res 1540 [2004] ‘Non-Proliferation of Weapons of Mass Destruction’ [28 April 2004] SCOR [1 August 2003–31 July 2004] 214). Although Security Council decisions have a consensual origin, namely the acceptance of the UN Charter, the legitimacy of such decisions has been put into question (Weston). It is a salient question of whether the existing foundations of international law allow for the establishment of international organizations which have norm-creating functions not based upon consent of the addressees of the norms they prescribe.
- 43 Resolutions of the UN General Assembly call for a differentiated view. They may play a significant role in law-making even though they are non-binding, notwithstanding the fact that their recommendatory character is based upon State consent. General Assembly resolutions may be declaratory of existing customary law. As such they are not law-making in the true sense of the word but only a means of reference. There have been instances of General Assembly resolutions starting a process which eventually led to the adoption of an international treaty. Finally, repeated General Assembly resolutions adopted by consensus or unanimously may be considered State practice, thus establishing new customary international law.
- 44 So far, only the external effects of General Assembly resolutions and decisions have been addressed. It is well established that internally, certain decisions of the General Assembly have normative functions.
- 45 Regional organizations and arrangements offer, due to the homogeneity of their membership, increased possibilities for the development of a regional normative order. It is worth considering whether one should acknowledge that the international community is formed of regions and consequently put more emphasis on regional integration; there are tendencies pointing in that direction.

### **6. The Contribution of Courts and Tribunals**

- 46 The contribution of international courts, tribunals, and dispute settlement mechanisms (for example the → *International Centre for Settlement of Investment Disputes [ICSID]*) to the establishment of an international normative order also deserves attention. Considering judgments of international courts merely as an interpretation of a given international agreement does not do justice to their role. Any such interpretation contributes to the further development of the relevant agreement or of customary international law. For example, the Appeals Chamber of the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* in *Prosecutor v Tadić* held that customary international law rules concerning methods and means of warfare applicable in international conflicts may also apply to non-international conflicts ([*Jurisdiction*]

para. 137). This reasoning was not based on State practice; rather, the Appeals Chamber argued that the concerns of humanity were the same and could not depend upon the nature of the conflict. Nevertheless, international courts and tribunals as a rule are not considered to have norm-creating functions, although the line between interpretation and law-making is sometimes fluid. The first argument is a positivistic one. International courts and tribunals are called upon to settle disputes on the basis of international law. As a matter of logic, this means the law has to exist. Apart from that, → *judgments of international courts and tribunals* bind only the parties to that dispute (Art. 59 ICJ Statute), although the interpretation of the relevant source may be influenced by that case. International courts or tribunals referring to previous judgments, in particular those of the ICJ, do not do so because they feel bound, but rather as a matter of convenience (Fitzmaurice 172; Jennings 73). Finally, those who equate the functions of international courts and tribunals with law-making, fail to acknowledge the relevance of the international law-making process.

## 7. Others

- 47 → *Non-State actors* are playing an increasing role in the norm-creating process. Even though they do not participate on an equal footing in codification conferences, they may be involved in the pre-normative process which leads to the development of new international legal regimes. Examples are the impact of → *non-governmental organizations* on the drafting of the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, and on the establishment of a mechanism for an individual complaint procedure under the 1979 Convention on the Elimination of All Forms of Discrimination against Women. Through this involvement, the views of representatives of the international society are introduced into the norm-creating process, eroding a monopoly of States. It has been argued that the proliferation and increasing influence of non-governmental organizations has strengthened the democratic element in international relations. Numerous international organizations have developed close links with non-governmental organizations engaging them in the norm-creating process they administer.

## 8. *Ius Cogens*

- 48 In national law there exists a complex hierarchy of legal sources: constitutions; acts of parliament; regulations; and administrative decisions.
- 49 In international law—at least in traditional international law—a comparable hierarchy was unknown. However, there was a shift in emphasis in the late 1960s. Within the UN General Assembly, the view evolved that some international norms should be accorded higher rank than others, in particular the right to → *self-determination*. This had already been proposed in the 17<sup>th</sup> and 18<sup>th</sup> centuries by scholars such as Samuel Rachel, Christian Wolff, Georg Friedrich de Martens, and Emerich de Vattel. The 1969 Vienna Convention on the Law of Treaties adopted this approach and provided that a treaty will be void if at the time of its conclusion it conflicts with a peremptory norm of general international law (Art. 53). The same principle would apply to customary international law. This clearly establishes a hierarchy of sources. Such a rule must be accepted and recognized by the international community of States as a whole, which makes it evident that a peremptory norm of international law rests on the consent or at least acquiescence of the world community. This consensual foundation deprives the → *ius cogens* concept of the function to transport meta-legal or general considerations into international law, a function this concept had in the eyes of the proponents of natural law (see also → *Natural Law and Justice*; → *Legal Positivism*).
- 50 So far, no significant State practice has developed with respect to peremptory norms, in particular none which has qualified one concrete norm as being of peremptory nature (see also Art. 50 UN ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] GAOR 56<sup>th</sup> Session Supp 10, 43). No dispute has arisen amongst States in which a peremptory norm played a significant role. The notion is referred to mainly in academic writings and alluded to in advisory opinions of the ICJ (see *Legality of the Threat or Use of Nuclear Weapons* para. 79; → *Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]* para. 157).

## D. Assessment

### 1. Expanding Scope of International Law

- 51 The international normative order has significantly expanded over the last few years; international law now governs issues which would clearly have been considered domestic affairs up until the middle of the 20<sup>th</sup> century. But the international normative order has not only expanded as far as its scope is concerned. What is even more relevant

is that it has a deeper and more direct impact on national law than ever before. New actors, besides States, have become involved in the shaping of the international normative order—international organizations; non-governmental organizations; and sometimes groups of individuals. Their influence cannot always be adequately described by reference to traditional mechanisms of international norm development. This has become a reality in spite of the warning not to blur the distinction between normative and non-normative rules and to differentiate between normative and pre-normative acts in the international norm-creating process (Weil 415).

- 52 The international normative order comprises the legal rules governing and guiding international relations. It prescribes what its subjects are obliged to do, must not do or may do, and which factual situation they have to establish (Dupuy 371). Thus far, the international normative order constitutes a stabilizing factor in international relations. This does not imply, however, that the international normative order has the sole function of restraining States in their international relations. On the contrary, international law is designed and also used to establish alternative forms of State conduct or, to rule out particular forms of conduct, to create new relations and new situations. Recent examples where pre-normative or normative acts have played a proactive role in international law-making are those where legal principles have been established serving as a foundation of new legal regimes. The → *common heritage of mankind* principle in the context of the law of the sea and the principle of → *sustainable development* in the context of the international protection of the environment are cases in point. However, the international normative order is not limited to regulatory functions. It also has an effect concerning the formation of the international community. This effect is sometimes referred to as the ‘constitutionalization’ of international governance (Frowein; Tomuschat). In this capacity, the corpus of international law is a precondition for the very existence and for the further development of the international community. It reflects the need and desire of its members for a common structure. It constitutes the framework in which its members may seek to accommodate their mutual interests and through which the interests of the international community as a whole can be formulated and achieved.
- 53 The rapid growth of international treaty law in recent times has occasionally resulted in changes in the texture of international treaties and in the way they have evolved. Currently, multilateral international treaties are developed step-by-step quite frequently. For example, the 1967 Outer Space Treaty (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies) is based upon several resolutions of the UN General Assembly, while the 1969 Vienna Convention on the Law of Treaties was prepared by the → *International Law Commission (ILC)*. The creation of international treaties has thus been entrusted to a political forum or fora, or to a technical forum in combination with a political one (Wolfrum ‘Introduction’ in Wolfrum and Röben 1–13, at 3).
- 54 International treaty law has particularly expanded in areas such as international environmental law; → *international economic law*; international → *law of the sea*; and → *international criminal law*. It seems evident that the norm-creating impetus of international treaties is unbroken. Referring to international treaties as norm-creating means taking it for granted that they actualize the interests of the international community rather than just formulate the individual interests of the States participating in the negotiating process. This invokes the distinction between international treaties which simply accommodate the interests of the participating States and those which pursue community interests (*traités-contrats v traités-lois*). The latter creates a micro-legal system within the general international normative order. But apart from their regulatory effect, international treaties also become an important part of the practice of the States involved, which may lead to the establishment of new customary international law. Additionally, particular international treaties may influence the legal relations with and even amongst non-parties, such as treaties having *erga omnes* effect (→ *Obligations erga omnes*) or establishing the status of a particular territory or institution. Such international treaties have normative effects beyond the participating parties.

## **2. Mechanisms for a Progressive Development of Treaty Law**

- 55 Many multilateral international treaties of the recent past have been designed as → *framework agreements* whose provisions are supplemented by further rules. While in the past, international treaties frequently provided for supplementary law-making so as to adapt a legal regime most flexibly to changed needs or circumstances, this approach has now reached a new level as particular institutions are being entrusted with the progressive development of particular treaties (see → *Conference [Meeting] of States Parties*). The system established by each of these international agreements thereby gains an additional dimension. Framework conventions establish ‘living’ treaty regimes with the prospect of continuous legislative activities. The formats developed display a significant variety.
- 56 A parallel mechanism, although with less authority, exists concerning international human rights treaties; it also opens the possibility for further development of the respective agreements through interpretation and application. So-called treaty bodies, such as the → *Human Rights Committee* or the Committee on the Elimination of Racial Discrimination (→

*Human Rights, Treaty Bodies*; → *Environmental Treaty Bodies*), have the competence to issue → *general comments/recommendations* which have an influence on the interpretation and application of the respective treaty.

### 3. Development Outside the Treaty-based Order

- 57 The development of the international normative order does not solely depend upon international treaties. The ILC, as far as → *State responsibility* is concerned, did not initiate the finalization of the norm-creating process which commenced when it was entrusted with the codification of the respective rules. Instead, the ILC recommended that the UN General Assembly only take note of the Articles on State Responsibility rather than submit them to a codification conference, thus relying on the development of customary international law. In other areas, customary international law is also developing or has developed parallel to international treaty law, in part supplementing or modifying it. The relevant mechanism is subsequent State practice in accordance with Art. 31 (3) (b) Vienna Convention on the Law of Treaties.
- 58 Apart from international treaty law, customary international law, and principles, other mechanisms have become increasingly important for the development of the international normative order. These are norms developed by self-established or politically mandated bodies; treaty-based conferences of parties; treaty bodies; international courts; and international organizations. The rules developed by such institutions have different impacts upon the international normative order. They may constitute restatements of international law or modify international treaty law.
- 59 For example, the 1994 San Remo Manual on International Law Applicable to Armed Conflict at Sea or the 2009 Harvard Manual on International Law Applicable to Air and Missile Warfare, developed by experts, are designed as a contemporary restatement of the law applicable in armed conflict. State practice will show if they will be accepted. Other similar instruments exist, for example, in international economic law and in international environmental law (eg the Codex Alimentarius or the Code of Conduct for Responsible Fisheries). The Codex Alimentarius, prepared by the → *Food and Agriculture Organization of the United Nations (FAO)* and the → *World Health Organization ('WHO')*, is non-binding. Nevertheless, it has a significant influence on the international harmonization of food safety standards, as products consistent with these standards are presumed to be in compliance with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement'). The Code of Conduct for Responsible Fisheries is not, as such, a binding instrument, but it is implemented and used by the FAO as an instrument to generate new international norms. It is the particularity of these codes that they have been developed outside the context of an international treaty regime. Their legitimacy and their potential impact upon the international legal order depend upon them being drafted by experts and subsequently accepted in State practice (Wolfrum 'Introduction' in Wolfrum and Röben at 6).
- 60 One should also consider to what extent the various sources influence each other. Non-treaty law standards may concretize treaty law provisions previously open for interpretation. For example, the → *lex mercatoria* is used for that purpose. Non-treaty standards may be restatements of customary international law or may influence the formation of the latter. Also, treaty law influences the formation of customary international law. For example, the → *Geneva Conventions Additional Protocol I (1977)* is considered by several national military manuals as customary international law, while the manuals themselves constitute State practice and contribute to the development of customary international law. International law sources form a unity and, as such, influence and supplement each other. They are, to a varying degree, susceptible to meta-legal and general consideration which is a mechanism for their progressive development, as well as the basis for their sustainable legitimacy.
- 61 There are norms which may not be considered binding in a formal sense but which are nevertheless expected to be followed (see also → *Soft Law*). In this category belongs, among others, the Basel Accords, which apply among the governors of the G20 central banks.
- 62 Hortatory rules may also play an important role in the formation of the corpus of international law. Such rules constitute important phases in law-making (Boyle 904). For example, IAEA Guidelines were the basis for the adoption of the 1986 Convention on Early Notification of a Nuclear Accident. UNEP Guidelines were incorporated in the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context. In particular, non-binding norms may establish general principles which may in turn direct the establishment and shape of legally binding international norms. There is even a recent trend towards the enforcement of non-binding rules. This is the case, for example, for the FAO Code of Conduct for Responsible Fisheries.
- 63 The formerly strict division of sources into legally binding ones and those that lack binding force is getting blurred. Not only do non-binding norms have an impact upon broadly-phrased treaty norms, but they also influence the development and shaping of principles of international law. What is more, there is a growing tendency to implement such non-binding

norms. If this development is consolidated, they will gain an established place in the corpus of international law besides the established sources.

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