

University of Manchester



**THE SOURCES AND EVIDENCES
OF INTERNATIONAL LAW**

THE MELLAND SCHILL LECTURES

*delivered at the University of Manchester
and published by the University Press*

The Law of International Institutions in Europe
by A. H. Robertson, B.C.L., S.J.D., Spring, 1961

The Role of International Law in the Elimination of War
by Professor Quincy Wright, Winter, 1961

The Acquisition of Territory in International Law
by Professor R. Y. Jennings, 1963

Rights in Air Space
by Professor David Johnson, 1965

THE SOURCES AND
EVIDENCES
OF INTERNATIONAL LAW

by

CLIVE PARRY, LL.D.

Fellow of Downing College, Cambridge

MANCHESTER UNIVERSITY PRESS
U.S.A.: OCEANA PUBLICATIONS INC.

© 1965. Manchester University Press

Published by the University of Manchester at
THE UNIVERSITY PRESS
316-324 Oxford Road, Manchester, 13

U.S.A.

OCEANA PUBLICATIONS INC.
40 Cedar Street, Dobbs Ferry, N.Y.

Library of Congress Catalog Card No. 65-17525

CONTENTS

	<i>page</i>
I. THE PROBLEM IN GENERAL	1
Sources of law in general	1
The traditional notion of sources in international law: terminology	1
The direction of the traditional enquiry	5
Critique of the traditional enquiry	5
The direction of the non-traditional enquiry	6
The purpose of any enquiry into sources and evidences	7
The nature of the international community	8
The nature of the State	9
The nature of the practice of States	13
The expansion of the international community and the sources of international law	14
The new institutions of the international community and the sources of law	19
The new international persons and the scope of inter- national law	24
The particular direction of the enquiry	27
II. THE TREATY AS SOURCE	28
The terms of Article 38	28
The place of treaties in the international legal system: the treaty as contract	29
The treaty as statute	32
The peripheral status of treaties in international law	33
The historical role of the treaty	37
The lesser treaties	40
The state of the evidence of treaties and its significance for their influence	42
The wider explanation	43
The evidence of British treaties	46
The status of treaties in the practice of States	48
Why are treaties binding?	52
The consequences of the verdict	53

CONTENTS

	<i>page</i>
III. CUSTOM OR THE PRACTICE OF STATES	56
The text of Article 38	56
The formation of new customary law	57
The elements of custom	61
Proof of practice	62
Obstacles in the way of a comparative enquiry	67
The initiative of international organizations	70
The preliminary national stage.	71
The French Digest	72
The projected British Digest	74
IV. THE REMAINING SOURCES	83
The general principles of law	83
Judicial decisions	91
The teaching of publicists	103
V. CONCLUSION	109
Matters which Article 38 omits.	109
The practice and pronouncements of organs of inter- national organizations	109
APPENDICES	116
I. The text of Article 38 of the Statute of the Inter- national Court of Justice	116
II. Recent general treatises in French, German and Italian	117
INDEX	118

FOREWORD

By her Will, the late Miss Olive Schill of Prestbury, Cheshire, an old friend of the University, whose portrait is painted in Lady Katharine Chorley's *Manchester Made Them*, left the sum of £10,000 to the University in memory of her brother, Melland Schill, who died in the 1914-18 war. The annual income from this sum is to be used to promote and publish a series of public lectures of the highest possible standard dealing with International Law.

No one of the present generation of international lawyers knows as much about the sources of International Law existing in England today as does Dr. Parry who, with successive teams of willing helpers drawn mainly from the Universities, has since 1959 worked on the British archives. The richness and continuity of these records is probably without parallel in the secular states of the world today (see pp. 46 and 78 for example). The British Digest which Dr. Parry is editing (see p. 74) is already making excellent progress. The method employed by him and his teams is documented fully (p. 80 *et seq.*). Of the other 'national' digests of International Law, those of the United States and France are well known. Perhaps in line with the encouragement of the General Assembly of the U.N. and with the cooperation of other states, the International Law Commission will have at its disposal, for its work on codifying International Law, a documentation unequalled in human history. Dr. Parry's foresight and practical organizing ability, coupled with his high standing as a scholar, may well have a greater impact on international legal scholarship than that of any other modern scholar.

This short account of the sources and evidences of International Law should be read by all who wish to be abreast of the latest developments of modern scholarship. Not all will agree with all the points of view, but all, it is confidently predicted, will realize Dr. Parry's great contribution to the modern movement towards the re-statement and codification of International Law.

B. A. WORTLEY

1 January 1965

Faculty of Law

Manchester University

Chapter I

THE PROBLEM IN GENERAL

Sources of law in general

IN English jurisprudence at least, the classic scheme of the sources of law is that of Salmond, who divided them first into those which are 'formal' and those which are 'material'—those imparting to a given rule the force of law and those from which its substance is drawn. He further subdivided 'material sources' into 'legal' and 'historical' sources—those which the law itself acknowledges, such as statute and judicial precedent in England, and those which, though possibly no less influential, are not so acknowledged, as, for instance, the Roman legal system from which, via judicial precedent, many English rules are derived. Finally, in a footnote, Salmond distinguished a category of 'literary' sources, consisting in 'the sources of our knowledge of the law, or rather the original authoritative sources of our knowledge, as opposed to later commentary and literature'.¹

Though its primary distinction between 'formal' and 'material' sources, however difficult of application in practice, still commands some general acceptance, Salmond's scheme has been much criticized. The alternatives to it which have been proffered have not, however, fared much better. Indeed Sir Carleton Allen, Salmond's chief critic, is regarded by Professor Paton as advocating the abandonment of the search for the sources of law in favour of an enquiry, into first, its validity and, second, the origins of the materials from which it is fashioned, on the ground that the multiplicity of theories has utterly confused the term 'source'.²

The traditional notion of sources in international law: terminology

International lawyers appear to have persisted longer in the search for 'sources'. Whether this is because they have displayed a greater capacity for the clear definition of terms is perhaps questionable. But their terminology is, in any case, slightly different from Salmond's.

¹ Salmond, *Jurisprudence* (10 ed., 1947), pp. 151–6.

² Paton, *Jurisprudence* (3 ed., 1964), pp. 159–60.

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

In an endeavour to introduce some order into the words used, Professor Corbett essayed forty years ago to distinguish different elements relevant to the discussion. He thus laid it down:

1. The *cause* of international law is the desire of States to have the mutual relations which their social nature renders indispensable regulated with the greatest possible rationality and uniformity.

2. The *basis* of international law as a system and of the rules of which it is composed is the consent of States.

3. The origins of the rules of international law, which may also be called '*the sources*' of that law—though the word 'source' has such a history of confusion behind it that it might well be abandoned—are the opinions, decisions or acts constituting the starting-point from which their more or less gradual establishment can be traced.

4. The records or *evidence* of international law are the documents or acts proving the consent of States to its rules. Among such records or *evidence*, treaties and *practice* play an essential part, though recourse must also be had to unilateral declarations, instructions to diplomatic agents, laws and ordinances, and, in a lesser degree, to the writings of authoritative jurists. Custom is merely that general practice which affords conclusive proof of a rule.¹

Amongst the interesting features of this series of propositions is, first, that the term but not ostensibly the concept of the 'sources' of law is condemned, though both term and concept are narrower than Salmond would have made them; and, secondly, the introduction of the term 'evidence'. This last is something more, it is clear, than Salmond's 'literary sources'.

Even writers in English have not adhered to these golden rules, as is testified to by John Bassett Moore, who usually had a pretty turn of phrase. For, in the Introduction to his great series of *International Adjudications* he wrote:

Being desirous to deal with the substance of things, and, by avoiding as far as possible wars of epithets, to save a great cause from needless injury and attrition, I have placed the words 'source' and 'evidence' [in the title to a section on the influence of arbitral decisions on the law] in the alternative, thus leaving it to their partisans, who may often agree except in terminology, the unchallenged enjoyment of the title they prefer.²

Oppenheim endeavoured to resolve the confusion between 'source' and 'cause' by tracing the former term to its own source in the meaning of spring or well which

has to be defined as the rising from the ground of a spring of water. When we see a stream of water and want to know whence it comes, we follow the

¹ Corbett, 'The Consent of States and the Sources of the Law of Nations', *British Year Book of International Law*, VI (1925), pp. 20, 29–30.

² *International Adjudications*, Modern Series (1929), vol. I, p. xii.

THE PROBLEM IN GENERAL

stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water . . .¹

My own first undergraduate reaction on reading this passage, I must confess, was to wonder whether its author had speculated sufficiently on the word 'cause', let alone 'source'. Would his expression of view on the source of water have been the same if he had had the same experience as I had had some three months before, when sitting as a candidate for the examination in chemistry conducted by the Oxford Delegacy of Local Examinations? For then, having laboriously complied with what I took to be an invitation to explain how to analyse the composition of the atmosphere by weight, I took a satisfied glance round the examination room, to discover to my disconcertion that everyone else was busy with protractors: which could only mean that they were occupied in drawing flasks and that the question must relate to analysis by volume and not by weight. Would Oppenheim have regarded oxygen and hydrogen, or the process of their combination, as cause or source?

Oppenheim's qualifications as a chemist apart—and mine are so slight that I will not vouch for the details of my reminiscence, only for its general nature, he continues as to the sources of law:

If we apply the conception of source in this meaning to the term 'source of law' the confusion of source with cause cannot arise. Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to the beginning; where we find that such rules come into existence, there is the source of them. Of course, rules of law do not rise from a spot on the ground as water does; they rise from facts in the historical development of a community. Thus in Great Britain a good many rules of law rise every year from Acts of Parliament. 'Source of law' is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force.²

Romantic and evocative though I find this image, I must avow that it is unhelpful to me for at least two reasons. First, I feel that the assertion that an Act of Parliament is, or is simply, 'an historical fact' would stand, and would not withstand, closer examination. And secondly, though I can see that an Act of Parliament would be both a 'literary source' in Salmond's scheme and an item of 'evidence' in Professor Corbett's, and that this circumstance would not exclude

¹ Oppenheim, *op. cit.* (8 ed., 1955), vol. I, p. 24.

² *Ibid.*, p. 25.

its inclusion also in other categories established by those authors (since these categories are not necessarily on the same plane or not mutually exclusive), I am troubled by the possible effect of Professor Corbett's cursory assignment of custom to the category of *evidence*.

To say this is perhaps to be obscure unless it is first explained that Oppenheim goes on almost immediately to say that 'Custom is the oldest and the original source of International Law', to define it as 'a clear and continuous habit of doing certain actions [which] has grown up under the aegis of a conviction that these actions are, according to International Law, obligatory or right', and to distinguish it from mere usage, a habit which has grown up without any such conviction.¹ Professor Corbett is no doubt more logical here: he says in effect custom merely proves or illustrates—or indeed merely provides evidence—that the conduct it reflects is obligatory. Therefore, in his system, it cannot be a 'source'—an origin. Oppenheim says or implies in somewhat circular fashion that a custom is already considered as binding before it becomes such, but it is for him a source. But perhaps I misunderstand Professor Corbett here. Perhaps what he terms *practice* is Oppenheim's custom, and presumably he would concede *practice* to be both source and evidence in his sense. The alternative, which is not excluded, is that Professor Corbett has in fact carried out his threat and excised 'source' in all but name from his system: certainly it is difficult to regard *practice*, however defined, as involving no more than 'the opinions, decisions or acts constituting the starting-point'.

However this may be, it is well—a point sometimes overlooked by students of international law—to see briefly how writers in other languages and other countries regard the matter of terminology. A fair and accurate summary seems, if one may say so, to be provided by Professor Sørensen, who says that in usual legal language the sources of international law are those things which indicate the actual or concrete content of that system. Admittedly, certain authors prefer to avoid the term altogether or substitute alternative lines of enquiry for an enquiry after sources. Among these he includes Professor Corbett, thus confirming in some measure the suspicion we have already aired. But there is no harm in retaining the word if one makes sure how it is intended to be used. And it should not be used in relation to the question why international law is in general binding. That is the problem of 'basis', upon which designation

¹ Oppenheim, op. cit. (8 ed., 1955), vol. I, pp. 25–6.

THE PROBLEM IN GENERAL

Professor Corbett and many others agree,¹ or of 'source' in the singular. Nor should it be used in connection with the question what are the 'material sources' of international law in the sense of the elements and influences determining its content, be they the practical interests and needs of States or the idealistic urgings of the social conscience or the ideologies prevailing at any particular time.²

The direction of the traditional enquiry

The search being for the thing which, by the highest compulsive force as it were, gives to the content of the rules of international law their character as law, whither should it be directed? The traditional approach leads one to turn to Article 38(1) of the Statute of the International Court of Justice—formerly the same article in the Statute of the former Permanent Court of International Justice.³ Quite why this should be the approach is not wholly clear. That article, says Brierly, is 'a text of the highest authority',⁴ which is to state the proposition to be proved. The article does not even say that it purports to be a list of sources otherwise than by implication. For it simply states that the Court 'whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply' that which it prescribes. One of the matters so prescribed is 'the writings of the most highly qualified publicists . . . as subsidiary means for the determination of rules of law', a formulation which suggests less a formal source than what Salmond would have called no more than legal literature—not even a literary source. Another item echoes, or is echoed by, Professor Corbett: namely 'international custom as evidence of a general practice accepted by law'—not a source at all according to him, if he admits any sources at all.

Critique of the traditional enquiry

Nothing traditional stands unchallenged. Hence the traditional notion of a category of formal sources, in the sense explained, has naturally been challenged. One ground of opposition to it is that such a category is a logical impossibility. Some rule must underlie its authority. That rule must be outside any of the matters included within the category, otherwise its validity would simply depend on its being so included. But if we postulate an external rule—a higher

¹ Cf. Brierly, *The Basis of Obligation in International Law* (1958).

² Sørensen, *Les Sources du Droit International* (1946).

³ For full text of the Article see Appendix I, p. 116 below.

⁴ Brierly, *Law of Nations* (6 ed., 1963), p. 56.

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

norm—we must find a source for that in a still higher norm and so on.

In fact this criticism is not very seriously pressed. I apprehend that it was first formulated by Professor Kelsen.¹ But he is not afraid to relate the source to which the establishment of the category of formal sources owes its authority to something within that category, for reasons which will shortly appear. Judge Fitzmaurice too, who states the logical impossibility in a neat algebraic proposition, warns that 'what this shows is not so much that the sources of law are undiscoverable, as that they can never be exhaustively stated'.² One might add to this that all one lacks is the infinite chain of superior norms logically necessary for the single proposition that all the rest of the sources are valid—and one may perhaps do well enough without that.

Professor Kelsen appears to think so because, as he sees it, the theory of the formal sources of law implies a distinction between the agencies of creation of law and the agencies of application of law which is of only relative importance.³ Parliament, yes, in a sense creates law by enactments which the courts apply. But if, as it were, the courts did not apply them Acts of Parliament would not be law.

The direction of the non-traditional enquiry

A particular development of the attack on the traditional category of the formal sources of international law has been effected by Professor Alf Ross. He accepts the theory of the logical impossibility of its exhaustiveness. He accepts too the unreality of the distinction between law-creating and law-applying organs. Indeed his main objection to the traditional doctrine is that the latter reduces the status of the judge to that of a mere law-applying agency, whereas to him and to others for whom 'the judicial decision is the pulse of legal life', it is clear enough that judges do a great deal more than apply a received 'valid' law in more or less mechanical fashion. Indeed, 'validity' for him is not a value applicable to law at all. What is significant is reality and the elements of reality, which are therefore the 'real' sources of law, are the factors which impel the judge to decide as he does. These include a received law, a species of statute, coming in a manner from above, and also custom, proceeding as it

¹ Kelsen, *General Theory of Law and State* (translated by Wedberg, 1949), pp. 132–3.

² Fitzmaurice, 'Some Problems regarding the Formal Sources of International Law', *Symbolae Verzijl* (1958), pp. 153, 161.

³ Kelsen, *op. cit.*, pp. 339–41.

were from below, but they include also certain 'free factors'. What these are is not wholly clear to me since Professor Ross describes them, roughly, as the product of the social consciousness and responsibility of judges but calls them 'legal principle'.¹

This, however, is not important, at least for the moment. What is significant is that the non-traditional approach of Professor Ross and his school leads in a sense to exactly the same result as the traditional approach: to a concentration of the enquiry into the sources of international law well-nigh exclusively upon the relatively restricted body of jurisprudence of such courts of very limited jurisdiction as the international community possesses: in effect upon the jurisprudence of the World Court. Just as the traditionalists produce very exhaustive, and indeed very valuable, commentaries upon that small body of decisions, so do the non-traditionalists.

The purpose of any enquiry into sources and evidences

Now is this right and is it enough? This must depend upon the purpose of an enquiry as to what are the sources of international law. The ultimate purpose of such an enquiry is to find out what international law is. It is an essential preliminary step in that enquiry because, if attention be directed to the wrong sources, it is impossible to discover what international law is or, what is perhaps more important, what is not international law.

It is commonly said that there is no parallel problem in municipal law—in, that is to say, the law within the State. The reason assigned for this is that, within the State, the courts have universal jurisdiction and will say soon enough what the answer to any legal question is and whether an alleged legal rule—for instance a resolution of only one House of Parliament—is or is not in fact such a rule. This may be fairly broadly true, though it may be suspected that there are various and growing areas of administrative law where it is not so true. But it is not true also that the existence of courts of universal jurisdiction is the sole explanation for the diminished frequency with which the problem as to what are the sources of law is encountered within the State. The courts are enabled to dispose of such problems because, in effect, they know what the law is. In modern times, however, their certainty in this matter is contributed to very greatly by legislation.

Uncertainty as to what the sources of law are in the international community as contrasted with the State community is as much

¹ Ross, *A Textbook of International Law* (1947), p. 80.

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

attributable, if it exists to the degree that is claimed, to the absence of developed international legislative organs as it is to the restricted character of international judicial jurisdiction. And in fact it does not at all follow logically that either courts or legislatures are the institutions of which to enquire, or which primarily need to know, what are the sources of international law and, in consequence, what that law is or may be.

The nature of the international community

For the international community is a very peculiar one from the legal point of view. It lacks, as we have seen, comprehensive judicial institutions. It lacks developed legislative institutions, if indeed it has any at all. The system of law which applies within it is patronizingly described, in consequence of this or of its retention of the institution of self-help, as a primitive system. But it is not to be assumed without enquiry that this verdict is correct, or that the international community requires legislative institutions. It is essentially a society of States, and therefore of collectivities rather than individuals. All or very nearly all of these collectivities already have legislatures, from which it must follow, at least, that the competence of an international legislature must in any event be restricted to that of something very like the diet of a confederation unless the autonomy of the national legislatures is very considerably trenched upon. That might or might not be desirable from some points of view. But were it to begin to occur, as indeed it may well have done, and were it to continue, its logical consequence would be the ultimate transformation of the quasi-confederation into a federation, and therefore the transformation of the whole basis upon which the international community has hitherto stood.

In a delightful phrase Baty pointed out that 'It is universally agreed that, in spite of the modern theories . . . International Law . . . nevertheless has something to do with States'.¹ That still remains true. Not only are States the normal members of the international community but the whole theory of the law of that community, and of modern innovations in it no less, is constructed upon the basis of that fact. States are thus not only subjects of the law but they are objects as well: their territory is themselves. Equally, while it is to them the law is given, they are the lawgivers. And if any element of international legislation is to be discerned in the operations of international organizations, enthusiasts for such structures would do well

¹ Baty, *The Canons of International Law* (1930), p. 1.

THE PROBLEM IN GENERAL

to remember that the theory upon which they were built was one of delegation from the State. If by a process of change and growth international law is becoming or is to become something else, some other theory and some other principle must apply.

The evidence would suggest indeed, that though the State may be tending to wither away under the influence of internationalist or supernationalist or transnationalist ideology, of technology, and of a general tendency to classlessness, there is a strong tide of nationalism which may not be pulling in quite the opposite, but is not pulling in the same, direction. Two answers can be given to the question as to which remarkable phenomenon of recent years has had the most influence upon the international community and its law: the extraordinary profusion of international organizations or the extraordinary growth in the number of States.

Given then, that for the time being the State, which was the fundamental fact and assumption of the international legal system, remains an essential part of it, and remains an organ as well as a member of the international community, it may be as important to enquire what are the sources of international law for the State, and what the State considers them to be, as to enquire what are the sources for the Court and what the Court construes them to be. Concededly, international organizations are also to be taken into account in this regard. Some attention must be paid to what are the sources of international law for them, and how they view them. The question may thus be put in this form: are the prescriptions of Article 38 of universal validity? Do they in fact list all the sources of international law to be applied, not only by the Court, but by whatsoever organ of the international community?

The nature of the State

It may be pertinently enquired at this point what I mean by the State. Anticipating the discussion a little I may reply, first that I shall seek to show that the executive State, though admittedly an organ of the international legal community, is very much else besides and is, fundamentally, a layman and not a lawyer. It is to my mind of the essence to appreciate this fact. But it would seem questionable whether it is, or ever was, the executive State alone with which we should be concerned.

The State litigant before the World Court is a relatively familiar figure in the context of the discussion of sources. For Article 38 of the Statute, impliedly directing the Court to apply the sources it

prescribes to the disputes coming before it, has to be read with Article 34(1) which confines the contentious jurisdiction to disputes between States. The State litigant is apparently the classical executive State—the coherent individual of international law. But we are no less familiar with the phenomenon of international law applying within the State—in the State's courts. And the question arises whether that phenomenon can any longer be explained away on the basis that international law is to a certain degree, in one way or another, incorporated in municipal law and applies simply as municipal law.

For more than a generation now the efforts of independent scholars have been devoted to the collection and publication in collected form of the decisions of municipal courts on questions of international law—or at least what is called by those making such collections international law.¹ But to what end? The World Court does not, ostensibly, make use of their work. What, in fact, is the status of a municipal decision of this sort? Does it in any sense constitute a source of international law? If so, is it such a source as an international tribunal can rely on—so that the World Court has either, as it would clearly be more proper to say, not had occasion so far in its limited experience to do so, or has regrettably neglected so to do? Alternatively, are the decisions of municipal courts part of the practice of the States to which such courts belong and thus subsumed under that source of international law which Article 38 describes as 'international custom, as evidence of a general practice accepted as law'?

Or is there a third possibility: that the decisions of municipal judges are to be considered, from the point of view of international law, as no more than the opinions of learned individuals—as the writings of 'highly qualified publicists'? If one considers the cases of Lord Stowell or Chief Justice Marshall this explanation of their status is of course attractive. But if municipal judges are no more than writers, what becomes of international judges in the light of the incorporation by reference, in Article 38 of the statute, of the pro-

¹ The editors of the fourth to the eighth editions of Oppenheim's treatise, Lord McNair and the late Judge Lauterpacht, who were, with Sir John Fischer Williams, responsible also for the *Annual Digest of Public International Law Cases*, now the *International Law Reports*, stand foremost among those in England. But the compilers of the numerous American Case Books—Dickinson, Hudson, Fenwick, Bishop, Sohn, Briggs, and Brewster and Katz, not to name them all—are not to be forgotten, nor the original compiler and the editor of that first English Case Book now so unhappily out of print, *Pitt Cobbett*, nor yet the works of Professors Schwarzenberger and Green.

vision of Article 59 to the effect that the decision of even the Court itself has no binding effect except in the proceedings in which it is given? And what, more generally, becomes of the thesis that an international decision is entitled to a particular respect because it has 'an actuality and a concrete character that causes it to impinge directly on the matters at issue, in a way that an abstract opinion, however good, can never do'?¹ Is not this thesis in any event applicable no less to municipal decisions?

But before it is decided that the successive editors of the *International Law Reports* and of comparable collections have laboured in vain, or have laboured only to produce exercises in a particular department of municipal law, comparatively treated or otherwise, ought not a fourth possibility to be explored? It is commonly said that prize courts, at least, are not courts of municipal law at all, but courts of international law. The theory behind this opinion is largely unexplored it would seem. Its adoption explains the universal validity of adjudications in prize, properly arrived at. And the exceptional responsibility of States for the improper decisions of such of their courts as are prize courts is no doubt connected with the underlying theory, whatever it may or should be.² But it is of course not difficult to relate the rule as to the universal validity of transfers of title by the decision of prize courts to the maxim *locus regit actum*, an ordinary principle of the conflicts of law and therefore, according to current theory, of municipal rather than international law—though there may be difficulties in connection with the operation of the competing principle that the courts of one State will not enforce the penal laws of another, which might have to be explained away on some such basis as that a title acquired under a penal law may still be recognized though it will not be affirmatively enforced in a foreign court. However this may be, universal recognition is habitually accorded to judgments of municipal courts other than prize courts on a basis, again according to current theory, other than that of international law.

Perhaps current theory is merely wrong here. Perhaps modern international law still in a manner underwrites the classical *ius gentium*. If so the books of international law should contain, as normally they do not, rules relating to the limits of the civil jurisdiction

¹ Fitzmaurice, loc. cit., at p. 172.

² Remarkably, the leading English textbook on the subject, Colombos, *The Law of Prize* (2 ed., 1941) does not, apparently, anywhere discuss the question of the international validity of title acquired through adjudication in prize.

of States, derived from the only source available, the decisions of municipal courts. But if the books omit this particular topic, they do nevertheless habitually include exhaustive accounts of the limits of municipal criminal jurisdiction and of the municipal jurisdictional immunities of States, organs of States, and diplomatic and consular envoys. They likewise devote much attention to the municipal legal consequences of the recognition of States and governments, and to the effect upon municipal legal rights of the so-called succession of States and governments. And it is of course in relation to these topics that the mass of municipal decisions has been imported into the books and which very largely accounts for the fact that whereas Sir Henry Maine mentions but one decision in his lectures the table of cases in Oppenheim now extends to thirty pages.

The question arises as to whether all this is international law or whether it is not. Upon the strict dualist hypothesis it is not. It is simply that part of international law, or its reflection, which is or which has become part of municipal law. The dualist hypothesis is not, however, the only one. It would, moreover, be surprising if the devotion of the compilers of collections of municipal decisions was inspired simply by the doctrine that international law is part of the law of the land. It is scarcely credible that they have been concerned simply to instruct and inform municipal judges who may encounter again in their work the same problems which had been encountered before. It is sufficiently obvious that there has been also a view, perhaps often unspoken, perhaps to a large extent unconscious, that municipal law is also part of international law. In short, a two-way traffic has been contemplated. And, if the World Court has to some extent disappointed expectations in this regard, it does not follow that other organs of the international legal system have done the same. The executive governments of States, for instance, despite the theoretical problems arising from the separation of powers and the habitual independence of the judiciary may well have taken note of the current of municipal decisions.

Alternatively, upon a monistic hypothesis, may it not be hazarded that municipal courts, in so far as their concern with such topics as have been mentioned comes in question, are themselves organs of the international legal system, applying not municipal law derived from international law but international law itself? That system, upon any theory of its relation to municipal law, manifestly has points of contact with the latter. And from very early times, in the shape of the monistic theory, there has been a strongly held contention that

the two systems are really one. Today the tendency is towards a view that the battle of the dualists and the monists was fought upon a false issue. There is occurring something not unlike the liberation of the spirit experienced by the physicists when they realized that 'up' and 'down' were but relative terms. Law is not so much either municipal or international as national or transnational. And in the light of this the new and otherwise happy term 'foreign relations law' is not necessarily helpful.

If, therefore, municipal decisions upon questions of international law have some value otherwise than as strictly municipal decisions—as, that is, sources either of the international law applicable by international tribunals, or by other organs of the international legal community of the category of States acting either severally or collectively, or as sources of a species of international law which, though applied by municipal courts, is still international law, then the question arises whether the labours of the collectors of such decisions, though they have not been in vain, have been entirely correctly directed so far? Should they have so largely failed to provide information on the standing within municipal hierarchies of the tribunals whose pronouncements they have printed? Is it of any profit to pile decision upon decision, now of the Supreme Court of the United States, now of the Civil Tribunal of the Department of the Lower Seine, without much, if any, discrimination? It is impossible to resist the impression that the process of making such collections began with the thought, which was no doubt a perfectly proper sentiment at that time, that anything which looked like the judgment of a court and which related however remotely to international law, was worth collecting—for the worthy end of making international law look more like law than it had beforehand. Now that the cause is won, however, it may be that some greater discrimination is desirable, upon the basis of a more exact assessment of the status of municipal decisions as sources of international law.

The nature of the practice of States

One possible solution of the problem of the relation of the decisions of a State's courts to international law we have at least propounded if not discussed is to assign them to the category of the practice of the State. I think I have said sufficient to indicate that I do not myself regard this as a wholly adequate solution. In any event, I take leave to suggest that it must involve a voyage into seas for which the charts are poor. The Court, we shall see, has not yet

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

had occasion to pronounce very directly or very fully upon this source, or upon the process of creation of international customary law.

Yet the question—and incidentally the question of the relation of municipal decisions to international law—has been endowed, one might think, with a certain urgency in the light of the direction to the International Law Commission in its Statute to

consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law.

What documents do concern State practice? What, indeed, is State practice? Does it consist solely in what States do, or does it comprehend what they say or what they think? And, by the State, do we mean exclusively the executive State? Is the legislation or are the legislative debates of States irrelevant? Have the pronouncements of Courts, or even of unofficial elements such as the writings of publicists, any relevance? These last, we know, have a mention in Article 38. But what, if any, is their relation to the practice of States? What, again, is the relationship of the 'general principles of law', which the Statute of the Court mentions also, to the jurisprudence and practice of States?

Even assuming some common understanding as to what the elements of the practice of States are, which would seem to be a necessary pre-requisite to the assembly of the evidence thereof, it remains to ask what is the relation of the practice of a single State to that of States generally. What does one do with the evidence of the practice of State A, of State B and State C? Does one weigh one against the other, and, if so, upon equal terms? Have 'Russia and Geneva equal rights' in this regard? Or should one seek some common denominator from them? All these questions would suggest a need for a further enquiry into 'sources'.

The expansion of the international community and the sources of international law

Another reason for some effort at re-appraisal of the sources of international law is to be found in the vast expansion of the community of States which has taken place, and taken place very rapidly and recently. Within a quarter of a century the number of States has virtually doubled. Many important consequences for what may

THE PROBLEM IN GENERAL

be termed the technical development of international law must inevitably follow this remarkable event.

In the first place, it is to be noted that many if not most of the newcomers upon the scene are not only newcomers but have little in the way of inherited international legal tradition. They are inevitably inexperienced. If the principal aim of a study of the sources of international law must be to determine what is international law, numerous of the new States obviously stand in need of such a service. For a long-established system in which the customary element plays a great part is not easy to grasp. Its frontiers cannot well be learned from books. It is not to be learned in a day. It has in fact to be extracted still to a large extent from principle, tradition, history and practice. For the long-established States this has become a matter of instinct. Such for a very long time to come it cannot be for new States which, it must be remembered, must themselves, like the old States now, be dealing half their time with new States also. More precise guiding lines than have hitherto been necessary are therefore eminently desirable.

This is illustrated incidentally upon a consideration of the second problem which seems to arise as a result of the virtually simultaneous arrival on the scene not only of numerous new and inexperienced States but also of new collective organs of the international community. These last include of course the Court, but there are others, for instance the United Nations and the International Law Commission. For it is not unimportant to recall that the World Court is very much a newcomer among the traditional organs of the traditionally disorganized international society—the long-established States themselves. And though in a short space of time it has most happily acquired a remarkable reputation and, by virtue of its nature as well as the sagacity of the men who have composed it, has come to lead a life and wield an influence of its own, the Court possesses an authority which is essentially a delegated authority. Its jurisdiction depends always upon the consent of States. Within limits which follow from the nature of the judicial function it must be told what to do. Its statute, and in particular Article 38, may thus be looked upon as in some sort a standing *compromis d'arbitrage*. In theory, therefore, should that *compromis* prove misconceived, or should it be misconceived by the tribunal it establishes, it can be amended by its framers, the States party to it, or those States can take other appropriate remedial action. If thus it were found that the Court had been incorrectly or insufficiently instructed as to the law it

should apply, or if it proved unresponsive to its instructions, it would be for the parties to the Statute to mend matters. It must be admitted that the possibility adumbrated here was a somewhat theoretical one even before the recent expansion of the international community. Separately established institutions, even if they be merely bipartite arbitral tribunals, inevitably develop something in the way of a personality and tradition different from those of their creators. This is especially true of judicial institutions because of the character of their business. There is in consequence not very much even as few as two States can do when a tribunal they have set up acts in a manner which is unpalatable to both of them. And the practical difficulties of revision become immensely greater when what is in question is a truly International Court set up by multi-partite agreement.

There is, however, one remedy available to the State litigant disappointed with the Court it has assisted to create: it can take care to keep out of that Court for the future. It is of course a matter for serious complaint and comment that many of the States which combined in the creation of the World Court pursue exactly that policy. So great is the influence of those who would see international law written from the cases, that this is almost universally held to be a matter for profound regret. But it is not wholly heretical to venture the suggestion that, in imaginable theoretical circumstances, the States might be wiser than the Court. Great tribunals have been known to be out of step with the times, as the record of the Judicial Committee of the Privy Council in the matter of Canadian appeals or of the Supreme Court of the United States in relation to the New Deal legislation sufficiently show. Indeed the possibility is inherent in the necessary concern of courts of law with remedial justice alone, and as such was pointed out already by Grotius. And, if the theoretical possibility suggested is thus not unreasonable in theory, it would be wholly unrealistic to deny that among members of governments, as distinct from international lawyers, the view is very often firmly held that international tribunals not only may be but very nearly always are, if not wrong, in a measure predestined to error.

But that some authority other than the Court should be wiser than that august body implies in that other authority a measure of traditional experience not to be expected of the new States. If the Court err, therefore, it may as a result lead the new States into error, and, by reason of their number, ultimately the whole international community, with results permanently damaging to the entire system

THE PROBLEM IN GENERAL

of international law. And, if this be a true possibility, it provides a very profound ground for an appeal that the sources of international law, and therefore international law, should not only be looked at exclusively through the eyes of the Court, but should be looked at with some urgency through other eyes as well.

One illustration which is only partly hypothetical may be given of the possible dangers which are alluded to here. The new States are confronted, as is well known, with a problem which, though it also belongs to the realm of high theory, can still have practical aspects. This is the problem as to the extent to which rules of international law established before they came into existence are binding upon them. It is a very puzzling problem for which various theoretical solutions, none of them particularly satisfactory, can be offered. As is equally well known these solutions, however logically convincing, are not especially attractive emotionally to the new States because of a coincidental factor in the situation: that the system of international law grew up in Europe and was developed within the sphere of Europe and European colonization proper, whereas almost all the new States have arisen outside that region and are founded upon distinct ethnic and cultural societies. And as a consequence it is a little difficult to persuade African or Asian States of the relevance to their new international lives of much of the old learning in the books concerning, for instance, the Congress of Vienna. It is by no means unnatural that such States should, on the emotional plane, have a wistful regret that all that has not departed with direct European national rule. If the basis of rules of international law is consent, such States may and indeed do, consciously or unconsciously, ask why should not they be bound only by those rules to which they have expressly consented.

Now though it is impossible not to be sympathetic to such a line of argument to a certain extent, the extent of one's sympathy must be measured by the view one takes of the respective roles of custom and treaty in international law. It is not an impossible point of view that treaties are not only a source of international law but the prime source. Some countenance is given to such a point of view by the inclusion of a mention of treaties in Article 38 of the Statute of the Court, and by its mention first among all the matters which are referred to there. On that evidence, combined of course with other evidence, the point of view referred to is strongly held by some. The Court could scarcely be blamed if, on the faith of the Statute, it entertained the same opinion. Given their emotional predisposition

in its favour, the new States might well be persuaded to that opinion by the Court, if the latter held it. Upon its basis they might proceed to the position that treaties are not only the prime but the only source of international law, and that only treaties are binding. And, given their numbers, even so remarkable a doctrine might make rapid progress towards universal acceptance. But were that to come about there would without question have to come about also the greatest imaginable revolution in the international legal system.

One final point remains to be made while the position of the new States in relation to the question for the sources of international law is under discussion. These States, as has been seen, are often oppressed by the exclusively European tradition of international law. Before they came into existence it was not particularly relevant to examine the regional character of that tradition. For the world of sovereign States, as it then was, was a world confined to Europe and the area of European colonization in the true sense of that word. A proper concern for the future of the international legal system would suggest that as soon as may be it should be given, or be discovered to have, a somewhat wider basis. And a comparative examination of cultures may well reveal that what has been considered hitherto to be European is not European at all. It is, naturally, already known that there have been other systems of international legal relations besides that which is denominated the modern European system. Hitherto these have been dismissed as historical byways by the lawyer because they have not been considered to have contributed to the latter system. This is of course true in a strictly chronological sense. It cannot be pretended that the customs of Nigerian tribes have influenced the growth of the law of treaties or that the mutual courtesies of Indonesian islanders have anything directly to do with those which ambassadors receive. Yet if it should be that autonomous communities inevitably develop identical patterns of relationship between themselves in whatsoever culture, that is a remarkable circumstance, indicating that so-called European international law has a somewhat broader base than has been hitherto imagined, at least by its practitioners. It is, too, a circumstance which should render that law of universal acceptance. Such matters should be studied. It may well be that the rubric of Article 38 already permits of their consideration as sources of international law. They may thus be comprehended within a 'general practice accepted as law', or within 'general principles of law recognized by civilized nations'. If so, this fact should be made more explicit than it now is.

The new institutions of the international community and the sources of law

In an argumentation directed towards a reconsideration as to what are the sources of international law it is natural to move from the new States to the new collective institutions of the international community. It would be more correct perhaps to say that it is new activities rather than new institutions which must be looked to. For the United Nations, the principal institution whose activities come in question, does not exactly represent a new idea. In its beginnings it appeared to some as no more than a pale shadow of the League of Nations. The Charter, moreover, gave no very precise indications that its development would follow different lines. As it has fallen out, however, the United Nations has clearly come to play a role which involves a very direct impact upon the system of international law. The content of that law has very obviously been considerably changed as a result of the activity of that organization. And it is not possible, or at any rate not easy, to relate the changes which have come about to the traditional sources of the law.

In accepted theory the Charter is a treaty. Any new rules of international law which it may have explicitly introduced are therefore attributable to that beginning. It is possible, too, to adopt a somewhat extended view of the nature of treaty in this connection and to find the source of obligation of various subsequent departures in the Charter itself on the thesis that what has been done in relation to them is merely to fill in details in the Charter. Such was the approach adopted in the first years of the life of the new organization in regard to, for instance, the question of its privileges and immunities. As the Preparatory Commission reminded its parent body, the obligation of members to accord appropriate privileges to the organization was already contained in Article 106 of the Charter. A general convention on the subject, such as was in fact adopted, merely spelled out the details of this existing obligation. A not dissimilar line of thought underlay the approach to the question of the distinct personality of the organization and, equally, the advisory opinion of the Court respecting it. The Charter was, as it were, a *traité organisé*, a living treaty, and both the practice under it as well as its original terms were to be taken into consideration in determining whether or not the organization had been endowed with an independent treaty-making power and other capacities associated with international personality.

But, save as such extension of the Charter might be permissible, opinion was originally somewhat against the possibility of the United Nations having any direct influence upon international law. Brierly thus roundly declared that 'apart from its control over the budget, all that the General Assembly can do is to discuss and recommend and initiate studies and consider reports from other bodies'. The farthest anyone outside the Secretariat appeared at first to go was to suggest, as did Professor Potter, that the resolutions of the General Assembly might eventually pass into customary law—and thus be subsumed under the second head of Article 38 of the Statute. Within the Secretariat, however, a rather different view was evidently taken from the outset. This is not to be discerned with complete clarity in Mr. Schachter's well-known article on the development of international law through the legal opinions of the United Nations Secretariat.¹ For he still saw the legal opinions of the Secretariat as either purely advisory or as related to the Secretary-General's authority to make administrative decisions. In other words, though he felt that 'the daily practice of its various organs was adding, bit by bit, to the body of international law', he was claiming no more than that, firstly, the practice of the organization was part of the practice of States, and, secondly, that an internal law of the organization was developing. On the other hand Mr. Sloan, in an unofficial contribution of considerable verve, claimed already in 1949 that there were some areas in relation to which the sovereignty of States was not established where 'the General Assembly acting as an agent of the international community may assert the right to enter the legal vacuum and take a binding decision'.² For him it was even at that date maintainable that resolutions of the General Assembly were sometimes binding. And he derived, it would seem, their binding force from a general rather than a specific mandate to the General Assembly, from which it would follow that such resolutions as he had in mind could not be considered as mere extensions of the Charter.

The question was re-examined by Professor Johnson some sixteen years later. The occasion for this re-examination was the author's noticing some expressions of view by Judges Lauterpacht and

¹ O. Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', *British Year Book of International Law*, XXV (1948), p. 91.

² Sloan, 'The Binding Force of a Recommendation of the General Assembly of the United Nations', *Ibid.*, XXV (1948), p. 1.

THE PROBLEM IN GENERAL

Klaestad in their separate Opinions in the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa Case* in 1955. Judge Lauterpacht there said in particular:

It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly in the matter of trusteeship or otherwise addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other and that they cannot be regarded as forming in any sense part of a legal system of supervision.¹

This suggestion coincided to some extent with the view of Professor Kelsen, put forward in 1951, that a resolution in relation to the maintenance of peace and security might possibly be binding.² Professor Johnson concluded from a highly conscientious study of the matter that Mr. Sloan had put his case too high. But he also concluded, somewhat unexpectedly, that, though the general run of recommendations of the General Assembly—other than those which the Charter specifically says shall be binding—are not binding on members who vote against them, they nevertheless ‘have . . . a “legal effect” . . . in the sense that they may constitute a “subsidiary means for the determination of rules of law” capable of being used by an international court’.³ This conclusion has been described as unexpected. It is so because, whereas Professor Johnson evidently intended something in the nature of a negative verdict, he has in fact arrived at one of a positive sort.

And this positive verdict may well be right. For it is exceedingly difficult to resist the impression that the content of international law is very different now from what it was commonly understood to be at the beginning of the life of the United Nations—even after the entry into force of the Charter. Numerous factors no doubt have contributed to the change. But among these the resolutions of the General Assembly would seem to have been of no little importance. It would not seem, moreover, that the effect of these resolutions can be explained away, as it were, or rather brought under the accepted categories of the sources of international law, by any argument that they are only binding for the States which vote in favour of them.

¹ *I.C.J. Reports*, 1955, pp. 67, 118.

² Kelsen, *The Law of the United Nations* (1951), p. 195.

³ Johnson, ‘The Effect of Resolutions of the General Assembly’, *British Year Book of International Law*, XXXII (1955–6), pp. 97, 121–2.

There are in any event great difficulties about the theory that the resolutions of an organ of an international organization can be construed as a treaty between the States whose representatives vote in favour of it. It does not at all follow that those representatives are appropriately authorized to enter into tacit treaties by the mere fact of their accreditation to the organization concerned. The matter may be sufficiently tested by reference to the General Assembly's resolution of 1960 concerning 'colonialism'. Therein that body 'declared' amongst other things that 'The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of human rights [and] is contrary to the Charter of the United Nations', and that 'All peoples have the right to self-determination'.¹ Can even the nine abstaining members deny that the law of territorial sovereignty has been, or must be, re-written as a result of that resolution? And must not even the 89 States which voted in favour of it concede that its disguise as an interpretation of the Charter, and therefore as existing law, is an exceedingly thin one?

The general change in the climate of international law which has occurred since the United Nations came to life in rather novel fashion has not come about solely by means of resolutions of the General Assembly. The promotion of diplomatic conferences by the organization has been no less influential. And it is not, it is submitted, possible to consider that the effects produced by such conferences are confined to the formal treaties, if any, which emerge from them. Again it is sufficient in this context to take one example. Can anyone deny that the international law of the sea has been significantly changed as a result of the two United Nations Geneva Conferences—and this quite irrespective of the formal inconclusiveness of the second Conference or of the extent to which the conventions drawn up by the first Conference have or have not been accepted by States and have or have not had a formal effect? It is again Professor Johnson who has provided a valuable study on this matter. And again it is permissible to read into his conclusions rather more than he himself sees. For the upshot of his careful examination of the procedure and forms of conferences is that there is a distinction between conventions drafted by such conferences and 'resolutions' and 'declarations' and similar manifestoes. The distinction, according to him, depends on the existence or otherwise of an intent to enter into legal relations. He reinforces his conclusions as to the non-obligatory character of 'resolutions' of conferences, interestingly

¹ United Nations, Resolutions of the General Assembly 1514 (XV).

enough, by reference to his earlier verdict on resolutions of the General Assembly as being, in words he adopts from Judge Fitzmaurice, of a 'fundamentally recommendatory character'. But, it is conceded, the 'resolutions' of a conference may be intended to be binding. The question is, from a certain point of view, one of intent rather than form.¹ Is it not, however, necessary to go farther and to concede that a conference which ostensibly reaches no conclusion whatever may nevertheless change the law?

Is it not also permissible to say that it is somewhat unrealistic to attempt to relate the apparently considerable and apparently effective law-creating activities of the United Nations which are conducted by means other than the conclusion of formal treaties to some other head of Article 38? This must at least be the case when there is considered the third channel through which the United Nations acts in this regard: the International Law Commission.

The Commission is a body tacitly envisaged by the Charter of the United Nations, Article 13 whereof charges the General Assembly with 'encouraging the progressive development of international law and its codification'. In its turn the General Assembly charged the Commission with the requisite technical work. The precise directions in the Statute of the Commission were interpreted, in a *Survey of International Law in Relation to the Work of Codification of the International Law Commission*,² which appeared in 1949 under the name of the Secretary-General but which is known to be the work of an independent scholar, to absolve the Commission from 'producing such drafts only as are intended to materialize as conventions to be adopted by a considerable number of States'—and which might therefore be considered to stand or fall according as they were so adopted or not, and to permit it to leave the fruits of its labours

in the form of a draft either merely submitted to the General Assembly or of which the General Assembly has taken note or which it has approved without going to the length of recommending it to the Members of the United Nations with a view to the conclusion of a convention or without proceeding to convene a conference for the purpose of concluding a convention.

The thought here was that 'drafts which are permitted to retain [a] preliminary status . . . would be at least in the category of writings

¹ Johnson, 'The Conclusions of International Conferences', *British Year Book of International Law*, XXXV (1959), p. 1.

² *United Nations Document A/C.N.4/Rev. 1* (1949).

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

of the most qualified publicists, referred to in Article 38 . . . ' But it was claimed that

Most probably their authority would be considerably higher. For they will be the product not only of a scholarly research, individual and collective, aided by the active co-operation of Governments, of national and international scientific bodies, and the resources of the United Nations. They will be the result of the deliberations and of the approval of the International Law Commission. . . . They will be of considerable potency in shaping scientific opinion and the practice of Governments.¹

Is it possible to deny that this result has come about? Where, however, does the status, higher than that of the writings of the publicists, thus claimed for and achieved by the work of the Commission, stand in the hierarchy of sources Article 38 of the statute appears to establish?

Thus far, among the new institutions of the international community, there have been mentioned only the United Nations, or rather the General Assembly, and the International Law Commission. This is not, however, to say that other institutions, whether with a world-wide mandate or of a regional character, cannot also be discovered to have been making law in other than the traditional ways. The example of the International Labour Organization indeed springs to the mind at once in this connection. For it is certainly very difficult to regard so-called international labour conventions as treaties. But, rather than make a catalogue of institutions, it is perhaps better to consider the impact upon the problem under discussion of other institutions from the point of view of their contribution to the expansion of the categories of international persons.

The new international persons and the scope of international law

Allusion has already been made by the way to the assertion of the international legal personality of the United Nations. Its acceptance must involve that other international organizations possess personality, though it be not necessarily of the same quality as that of the United Nations any more than the personality of the United Nations is of the same quality as that of States. It must raise also the question whether the achievement by international organizations of at least quasi-membership of the international community invests them with that capacity to participate in the making and changing of the international legal system which States possess and the possession of which by States is the hallmark of that system. If it were the case—

¹ Ibid., pp. 15-18.

but it is submitted that it is still an eminently examinable proposition—that treaties were a source of international law, then this capacity would have immediately to be conceded to international organizations. For their treaty-making power is the foundation of their personality. But must not allowance also be made for a ‘practice of organizations’ akin to the ‘practice of States’ as a source of the law? If so, it is not made in Article 38 of the Statute of the Court. Moreover, there clearly has developed a ‘practice’ of organizations in relation to, for instance, the question of the right to membership of organizations, to that of the effect of change of identity of States upon membership, and perhaps to that of the relationship of the recognition of States and Governments to the right of representation within organizations. Mr. Schachter’s pioneering article is thus a valuable contribution.

Such matters apart—and because they have to do with the relations of States to organizations as much as of organizations to States they can of course be looked on as aspects of the practice of States rather than of organizations—it is very strongly urged that what may be termed the internal law of international organizations, to say nothing of the rules governing the relations of organizations, not with States but *inter se*, are to be deemed a part of international law. The basis of these claims is, however, a somewhat negative one. It is that no other law can possibly apply. And, according to a somewhat barren logic, the case may be considered proved. But it is not wholly without significance that it has never apparently been suggested very seriously that the internal law of an internationalized territory must, by a parity of reasoning, also be considered to be international law.

It has in the past at least been suggested that the law governing the relationship of the constituent parts of federal States is a sort of international law, and, on that basis, such cases as *Re Labrador Boundary*¹ have crept into the books. But here the argument has been rather that, in such relations, the situation is one of close analogy. The suggestion, moreover, dates from the period when any straw was clutched at to make international law look more like law.

The circumstance that international organizations have established tribunals to regulate their internal affairs has contributed to a further confusion of the issue. It is not impossible, however, to have sympathy for the inclusion in the *International Law Reports* of the decisions of the United Nations and International Labour Organization

¹ (1927) 43 T.L.R. 294.

Administrative Tribunals. For they have, after all, an intimate connection with international organizations whose international personality has, rightly or wrongly, been admitted. And the question what law those tribunals do apply if it be not international law is, in a rigidly formal sense, unanswerable. The inclusion also of the decisions of the European Court and Commission of Human Rights gives one a little more pause, however. For here the substance of the matters dealt with is apparently only formally and as it were accidentally international. It has become so merely because the States party to the European Convention on Human Rights have created in a particular regard a species of common court of appeal for individual complaints of violation of the Convention. And when it comes to the devotion of many pages to the exceedingly technical proceedings of the Court of the European Coal and Steel Community a most serious question presents itself to the mind. Is this mass of learning, which surely can concern directly, except in so far as it may yield an occasional point in the interpretation of treaties, only the Court from which it emanates and actual or potential practitioners and litigants before it: is this international law?

To doubt that it is, must not be taken to imply any criticism of the learned editor of the *International Law Reports* or of others of his school of thought. The question may merely be one of terminology. It might simply be better to label this class of material 'non-municipal law' instead of 'international law', rather than to permit the latter to degenerate into no more than a formal category. There are, too, possibly dangers of misunderstanding. It might come to be thought that the law of administrative tribunals of international organizations or of what have been termed accidentally international tribunals was of more general application.

But to say this is, of course, to assert that international law is more than a formal category: Now is this true? Is municipal law so-called more than a formal category? What, after all, is 'the law of England' other than what the appropriate authority makes it? Does it not, in virtue of the principles of the conflict of laws, sometimes transform itself into foreign law? Is it not at times international law in virtue of the rule that international law is part of the law of England?

Is it perhaps sufficient to answer here that the law of England is still primarily the law between man and man or man and State in England, and that there is still a difference between a rule of English law and the stipulations of a contract which that law permits to be enforced?

Or to say in relation to international law that the heart of the matter is still the State, for better or worse?

The particular direction of the enquiry

If this be so, then the heart of the matter of the sources of international law is still Article 38 of the Statute—‘the official doctrine’ as Professor Ross calls it. Its content, however, ought to be examined not so much from the point of view of the Court as from that of the State. To such an examination I propose to devote the rest of my time. What, however, I shall find by so doing I have already in many respects indicated. This is not wholly because I have learned too well the duty of a lecturer who must deal with students: to ‘tell them what you are going to tell them, tell them, and then tell them again’. For I have here an audience of a rather different sort. No, the difficulty of exposition arises from the nature of the problem. What the sources of international law are cannot be stated; it can only be discussed.

Chapter II

THE TREATY AS SOURCE

The terms of Article 38

ARTICLE 38 of the Statute directs the Court to apply '(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States'. Two questions immediately arise upon this direction. Is there any significance in its coming first—in its being lettered (a)? And what does it mean?

As to the first matter, this is a general question affecting all the remaining stipulations of the Article. Does the order in which they are stated imply any hierarchical scale of values? Is the Court, as it were, first of all to exhaust everything which appears under paragraph (a), and then pass to paragraph (b) and so forth? If so, does the same hierarchy apply universally and thus when the application of international law, or even the mere enquiry after international law, is undertaken by some other body or person, whether an organ of the international community or not?

Countenance is given to the supposition that the matters mentioned in Article 38 are in fact arranged in an hierarchical order by the circumstance that the last matters listed—judicial decisions and teachings of scholars are directed to be applied as, and therefore seemingly only as, 'subsidiary means for the determination of rules of law'.¹ But, we read, the original proposal to introduce the Article with a direction to the Court to apply the things it lists, arranged as they now stand, 'in the order following', was deliberately abandoned.² Nevertheless, the order adopted reflects a logical scale of values, and there is a good reason for sub-paragraph (a) to stand first, as we may see if we examine its terms. To the argumentative—or merely the legal—mind the description given suggests as a theoretical possibility at least that there may be conventions which do not establish rules expressly recognized by the contesting States; for, otherwise, it would not be necessary to specify, for the purpose in

¹ See further, p. 91 below.

² Cf. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 20.

THE TREATY AS SOURCE

view, that those conventions which are relevant are those which do establish such rules. What, however, are the alternatives here: no more than that there may be international conventions which indeed lay down rules, but rules not expressly recognized by the contesting States? Or rather—or, indeed, in addition—that there may be international conventions the force of which the contesting States perhaps acknowledge but which lay down no rules, or no rules the contesting States acknowledge?

This question might well seem scarcely worth exploring. For, it may be said, the meaning of the clause is abundantly clear. The Court may, and should, look to and apply the provisions of conventions between the parties before it, be they conventions between these parties exclusively or binding on a larger circle of States. But conventional stipulations between other States, to which the contesting States have not expressly become bound, are obviously irrelevant to the issue between them. All this may be acknowledged to be true and in fact obvious. But, if true, it has important implications for the status of treaties as a source of law in any sense of that term.

The place of treaties in the international legal system: the treaty as contract

For by the words 'international conventions' the framers of the Statute mean what are more commonly and more broadly called treaties. The treaty is a familiar enough phenomenon of international legal relations and, though it has been aptly termed 'that sadly over-worked instrument',¹ made in the international system to serve a variety of purposes for which, in other legal systems, a variety of devices is available, its general nature is sufficiently clear. Such practical difficulty as is encountered is, generally, to know when an instrument or a transaction is a treaty, not to determine what a treaty is or what are its effects. For the moment it will suffice to adopt as a definition the following: it is an obligation of international law voluntarily undertaken—or, if it be preferred, the instrument whereby such an obligation is undertaken. Such a definition will suffice to distinguish the municipal legal obligations of States. States may, and do, sometimes contract in the context of some system of municipal law: for instance, State A may buy wheat from State B in pursuance of a bargain and sale exclusively regulated by the municipal law of one or other party. Such bargains are not treaties. But the matter

¹ McNair, 'The Function and Differing Legal Character of Treaties', *British Year Book of International Law* (1930), XI, pp. 100, 101.

of them may of course be made the subject of a treaty rather than of a municipal law contract. The distinction arises according to the system of law intended to regulate, or which does regulate, the transaction generally. Only if that system is international law is a treaty involved. The treaty is thus, in its primary role, the contract of the international legal system.

These somewhat broad propositions can be contested. It can thus be argued, considering first transactions exclusively between States, that such are still treaties even if they are intended to be governed by municipal law. If the intention of the parties is merely to incorporate certain provisions of municipal law by reference, no doubt the transaction still remains a treaty. If the intention goes farther than this, and is, expressly or impliedly, that municipal law shall 'govern' the transactions, the position is more obscure. The view can be taken that what is involved is a mere 'choice of law', with the result, presumably, that international law would apply to the form—if there are any rules of international law as to form—and that the selected municipal law would apply to the substance. This seems to be the thought of Dr. Mann when he says:

If, as is undeniable, international persons are at liberty to, and in fact do, submit their *treaties* to a system of municipal law by virtue of an express clause, such a choice of law may occur also impliedly, and it thus becomes a matter of the parties' intention whether public international law or a system of municipal law is the proper law applicable to the *contract*.¹

But there is still a difference between the insertion, expressly or by implication, of a choice of law 'clause' in an agreement and the conclusion of the whole agreement 'under' or by exclusive reference to a single system of law, be it international or municipal, with respect to both form and substance. It is not an acceptable proposition that States can only contract by reference, partial or complete, to international law—that they can only make treaties with each other and never contracts. Such a contention would deny the personality of a State in any municipal law but its own, and overturn a great weight of jurisprudence affirming that personality.

It can be said in the second place that international organizations can only contract with each other by treaty—by reference, that is, to international law. But this ignores that, though they may be thought to lack anything in the nature of municipal legal systems of their own—that their respective internal laws are necessarily at least

¹ Mann, 'The Proper Law of Contracts concluded by International Persons', *British Year Book of International Law*, XXXV (1959), pp. 34, 40.

a species of international law, they are apparently at liberty to contract under the internal law of a third party: a State possessing a system of municipal law. To deny this would, again, be to deny the municipal legal personality of organizations. A 'contract' between the United Nations and the International Labour Organizations concluded under English law would admittedly have curious features, both parties being immune from the jurisdiction of the English courts. Immunities, however, may be waived.

What would be a more valid criticism of the propositions laid down is that, while they may hold good as respects transactions between State and State, international organization and international organization, and State and international organization, they do not deal at all with the case of an agreement between, for instance, a State and an individual. And to say that treaties can only subsist between parties possessing treaty-making capacity is scarcely informative. Upon the dualist hypothesis, the problem is of course easily soluble: an agreement between a State and an individual cannot be a treaty, a contract of international law, because international law does not apply as between States and individuals. Such a response, besides being unfashionable, ignores the extent to which international law may have become part of municipal law. And to say that, when such occurs, the thing to note is that the final product is municipal law is to supply but a technical answer. An approach of this character precludes, too, in effect, any examination of the interesting question whether contract is necessarily a bilateral transaction. Cannot a State bind itself by unilateral declaration?

It would be no less pertinent to say of the propositions laid down that they make no mention of the fact that a treaty can be something else besides a contract of international law—though, indeed, one possibility in this connection, that of a transaction being both a contract of international law and a contract of municipal law, has been at least adumbrated in the attempt, already made, to counter the suggestion that States can contract only by treaty.

However these matters may be, the treaty is essentially and typically a transaction between States exclusively, concluded in the context of international law. That may be provisionally regarded as its primary role. Given, moreover, the limitation of the jurisdiction of the Court to disputes between States, the provisions of Article 38 of the Statute in so far as they are to be construed to refer to treaties must refer to treaties in this primary role, the consideration of which must be the point of departure, for despite its pre-eminence it has,

like the role of the State itself in international law, come in the latest times to be rather neglected.

The treaty as statute

Without losing sight of the primary character of the treaty as an arrangement between States it is nevertheless possible to question whether it is appropriate, or always appropriate, to characterize that species of arrangement as a contract. And here it may be conceded that the voluntary element in the international legal system—its basis in the consent of those entities which are its subjects, being more apparent than that which none the less exists in any municipal system, and the treaty, unlike the contract of municipal law, standing as it were alone as the source of new obligations, it has been tempting to liken it to something else besides the municipal law contract. Thus treaties, or at least certain sorts of them, have been likened to statutes. For a reason having to do not with the essential nature of legislation but rather with the relatively exceptional role which legislation plays in their systems, this analogy is perhaps especially attractive to Anglo-Saxon lawyers. Thus the term ‘international legislation’ has come into common use. But it connotes no more than treaties having certain characteristics.

A very similar if not an identical trend of thought and expression has led to the drawing of a distinction between law-making and other treaties. By the former are meant, as by international legislation is meant, principally, those treaties to which a great number of States are parties, if not all States, and which appear to lay down or to recapitulate rules having an especially legal flavour. The Hague Conventions on the Laws and Customs of Warfare are of this character. These particular instruments do little more than restate rules of customary international law. Their content is what might be called lawyer’s law. The Geneva Conventions on the Treatment of Sick and Wounded and of Prisoners of War, though they are often innovatory, are equally described as law-making, or as representing international legislation. Sometimes the analogy is pursued to the point of giving to the treaty the title by which pieces of municipal legislation are habitually known. We thus have the General ‘Act’ of Geneva and the ‘Statute’ of the Ruhr.

But it is perhaps the case that a multiplicity of parties does not alone suffice to attract to a treaty the description of international legislation or justify its classification as a ‘law-making’ treaty. There exist types of treaties to which great numbers of States are indeed

parties but whose attribution to the category of international legislation is perhaps doubtfully correct, however affectionately that term is regarded. Examples here are the successive International Whaling Conventions and the International Wheat and other commodity agreements. They seem to qualify as quasi-statutes from the point of view of generality of acceptance. But their content seems to lack the nature of law, as distinct from obligation.

The distinction sought to be drawn between law-making and other treaties has been criticized, moreover, on the ground that it appears to deny the binding nature of those treaties not considered to be law-making. It is asserted, in opposition to those who would set up the distinction, that all treaties make law for the parties thereto, be they numerous or be they few.¹ Discussion of this point must lead to the very essence of the question: the status of treaties as a formal source of law. Before the examination of this matter is undertaken, however, it is well to consider in a quite general way the material contribution which treaties make to the international legal system.

The peripheral status of treaties in international law

How important, it may be asked, are treaties in international law? In one sense they seem of course to be of greater importance than any other element—except, perhaps, the rule, whatsoever its source and status, which renders them binding upon States. For if two or more States have unequivocally agreed to something by treaty, in relation to the matter in hand nothing other than the treaty has much relevance. It is generally immaterial that customary international law points in another direction. It is possibly equally immaterial that customary international law points in the same direction. An example of what may be called the sovereignty of treaty in this regard is furnished by the *Tunis and Morocco Nationality Decrees* case, in which the Permanent International Court, while affirming that in the then state of international law questions of nationality were in principle within the *domaine réservé* of a State, went on to declare that this was not the case upon the particular facts before it owing to the treaty obligations undertaken by France towards other States.²

¹ As to the terms 'international legislation' and 'law-making treaties' and their advantages and disadvantages, see in particular Hudson, *International Legislation* (1931), vol. I, pp. xiii-xv; McNair, loc. cit., *British Year Book of International Law*, XI (1930), p. 100; and Oppenheim, *International Law* (8 ed., 1955), vol. I, pp. 878-80.

² *Publications of the Permanent Court of International Justice*, Series B, No. 4, p. 24.

It is undeniable that this is the case. As respects the determination of the rights and duties of States *inter se*, the stipulations of a treaty to which they have agreed are paramount over anything else. There is not even, it would seem, any exception to the obligatory nature of treaties comparable to the effect created by the doctrine of municipal law that an illegal or immoral contract is unenforceable or is no contract. For, in customary international law in general, may not States agree on what they wish, without limitation? If of course some pre-existing treaty obligation has already limited the freedom of one or other of the parties to contract, for instance the Charter of the United Nations, any later bargain may be prejudiced. In this case, however, attention is merely shifted from the later treaty to the earlier. The principle remains intact.

This explains why treaties stand at the head of Article 38 of the Statute. It does not by any means follow, however, that this is because treaties are a source of law, or that, because they do so stand, they are so to be considered. Law is, it may be taken, the ultimate source of all legal obligations. But not every obligation flows directly from the law. To aver that treaties are binding on States is not indeed to explain why they are so binding. Nevertheless such an averment does not inevitably involve that they are law or laws. For one thing, States may immediately release themselves from the obligations of a treaty by mutual agreement. This process can perhaps be regarded as the substitution of one treaty for another. Laws, too, can be repealed by laws. Significantly, the compromise of treaties has seldom been looked upon as in the nature of a repeal. Breaches or non-performance of treaties can, moreover, be legitimately overlooked by those parties which, but for their complaisance, would have the right to complain. They are in fact capable of being completely cured by consent. Only in very particular contexts can breaches of law be repaired in so facile a fashion.

Reverting now to the central theme, it may permissibly be observed that despite the primacy of treaty over customary international law in any particular regard, the proportional contribution of treaties to the whole content and stuff of the international legal system, even allowing for the area of customary law codified and restated by treaty, is relatively small. The treaty is, in truth, essentially peripheral. Occasionally a treaty rule may be of great, even supreme, importance. Such is the case with the rules laid down in the Charter of the United Nations, if indeed its provisions are correctly interpreted as abolishing war as a legal institution. It nevertheless remains essentially true

that one can have a very fair idea of international law without having read a single treaty: and that one cannot gain any very coherent idea of the essence of international law by reading treaties alone.

In the light of this the analogy between treaty and, as opposed to municipal contract, municipal statute is immediately striking and attractive. At least, this is the case for Anglo-Saxon lawyers, in whose systems the role of legislation is likewise peripheral to the whole. One cannot study the English, or the American, legal systems from statute alone; on the other hand one can gain a very fair idea of them without reference to any great bulk of statute law. It is perhaps necessary here to say that one needs to study no great bulk of statute law rather than none at all. For of course the Constitution must be studied in the United States, at least for the comprehension of public law. And it is no doubt the case that the English law student must be made aware at a very early stage of his studies of a minimum of statutory rules, corresponding to some of those contained in the American Constitution. For the rest, however, in either country one may get on very well without the statute book when the object is to gain a general understanding of the legal system rather than to master the details of any particular part of law. And one will not advance very far towards that object with merely the statute book before one.

It might be argued that this state of affairs results necessarily from the nature of legislation and law and has no other significance than that statutes, it might be said, are essentially directives addressed to courts and presuppose a judicial system to interpret and apply them. But a consideration of the code system must immediately persuade us that this is not the case. One can obtain a very fair idea of French law from the texts of the *Code Civil* alone; and, despite that the role of *jurisprudence* and *doctrine* in a code system is frequently underestimated by Anglo-Saxon lawyers, one will not get very far in the study of French law without the texts of the code.

If this is the case though, does it not follow that statutes are peripheral only in what may be abnormal municipal systems? And does it not follow also that the verdict that the treaty is peripheral to international law may be incorrect, or true only of the international legal system at a particular and perhaps primitive stage of its development? These questions certainly merit an attempt to answer them. And, as respects the role of legislation in municipal law, it may be acknowledged that the common law system, though it appears to

be the only system the modern western world has contrived to evolve for itself, the code system being basically *romanesque*, is in effect an exceptional system. Its elaboration in the courts rather than the legislature has indeed been not wholly a logical necessity, following from the nature of law itself.

Nevertheless that, in Holmes' phrase, the life of the common law has been experience rather than logic is, to a degree, the result of what may be termed an historical logic. The formal sources of the system have dictated the processes of its historical evolution. And this is a circumstance to be borne in mind when the parallel development of international law is considered. For, in short, the nature of the society of States and its basis in a system of co-ordination rather than subordination may, indeed does, demand that international law shall have as its general basis a process other than a legislative or quasi-legislative process.

If the thesis advanced here, that the treaty is the analogue of contract rather than statute, be accepted provisionally, it is a possible objection that no explanation has been offered of the triviality or of the rarity of treaties which is perhaps implied. Lacking any legislature, and incidentally lacking until recently any judicature, might one not expect that the society of States should have employed to the full the only easy means to hand for the development of the law—the treaty?

So far has this been from being the case that, though whether in municipal law legislation has a central or a peripheral role must be acknowledged to depend upon which particular municipal system is looked to, in classical international law, the role of the treaty has not been central. This is so well understood that the numbers of treaties concluded before this century are usually greatly underestimated. In fact, though they have been of secondary importance, treaties have not been rare. What has characterized them has been, in fact, a certain irrelevance to international law.

This has been so well understood that the term international law has very often been used as not to include treaties. Strikingly late examples of this usage are to be found in the text of the Covenant of the League of Nations and even in that of the Statute of the World Court itself. For the framers of the Covenant, having declared that their aims of co-operation and peace are to be achieved 'by the firm establishment of the understandings of international law as the actual rule of conduct among Governments', thought it necessary to call further for 'the maintenance of a scrupulous respect for all

treaty obligations in the dealings of organized peoples with one another'. The Statute likewise, while conferring on the Court quasi-compulsory jurisdiction in 'any question of international law', provides also for a similar jurisdiction with respect to 'the interpretation of a treaty'.¹

The dichotomy between 'treaties' and 'international law' implicit—if not explicit—here might be taken to suggest a view of treaties not as quasi-statutes but simply as contracts under the law. There may indeed, as must be shortly seen, be considerable theoretical justification for such a view. But it would not explain why, for instance, treaties are singled out for special mention in the Preamble to the Covenant and are placed, as it were, in a position of parity with international law—understood as customary international law. Nor would it seem to accord with historical fact.

The historical role of the treaty

For if we consider 'what every schoolboy knows' we discover, in the light of what we have said so far, something of a paradox. Statutes, we have asserted, are peripheral to the common law system, treaties similarly peripheral to the system of international law. And if we revive in ourselves that modicum of historical knowledge, national and international, with which we were all equipped at school, we see at once that these propositions have the appearance of truth. For we all remember Magna Carta, the Bill of Rights, the Habeas Corpus Act, the Act of Settlement, and the Reform Act; perhaps we remember also the Provisions of Oxford, the Statute of Wales, the Constitutions of Clarendon, and Pitt's India and Fox's Libel Acts. They stand up in the valley of our schoolbook recollections like towers and castles, above the level of the fields and the ordinary dwellings. And so, too, it is with the glimpse the schoolroom window gives of the wider world. Treaties, like battles, were somehow great events—decisive—but rare. Thus we recall the Peace of Westphalia much as we do the Battle of Lepanto, Utrecht in the same manner as Blenheim, Paris as Quebec, Vienna as Waterloo and Paris again as Balaclava or Inkerman. But what is paradoxical about the method of teaching history which leaves such fragmentary memories is that it must seem to the lawyer to neglect the whole cloth entirely. If the schoolboy knows but a few statutes, he knows nothing of the common law; if the names of a few treaties remain with him, it is certain that he knows nothing of customary international law

¹ Art. 36(2).

and even likely that he has never been told that the relations of nations are governed by law.

The explanation, however, is a simple one: that he has been taught political history, and not even legal history, let alone law. Statutes and treaties have been brought to his attention simply in their political aspect and not all of them he recalls have any large element of lawyer's law about them. But when a legal education is superimposed upon an elementary general one the picture is not changed.

No English law student can remember ten statutes of the eighteenth century, unless he selects ten successive Army Annual Acts. For, despite that the legislature was really very active throughout that century, it did not concern itself on more than a very few occasions with lawyer's law—with the law of the courts and the books.

In so far as the history of international law is concerned, the case is the same. Lawyers are perhaps indifferent historians in that they are tempted too often to argue from the effect to the cause instead of in the reverse direction. Theirs is the method logical rather than chronological. Legal history tends, too, to be an account of the evolution of institutions rather than substance. If anything, therefore, the historical treatment of international law, which has been largely devoid of institutions, should incline to the attributing of greater importance and emphasis to the episodic occurrence of treaties and congresses—the intermittent counterpart of the *Curia Regis* and Parliament. This, however, is not the case. And international legal history, as it is written, is characterized in fact by a greater concentration upon substance than upon form than is national legal history.

No doubt the historical treatment of international law as so far undertaken is very unsatisfactory. It leaves many things unexplained—such as exactly how the *jus gentium*, which was in effect a universal municipal law, could have become the *jus inter gentes*, a law having upon any hypothesis little directly to do with the individual and in essence a law presupposing and existing to regulate differing municipal systems. But it does reveal itself as an essay upon the development of ideas and doctrine, indeed of rules, rather than merely of institutions, if only because, before the very modern age, there is little or no institutional growth to chronicle.

Such historical treatment as we have the benefit of does not, either, distort the role of the treaty. There might be a strong temptation for the would-be historian, one would think, with the example of the national historian, political or legal, before him, to seize upon

the great landmarks such as the great treaty settlements appear to provide, and to give us an impression of the international legal system advancing by vast and irregular strides from episode to episode—from Congress to Congress so to speak. But it is perhaps only at the beginning and the end of the time-scale that any such distortion appears. Westphalia and San Francisco—or rather Lake Success and New York—alone appear to be overvalued.

The march of events is best shown in the treatment of the nineteenth century. Perhaps it is the memory of Grotius which has preserved us from the false alternative. For if ever an episode deserved to be selected as the starting-point of the international legal system it is Vienna and not Westphalia. A good case could be made out for regarding the Peace of Vienna as marking the opening of a wholly new epoch in the legal relations of States in the same manner as, with no little exaggeration, the setting up of the United Nations is now regarded as having begun a new age. But we do not in fact see Vienna in any such light. We see rather, in the settlement of 1815, something like a political endorsement, following a military vindication, of legal notions and principles which, so far from being novel, had already been the subject of intensive study and, what is more, which had already been largely applied in practice, during the eighteenth century. If a new age had to be sought, it would be more correct to seek its beginnings in Vattel rather than Vienna. And Vattel, among men, does not stand alone as, among events, does Vienna.

The essentially confirmatory, as opposed to innovatory, character of the Vienna and other Congressional settlements of the nineteenth century is demonstrated incidentally by the employment in the treaties they elaborated of certain striking terms of art. At Vienna the neutralization of Switzerland is thus declared to be part of the public law of Europe. And at Paris Turkey is declared to be admitted to participate in the advantages of that same public law and also of the European Concert. The employment of these terms implies that there was an existing public law and that there was an existing Concert, and that the connotations of placing a matter under the guarantee of that law, or as the case may be of membership of that Concert, were well understood. The public law of Europe was not made for the first time at Vienna, nor the Concert of Europe founded at Paris. These were already familiar institutions and they were not forged by treaty.

The political historian is right to invade what might seem to be

the lawyer's sphere and to claim the great treaties for his own. The schoolboy is equally right in remembering Vienna and Paris—if nothing else. For these were events of greater significance for general than for mere technical legal history. Their importance lies primarily not in their character as examples of operation of a law-making process (or even of an agreement-making process, remembering that these were treaties of peace, claimed to be valid irrespective of duress), but in their status as politico-military affirmations of a law made largely by other means. To the lawyer Vienna means the *règlement* concerning diplomatic envoys, the declaration concerning international rivers, and the affirmation of Switzerland's neutrality or neutralization—and little else. For him Paris means only Turkey's entry into the circle of law-governed States, the Black Sea clauses, and the Declaration—the declaratory, as opposed to the legislative, character of which is implicit in its very name. To the general historian these two great settlements imply much more than this. For him they are part of a great pattern of working political principle and of political action, of the Concert system and the principle of the Balance of Power. In this aspect, however, they contain nothing of lawyer's law.

The lesser treaties

Despite the general accuracy of the view of the place of treaty in international law which may be obtained from the schoolroom window, it should be said that treaties have not been as rare events as that limited field of vision might suggest. A close look reveals, on the contrary, that States entered into a surprisingly large number of treaties in early modern times. Thus, between the establishment of the Dutch Republic in 1578 and the Peace of Vienna, England or Great Britain entered into treaty relations with that State on approximately 130 occasions—on the average, therefore, rather more than once in every two years. The count involved here includes multipartite treaties—those to which foreign States other than the Netherlands were parties. But of course, as this fact implies, treaties were concluded by and between other States also, and on a scale which would not seem to be significantly less.

Now it has been asserted before that no very clear idea of international law is to be derived from reading treaties alone. This might be taken to imply that the subject-matter of these numerous treaties was trivial or restricted. This is not, however, the case. They relate to a very great variety of topics of international law and their study

is highly informative as to its detailed content. But they are in a certain sense irrelevant and are rightly so regarded.

It is perhaps desirable to give one or two illustrations of this superficially curious state of affairs. In a well-known case, *Polites v. Commonwealth and Another*,¹ in 1945 the Chief Justice of Australia stated that legislative provision for the conscription of nationals of other States to military service 'must be held to be contrary to an established rule of international law'. It would not appear, however, to have occurred to counsel, or the Court, or commentators on the decision to consult the treaties in the matter to which Great Britain, and therefore probably Australia, was a party. Had they done so, they would have discovered that, in 1939 the former country, and perhaps therefore also the latter, had treaty obligations on the subject towards almost every other State in the world.² The effect of these, in the given case, might well have been not to produce any different result since the obligations referred to were to give exemption to foreign nationals. But this might be thought to follow rather from the treaty with the State of nationality of the complainants than from customary international law. In any event, subject to the question which a mass of identical treaty provisions must always provoke as to whether they confirm or deny a rule of customary law,³ the existence of such a mass on this topic certainly renders it arguable whether the Court's view of the state of customary law was not wrong. At the same time, it is not easy to resist the conclusion that the Court did not really fall into error by failing to look to the treaties, and that they were not very material to the general issue.

This is an instance in which there was abundance of treaties. Another may be selected in which there were virtually none, the *Anglo-Iranian Oil Company* case, in which, owing to the restrictive character of Iran's acceptance of the Optional Clause, the United Kingdom found that its ability to get into court at all would depend upon its finding in its archives a treaty with Iran concluded subsequently to 1932. And it was reduced to arguing, for this purpose, either that such a treaty could be pieced together from the most-favoured-nation clauses in two treaties between the United Kingdom and Iran of the years 1857 and 1903 and various treaties between Iran and other States dated after 1932, or that the circumstances

¹ (1945) 70 C.L.R. 60.

² See Parry in *British Year Book of International Law*, XXXI (1954), p. 437.

³ As to pronouncements of international courts on this question, see Kopelmanas, 'Custom as a Means of the Creation of International Law', *British Year Book of International Law*, XVIII (1937), pp. 127, 136-7.

attending the grant of a concession by the Iranian Government to a British Company could be construed as a treaty.¹ A minor conclusion to be drawn from this incident is that, though it became a vital question before the Court whether the matter was regulated by treaty, it evidently had not mattered sufficiently during the previous twenty years to impel the United Kingdom to seek such a treaty.

The state of the evidence of treaties and its significance for their influence

A view that treaties have before the most recent times had a very secondary importance in strict law, and even that their importance is not now so great as might be thought, is supported by the state of the evidence concerning them. The literature of earlier treaties is very large but nevertheless very confused. It may be profitably considered in a little detail in relation to the treaties of one State, the United Kingdom. But first it is well to consider the inadequacy of the more modern literature. At first sight, treaties seem to have been abundantly documented during this century. In addition to the international series, sponsored by the League of Nations and the United Nations, there exist numerous national treaty series. Yet it would appear that no State, or no State whose existence has extended to a century or more, is in a position to estimate exactly the extent of its treaty obligations. The United States, it is true, publishes a list of *Treaties in Force* which is regularly revised. But though this will reveal whether or not the United States has become or remains a party to a particular instrument, it does not necessarily indicate, in the case of multipartite treaties, when other States become parties or whether they remain such. In many cases, therefore, this otherwise most useful publication will not show whether a particular instrument is in force as between the United States and a particular foreign State.

The reasons for this uncertainty are not far to seek. In the case of the major multipartite instruments it is a considerable task, albeit of a mechanical sort, to marshal all the parties and to tabulate the dates of their adhesion or withdrawal. Uncertainty arises, too, from the overlap of treaties. How far is an earlier treaty to be regarded as still in force if the ground has been gone over again, in part or in whole, in some subsequent instrument? Is, for instance, the League of Nations Covenant still in force, having regard in especial to the subsequent conclusion of the Charter of the United Nations? Professor

¹ *I.C.J. Reports*, 1952, pp. 93, 107-13.

Kelsen suggested a negative verdict.¹ But the opinion of the Court, in the *South-West Africa* case,² in so far as it touches Article 22 of the Covenant—the mandates article—is capable of interpretation in an opposite sense. Clearly a difficult legal question is involved here. Even more difficult questions are involved, and even if not especially in relation to bipartite treaties, where any succession of States has occurred. To what British treaties, for instance, has the Republic of Ireland fallen heir? Does Article 10 of the Webster-Ashburton Treaty of 1842, which remains the basis of extradition between the United States and the United Kingdom, and which was regarded as extended to the Philippine Islands when the United States acquired that territory from Spain, now apply as between the United Kingdom and the Philippine Commonwealth? And does it apply between the latter State and the Federation of Malaysia?

But possibly it is not merely such problems that produce the position in which States seem to be unaware of the total extent of their rights and duties under treaty and seem to be unable, besides often obviously unwilling, to resolve this uncertainty. Possibly, nay very probably, it does not matter. An individual, one may judge, could, and possibly should, make himself aware of the totality of his contractual obligations at any one time—of the terms of the lease of his house, his liability in respect of public utilities, and what he owes to the butcher, the baker and the candlestick maker. Upon his death, certainly, some such final reckoning must be achieved by his representatives. In the case of a corporation in no danger of winding-up, so precise a settlement is less often, and doubtless less easily, arrived at. Very frequently the entries in its annual balance sheet of its assets and liabilities will indeed be little more than book entries, valueless for the purpose of calculation of profit or loss save upon a comparison with parallel figures for earlier years. But even here statutes of limitation will operate in due time to extinguish liabilities and to annul paper assets which once existed. The State, however, by and large never dies and is never wound up. The extent to which there are limitation rules in international law is, moreover, largely undefined.

The wider explanation

If, however, the general continuity of the existence of States results inevitably in their gradual accumulation of obligations and in an

¹ Kelsen, *The Law of the United Nations* (1950), p. 459.

² *I.C.J. Reports*, 1950, p. 128.

atmosphere of obscurity as to the sum total of these which must offend the tidy mind, this is not the whole explanation. What is of equal importance is a limitation inherent in the treaty-making process or, what seems to be the same thing in the context, in the nature of the agreements which States make and of the subject-matter of these agreements.

With respect to very old treaties, the position may be reached that their meaning is outlived. For instance, the privilege of trial in Spain before a Judge Conservator was granted to British subjects by a Royal Cedula of 1645 and confirmed by the Treaty of 1667. The relevant stipulations of these instruments were confirmed by further treaties down to 1814. But the office of Judge Conservator became obsolete in metropolitan Spain already in 1713. When in 1852 the Spanish Government issued a new Code of Regulations as to the position and treatment of foreigners which was considered to be objectionable, it was appreciated that the claim to have the office of Judge Conservator revived would scarcely be practical, though it appeared to exist. That the claim did exist was in this instance established only after prolonged study of the tortuous treaty relations of the two States over two centuries. It was thus not unnatural that when, three years later, Spain began to negotiate a new commercial treaty with France, the United Kingdom Secretary of State intimated that Britain also

would be well pleased to conclude a new treaty, which should consist in a few clear and simple stipulations to be substituted for the antiquated, verbose, and in some respect inconsistent provisions contained in the various treaties now subsisting between the crowns of Great Britain and Spain.¹

Yet, it appears from the British Handbook of Commercial Treaties, the ancient treaties were still surviving almost another century later, requiring now to be read in the light of a further eight instruments.

But it is less the antiquity or multiplicity of treaties than the generality of their terms which renders the exact calculation of the totality of the rights or obligations of any State virtually impossible and, by the same token, of less than first importance. For treaties are often, in the nature of things to some extent and also as a result of drafting which is, by accident or design, very much less than perfect, very vague indeed. To take an example which comes, however, from the category of inter-organizational rather than inter-State treaties,

¹ *Memorandum, Mr. E. Hertslet, Rights and Privileges of British Subjects under Ancient Treaties: Foreign Office Confidential Print, No. 1593.*

the standard form of agreement between the United Nations and the specialized agencies provides that each of the latter 'agrees to co-operate' with the several organs of the former.¹ It is difficult to regard this wording as very precise. But it is also to be conceded that, having regard to the object in view, not much more precise wording could be used. For it is the very generality of that object which defies definition. Parallels from the category of inter-State treaties are perhaps best sought in treaties of alliance. A well-known modern example of the ambiguity of this category of agreement is provided by Article 5 of the North Atlantic Treaty, with its stipulation that, if any one of the parties is subjected to an armed attack, each of the others 'will assist' that party 'by taking . . . such action as it deems necessary',² which Mr. Fawcett has characterized as imposing no obligation at all.³

In cases such as the foregoing the rights or obligations the treaty creates conform so much to a type that the fact of the existence of the treaty tends to be of as much importance as its content if not of greater importance. One can in large measure deduce the effective content from that fact—not that the very existence of treaties is not on occasion lost sight of. In such cases interpretation of the content is scarcely necessary: the meaning follows from the type. And surprisingly large numbers of treaties conform to type. Standard forms and standard articles thus abound in treaties of commerce and navigation, in so-called treaties of establishment, in consular, air navigation and double taxation conventions, and in extradition treaties, to name only a few varieties of treaties which are types themselves. Indeed it is in the repetition of uniform provisions that treaties are held, in a certain sense, to contribute more to international law indirectly than they do directly.

The largeness of the purpose and language of treaties may, however, conduce to an uncertainty in their effect, and thereby diminish their significance, in a more direct and obvious way. The stipulations they contain may, in short, be so uncertain as to be virtually meaningless from the outset. No doubt this is often the result of accident, if not of the sheer impossibility of expressing a very general intent. But it can also be the result of the deliberate adoption of a vague formula by way of compromise between opposing negotiators. It would be

¹ Cf. *Agreements between the United Nations and the Specialized Agencies* (1952), U.N. ST/SG/1.

² *Treaty Series*, No. 56 (1949).

³ Fawcett, 'The Legal Character of International Agreements', *British Year Book of International Law*, XXX (1953), pp. 381, 392.

invidious to select examples of stipulations which are, in effect, void for uncertainty as a result either of drafting accident or design. It is permissible, however, to cite one instance where uncertainty seems to arise from too much rather than too little vision. This is to be found in the human rights provisions of the Charter of the United Nations. There are five mentions of human rights in the Charter. In the preamble the parties—or strictly, their peoples—recite their determination ‘to reaffirm faith in fundamental human rights’. In Article 13 the General Assembly is directed to initiate studies and make recommendations for ‘assisting in the realization of human rights’. In Article 55 it is stipulated that the United Nations ‘shall promote . . . universal respect for, and observance of human rights’. In Article 62 the Economic and Social Council is empowered to make recommendations for the purpose of ‘promoting respect for, and observance of human rights’. In Article 75 one of the basic objectives of the trusteeship system is declared to be ‘to encourage respect for human rights’. But the sum total of these provisions did not encourage the then Chairman of the International Law Commission to believe that it could be stated in the Declaration of the Rights and Duties of States to be a duty of States to treat all persons within its jurisdiction with respect for human rights.¹ On the other hand it is difficult not to have sympathy for Judge Lauterpacht’s argument that the words quoted would not be in the Charter at all unless they meant something and that the principle of good faith demands heed to be paid to them.² Yet again it is to be recalled that it has been cogently argued that the principle of good faith in the interpretation of treaties has no real meaning.³

The evidence of British treaties

To turn now, in relation to the question of the evidence of treaties, from the general to the particular, it is of interest to consider the situation in the United Kingdom. That situation can hardly be described as satisfactory either as respects earlier or more recent times. We are concerned here of course with an ancient State in which there has been a singular continuity in the current of foreign as well as of domestic affairs. And we have seen that the seventeenth-century treaties with Spain survived into this century. The same is true of

¹ *Yearbook of the International Law Commission*, 1949, p. 787, n. 21.

² *International Law and Human Rights* (1950), p. 149.

³ Fawcett, loc. cit., *British Year Book of International Law*, XXX (1953), pp. 381, 397–8.

seventeenth-century treaties with Denmark and Sweden. Thus, to prepare a list of 'treaties in force' it would be necessary to go back to the lifetime of Grotius. It is in fact, somewhat surprisingly, necessary to go back very considerably further. For the alliance with Portugal which is still said to exist depends on treaties dating from the fourteenth century.

Certainly no accessible list of ancient British treaties exists, let alone any complete information as to the extent to which they are still in force. Some of them are to be found in *British and Foreign State Papers* and in *Hertslet's Commercial Treaties*, but these series are seriously defective for any period before 1815. Yet the distinction of preparing the first official collection of treaties belongs to Britain, this being the celebrated *Foedera* of Thomas Rymer, the Historiographer Royal, undertaken pursuant to an order of Queen Mary, dated 1693. The seventeen volumes of this collection were published in elephant folio in 1704-17. A second edition, to which Robert Sanderson added three further volumes, appeared in 1726-35. A partial foreign edition appeared also in the eighteenth century. In the next century the Record Commissions undertook, but did not complete, a re-issue of Rymer. A syllabus of the documents contained in it was published by Sir T. Hardy in 1869-85.

Though Rymer was the first official compiler of a collection of British treaties he was not the first to make such a collection. That honour belongs to Arthur Agard, who was assisted by the Cottons, and whose collection or calendar first appeared in 1610. Sir Joseph Williamson's collection, prepared under royal warrant of 1669, never appeared but exists in manuscript. Derby's General Collection, covering the period 1648-1710, was the first work to follow Rymer. Some further series appeared in the eighteenth century of which the principal one is Jenkinson. There are, too, some specialist collections of the period of the Napoleonic wars such as the series of eleven volumes printed by Debrett between 1794 and 1802. Chalmers' two volumes, which appeared in 1790, deserve also to be noted.¹

The nineteenth century is dominated by the dynasty of the Hertslets and the two series of *Commercial Treaties* and *British and Foreign State Papers*, which are not, however, confined to British materials, produced by successive members of that family might, it is thought, be relied on to be reasonably complete because the Foreign Office Library was ruled by their distinguished compilers.

¹ See generally, Myers, *Manual of Collection of Treaties* (1922), pp. 184-96.

Their completeness can to some extent be proved or disproved by reference to the Foreign Office Treaty Register which began to be kept—of course by a Hertslet—in 1835. In fact, however, the Register is less complete than are these collections.

In any event the principal British materials relied on by the Hertslets for their own time are still extant and easily accessible. For treaties were, during the nineteenth century and also somewhat earlier, published either in the *London Gazette* or as Parliamentary Papers and these series constitute important sources of diplomatic materials. Indexes and breviates of various sorts to the Parliamentary Papers exist and are well known.

The publication of treaties as Parliamentary Papers culminated in 1892 in the issue of a distinct annual *Treaty Series* which still appears. But no consolidated index to that series exists. To make it would be in itself a not inconsiderable undertaking. What might deter one from embarking on it would be a realization that its utility would be distinctly limited. For the *Treaty Series* is by no means complete. One notorious omission, now being remedied as far as concerns the future, is that of most agreements with other members of the Commonwealth. For that, so long as there persisted the *inter se* doctrine, the doctrine that the relations of members of the Commonwealth to one another were regulated by constitutional rather than international law, there was originally a justification. But of course that doctrine and that justification have both been gone for some considerable time now.

There are also justifications or excuses of greater or less validity for other omissions. Amongst the latter is one of a grave enough character for which the explanation, though connected with a difficulty lawyers have felt, is in part purely mechanical. This is the omission of many exchanges of notes, and the explanation is, apparently, that the compilers were not aware, or were not instructed, that these constituted treaties.

The status of treaties in the practice of States

Even lawyers have, perhaps surprisingly, sometimes maintained that a treaty is an 'instrument' rather than a transaction or the record of a transaction and have in consequence debated whether the 'law of treaties' should extend to exchanges of notes.¹ From their point of view the problem is in effect whether diplomatic correspondence

¹ See 'Harvard Research Draft Convention on the Law of Treaties', Art. 1(b), *American Journal of International Law* (1935), Supplement, p. 698.

can ever constitute a treaty. The objection is that it partakes often of a political rather than a legal flavour—though why it should be a problem is difficult to see since single instruments of a greater or less political flavour are accepted as treaties without much question. What many lawyers fail to appreciate is that, to a diplomatist, the difficulty is to see that a treaty is much different from any other diplomatic exchange.

There are exceptions here, however, and it is proposed, without entering into the vexed question of the legal nature of a treaty generally, concerning which there exists an able and abundant literature, to borrow a set of relevant propositions from a most lawyerlike and perspicuous lawyer, Mr. Fawcett. In a profound study of the 'Legal Character of International Agreements' he lays down the following most illuminating rules:

(1) That the contractual character of international agreements depends upon the intention of the parties to create legal relations between them. (2) That international agreements are to be presumed not to create legal relations unless the parties expressly or impliedly so declare. (3) That there are two decisive tests of intention to create legal relations; first, whether the parties have declared, or it is to be deduced from the agreement as a whole that is to be governed by . . . law; second, whether the parties have provided for the settlement of disputes arising from the agreement . . . And (4) That international agreements of political obligations are not enforceable by judicial process but the maintenance of international order entails that they are binding on the parties.¹

No doubt the most surprising feature of these propositions, which most clearly indicate how the diplomatist regards treaties, will be, to a lawyer, the suggestion that the presumption is against an international agreement having any strictly legal content at all. But it is surely correct. And, to be in a position to draw the threads of history and law together and offer a verdict upon the status of treaties as a source of law, it is only necessary to add a postscript. This is to the effect that the parties to treaties have the character, essentially, of laymen, not that of lawyers, and that their attitude to the purpose of treaties and their sanctity is therefore of the same order as that of a lay individual to the function and binding force of municipal contracts, and not of the same order as that of courts or judges.

An upright and honourable lay individual will return the same affirmative answer as his legal adviser to the question whether a man is bound by his contracts. But every lawyer will know that he

¹ Fawcett, loc. cit., *British Year Book of International Law*, XXX (1953), pp. 381, 400.

means by that answer something different from what a lawyer means. In some cases he will mean more. For he may well scorn to take advantage of some technical trick such as the statute of limitations or the absence of a Statute of Frauds memorandum. More often, however, he will mean what the lawyer will regard from his point of view as something less, or something much more general, by his yes. For in the first place he must frequently be brought to see that he has made any contract at all. Only Mrs. Wallis's companion, going into the fish-shop for 'two nice fresh crabs for tea', consciously relies on the skill and judgment of the seller in the exact terms of the Sale of Goods Act.¹ The average layman, in his daily chafferings, no more knows when he is making an offer as distinct from an invitation to treat or an acceptance rather than an offer than he knows he is talking prose. He knows only that a man must abide by his bargains.

In continuing business relationships, moreover, the layman, unlike the lawyer, no more regards each contract as complete than he pays heed to the somewhat artificial stages the lawyer discerns in the formation of a contract. For him, very often, it is as essential a characteristic of a contract that it is *negotiable* as that it is *binding*. Brought, by hard experience of the application of such maxims of the law as that a man must be taken to intend the natural consequences of his acts or that the test of intention to enter into legal relations is what the officious bystander would think, to a realization that he has and may often unwittingly exercise a freedom of contract, he appreciates at once that he can always compromise his first contract by another.

To the lawyer, the principle of the sanctity of municipal contract is known to be qualified by many things. An agreement made under duress is void. An illegal or immoral agreement is equally void or unenforceable. There is a statute of limitations. Contracts may be discharged by frustration. Debtors may be discharged by adjudication in bankruptcy. Some kinds of contract are discharged by death of a party. And in the last resort the legislature may be induced to change the law. The common maker of contracts, the layman, realizes these qualifications but dimly. If he be asked what makes the principle tolerable his answer is of a different sort. Times change. All human things have an end. In Keynes's phrase, if you owe your banker a thousand pounds you are in his power; if you owe him a million pounds he is in your power. There is always competition.

¹ Healy, *The Old Munster Circuit* (1931), p. 207. Cf. *Wallis v. Russell* [1902] 2 Ir. R. 585.

THE TREATY AS SOURCE

Times change. Man is mortal. All this is implicit in his yes as more technical considerations are implicit in the lawyer's yes.

So it is with States. They are often, we know, able to call upon the most admirable legal advice. But States are not lawyers. The Foreign Office is not the Foreign Legal Office, the ministry of foreign affairs or department of external affairs the ministry or department of foreign or external legal affairs. Their legal business, like that of the lay individual, is incidental. And any legal adviser of a foreign ministry will testify that his function is strikingly like that of the lawyer advising a lay client.¹ His client is involved in continuing relationships with other States. These are punctuated by the conclusion of many agreements, as is the life of the man of affairs by many bargains. Some of these are relatively meaningless. Some are gentlemen's agreements so-called. Some are intended to be, or would be held by the officious bystander to be, of a legal character. All are in principle regarded as *binding*. Otherwise they would not have been entered into. All are equally *negotiable*. And though States, unlike men, are relatively immortal, times still change.

In fact it is the long life of States which largely accounts for the high respect for the principle of the sanctity of treaties, a respect which, as has often been remarked, seems surprising in view of the lack, within the international community, of many of the qualifications hedging about the municipal legal doctrine of the sanctity of contract. The chronic quality of international relations has a very important influence upon their character. Immortals are destined always to meet again.

Thus if war could once be styled diplomacy carried on by other means, treaty-making may with perhaps greater aptness be similarly described. Treaty-making is simply a facet of the conduct of international relations, and treaties are but consummated steps in a continuous process, some of greater political significance than others, some indeed high landmarks upon the highway to the future of both man and the State. They are here styled, perhaps oddly, consummated steps, because the difference between a completed treaty and an abortive negotiation is perfectly appreciated, though not regarded as either absolute or always very significant. The difference is appreciated in the sense that treaties are known to be binding. To what they bind the State, however, is often a matter for the lawyers and it may be to very little in legal terms. In any case they are generally negotiable. Generally they touch only a small facet of the

¹ See *Legal Advisers and Foreign Affairs* ed. Merillat (1964).

relations of the parties. They have a sanctity, yes, but the principle of their sanctity must be understood in the light of all this.

Pursuing the parallel between war and treaties as 'diplomacy carried on by other means' we should do well, moreover, to apply *mutatis mutandis* the lesson read by Mr. Amery to General Allenby in 1918:

A victory in Europe with its tremendously deep-rooted national feelings really alters very little. France remains France after 1870 and Germany will remain Germany after this war. But Palestine, Syria and Mesopotamia can never again be Turkey. It is just the same now as in the past: Plassey and the Heights of Abraham have mattered far more in history than Leuthen or Rossbach.¹

Or again, when Peterkin and Wilhelmine ask us 'what good came of it at last?', we may have often to reply:

But what they fought each other for,
I could not well make out.
But everybody said . . .
That t'was a famous victory.

Why are treaties binding?

If now it be asked why treaties are binding it will be realized that the lawyer and that layman, the State, may possibly return different answers, and that the answer of the layman may possibly be more correct. If asked that question, the statesmen who drafted the Treaty of Versailles, containing both the Covenant with its implied separation of treaties and international law, and containing also an article proposing the trial of the Kaiser for 'a supreme offence against international morality and the sanctity of treaties',² would presumably not relate the answer to international law at all. They might reply in circular fashion that treaties are binding because treaties are sacrosanct. This, however, is not to be seized upon as evidence that treaties are a formal source of international law. For, as it has been sought to show, in the lay view, which is that of the State and to which the lawyer must however reluctantly assent, treaties comprehend all sorts of agreements and not merely those having a legal character. The principle of their sanctity is something more than a source or rule of law, though it may be such also.

To the lawyer, three possible alternatives are available, it would seem. His first possibility is not to answer at all but to say that the search for the sources of international law is inevitably fruitless and that some other form of enquiry must be substituted to elicit the

¹ Amery, *My Political Life* (1953), vol. II, p. 169.

² Article 227.

information which is sought.¹ But if the alternative enquiry is as to how those organs of the international community which have to apply treaties regard them—the law-applying agencies or the decision-makers as they are called in current jargon, these must include States as well as courts and very great weight must be given to the view of the former.

Or again the lawyer may say that treaties are sources of the law. This is the traditional doctrine.

Since the Family of Nations [says Oppenheim] is not at present a State-like community there is no central authority which can make law for it in the way that Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is by members of the Family of Nations concluding treaties in which certain rules for their future conduct are stipulated.²

But it is important to notice that this passage goes on to deny itself and to provide the third, and it is submitted the correct, explanation. For it continues:

But it must be emphasized that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations that treaties are binding upon the contracting parties.

Treaties, then, are binding because there is a rule of customary international law to that effect. They are not necessarily therefore a source of law but often, as Judge Fitzmaurice very clearly puts it, a source of obligation under the law.³ Their prescription as an apparent 'source' in Article 38 of the Statute is to be understood in the light of this. Otherwise, as it has been said:

If this clause were to be interpreted literally, the World Court would be precluded from investigating, for instance, many of the grounds on which, from its inception or subsequently, a treaty may be invalidated. . . . Such a construction of the clause would be nonsensical. It would mean ignoring other relevant rules of international law in conjunction with which this clause must be read.⁴

The consequences of the verdict

Once it is conceded that treaties are sources of obligation rather than sources of law many things fall immediately into place. The

¹ See p. 6 above.

² Oppenheim, *International Law* (8 ed. 1955), vol. I, p. 28.

³ Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', *Symbolae Verzijl* (1958), pp. 153, 157.

⁴ Schwarzenberger, *International Law* (3 ed., 1957), vol. I, p. 38.

attitude of States towards them is seen not only to be natural but to be correct. They are but bargains of greater or less legal content punctuating, as has been said, the continuous course of international relations. Their pattern rather than their substance influences the law much in the manner of a trade custom in municipal law. But their influence in this regard is not much greater than that of other forms of co-operation of States which do not amount to, or fail to become, actual bargains. This is the case because all these things belong to the same order. The quasi-title of a signatory to find the treaty text unencumbered by reservations when he comes to ratify it is thus explicable.¹ So is the force of a resolution of the General Assembly. So also is the fact that it does not very much matter what form the drafts of the International Law Commission finally take.² And so, again, is the persuasive character, in regard to States which have not become actual parties, of treaties to which great numbers of States have finally become parties.

But so, equally, is the place which treaties are assigned in Article 38 of the Statute. For though each treaty is but a part of a very general pattern, each is in itself binding and therefore, to the extent that it may create any legal obligations for the parties, a potential qualification upon the generality of those parties' rights and duties which must first of all be taken account of in any assessment of them.

The indirect influence of treaties upon the law, as their direct impact, must vary according to their legal flavour. Just as the Court must, as between the parties to a dispute whose initial positions under the law may have been qualified by a treaty, assess the extent of that qualification, if any, in the light, in particular of the question whether there was any intent to create legal relations, so must the observer of the indirect influence apply similar tests. Here what will come in question, it may be tentatively suggested, is not so much the intent to create legal relations, but possibly the intent, presently or ultimately, to change or expand the law. Of course the two elements may merge. Treaties creative of greater rather than lesser legal obligation will generally have also greater indirect legal influence than those of less rather than greater legal force. It has been observed that the stipulations with which treaties of peace formerly habitually began, declaring perpetual peace between the parties, were clearly

¹ Cf. the *Advisory Opinion, respecting Reservations to the Convention on Genocide, I.C.J. Reports, 1951*, p. 15.

² See pp. 19-24 above and p. 114 below.

meaningless in law.¹ Such stipulations, and those of treaties of alliance, if they indeed have any legal content whatsoever, have no more indirect than they have direct impact. Treaties of extradition, on the other hand, though obligatory only between the parties, are conducive to a general pattern of law. Even in a treaty of strict legal obligation, however, the intent of a general influence may exceptionally be negatived—as in the case of the Anglo-American Liquor Treaty, with its recital of the affirmation of the principle of the freedom of the high seas by the parties despite the agreement of one of them to raise no objection to a particular departure from it.²

It is manifest that States today enter into more treaties of strict legal obligations than was formerly the case. They also make more treaties with respect to 'lawyer's law'. In view of this it is equally clear that the indirect legal influence of treaties is in the process of increasing. But to say this, or indeed to affirm that the indirect legal influence of treaties is related to an intent in some sort to change or expand the law, does not involve the concession to treaties of any legislative character. It is not so much the making of a treaty which is influential, for an abortive treaty, or something which is not a treaty at all, can be equally influential. We must be careful, therefore, not to accept as being of general application Sir Andrew Ryan's epitaph upon the Treaty of Sèvres:

Even as one who on his wedding morn
Sees the fell Angel smite his promised bride,
I lay thee here beyond the reach of scorn,
Intact though dead, whole though unratified.³

What is of significance is, in the last resort, that States should have some common expression of view, or even of difference of views, on the subject-matter. And the modern position is that States more often achieve such common expression of view on subject-matters of legal relevance than was formerly the case. By this means the law is expanding and changing with unprecedented rapidity. But the contribution of treaties to this process is incidental, arising simply from their being one, but only one, of the means of expression of the view of States.

¹ Martens, *Le Guide diplomatique* (5 ed., 1866), vol. II, p. 130n.

² See p. 62 below. And as to the question of the restatement of customary international law by treaty, see p. 32 above.

³ Ryan, *The Last of the Dragomans* (1951), p. 173.

Chapter III

CUSTOM OR THE PRACTICE OF STATES

The text of Article 38

AFTER, in effect, treaties, the Statute specifies 'international custom as evidence of a practice accepted as law' as something to be applied by the Court to the settlement of disputes which are to be decided in accordance with international law. Again, the argumentative mind is tempted to enquire after the alternative hinted at. Does there exist also custom which is not evidence of a practice accepted as law? Also one is bound to see as arguable Professor Schwarzenberger's thesis that the clause is really drafted upside down: that the position really is that practice is evidence of custom and that when practice is accepted as law this means that custom has duly functioned as a source of law and produced customary law.¹ But, as has been seen, Professor Corbett accepts in effect the formulation of the Statute and relegates custom to the category of evidence.² However, the question may be one merely of words. Why should not the framers of the Statute have avoided it by saying simply 'custom' or, alternatively, the practice of States?

The reason here is, presumably, as the formulation in fact employed suggests, that we are concerned only with what one may call legal custom or, in the alternative, practice followed in the persuasion that it is binding—though this attempted synonym may beg the question. In other words, it may be usual to greet visiting foreign Heads of States with salutes of twenty-one guns—not one hundred and twenty-one such as El Supremo demanded, and not nineteen. But it presumably would not be suggested that a visiting potentate's reception with any variation in the 'customary' number of explosions would give any right to complain upon the legal plateau. Of course

¹ Schwarzenberger, *International Law* (3 ed., 1957), vol. I, p. 39. Cf. also the remarks of Judge Hudson in the International Law Commission: *Yearbook of the International Law Commission*, 1950, vol. II, p. 4. As to Professor Guggenheim's rejection of the Statute's formulation, based on rather different considerations, see 'Les deux éléments de la coutume en droit international', *Etudes en l'honneur de George Scelle* (1950), vol. I, p. 275.

² See p. 2 above.

the answer here may be that we are not in the realm of possible legal rights at all. Let us consider, therefore, another case. States habitually accord the usual immunities of diplomatic envoys not merely to those envoys whom they themselves receive, but also to envoys accredited by one foreign State to another who are passing through their territory en route for their posts. But it is commonly insisted that this is a matter of comity, or perhaps usage, and not of law.

Usage is a term sometimes employed by writers on international law and is generally considered to be distinct from custom. It is doubtful, however, whether the term adds anything to the discussion because different writers put usage and custom in different orders of merit. Hall thus speaks of custom hardening into usage.¹ Oppenheim, on the other hand, as we have seen, regards usage as something less relevant legally than custom, connoting a habit followed without any conviction of obligation. But he speaks also of the transformation of usage into custom in his sense, that is, a habit followed with a conviction of obligation.² Both writers thus, and this is the justification for mentioning the matter at all, consider their higher category to denote something with a flavour of obligation about it.

It is tempting, therefore, to say that that higher category—whether it is called custom or usage does not matter—is already law. Is not indeed this the implication of the wording of the Statute? It speaks of ‘a general practice accepted as law’. Is not such a practice so accepted already law—so that Article 38 is here specifying, as there is no reason why it should not, considering its opening words, not a source but a kind of law? Upon this interpretation the status of ‘custom’, as that term is here used, is that of evidence of a kind of law—a category of law, the source of which must be sought elsewhere.

The formation of new customary law

One might be tempted to think superficially that it should be very easy to find the source of international customary law. For is not the great bulk of international law customary law? In fact, if treaties are not a source of law, must not nearly all, if not all, international law be customary? And, given that international legislative processes are almost non-existent and international judicial jurisdiction very limited, either the law must be static, or new rules of customary

¹ Cf. Oppenheim, *International Law* (8 ed., 1955), vol. I, p. 26 n. 3.

² *Ibid.*, p. 26.

law must be in an almost constant process of evolution. One would think that the jurisprudence of the World Court, limited though it is, would abound with examples of the operation.

But a rather puzzling thing is revealed by a study of that jurisprudence. The relevant parts of it seem to relate to the exception rather than the rule—to special custom rather than general custom. Thus in the *Asylum* case the Court said:

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. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.¹

The Court was in fact dealing with the question of the existence or non-existence of a special rule of international law peculiar to Latin America. This will of course provide a sufficient explanation of the expression of the problem in terms of one as to the existence or non-existence of a right in the one party and a duty in the other. But the specific reference to Article 38 is noteworthy. In the *Rights of United States Nationals in Morocco* case, however, the Court again referred to the necessity that a custom or usage relied on should be 'established in such a manner that it is binding on the other Party . . . in accordance with a constant and uniform usage practised by the States in question'.² And, again, in the *Anglo-Norwegian Fisheries* case, in reference to the United Kingdom's contention that the rule that the base-line of territorial waters can be drawn as a straight line is the rule of international law applicable to bays, and to bays only, the Court not only denied this on the ground that various States adopted a different limit from the ten-mile rule, which had been applied by the United Kingdom and United States, but added 'In any event, the ten-mile rule would appear to be inapplicable as against Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast'.³

But it may be said that the Court always has to think in terms of the rights and duties of the parties before it. And in both the *Morocco*

¹ *I.C.J. Reports*, 1950, pp. 266, 276-7.

² *I.C.J. Reports*, 1952, pp. 176, 200.

³ *I.C.J. Reports*, 1951, pp. 116, 131.

and the *Fisheries* cases, it is true, the Court was again dealing with what were, to a certain extent, local or exceptional situations. Thus again its insistence on the necessity that any rule contended for should have been accepted by all the parties is perhaps explicable.

Beyond, however, a few scattered observations of the vaguest and most general sort the Court has said nothing else about customary law, and, in particular, about general as opposed to special custom. The question therefore arises whether writers are correct in arguing from the particular, as treated by the Court, to the general. For this is what, for instance, Oppenheim does. After distinguishing custom from usage in the manner we have seen, he goes straight on to quote the passage from the *Asylum* case which we have quoted. And this is the only example he has to adduce of the process of customary law.¹

The Court does, in the cases mentioned, say more than has been quoted. It goes on, as will be seen, to pronounce on what sort of conduct on the part of States qualifies as evidence of or contribution to new custom. This makes it appear, perhaps, that custom or practice has a general law-creating role. But, if the matter be reflected on, can these remarks be considered in this way, remembering that they fell from the Court in special or local contexts?

In a community containing as few members as the international community, the difference between introducing a change into the law which is of universal application and merely asserting and establishing for oneself a claim to the benefit of an exception to the existing law, which nevertheless remains unchanged, is not enormous. As a result, there is some difficulty about pointing to an unmistakable example of the emergence of a new customary rule of general validity. One is tempted to put forward, as such an example, the recent growth of the doctrine of the continental shelf. Forty years ago a writer on international law could ask 'Whose is the bed of the sea?' and give the pretty certain general answer that it belonged to nobody.² But, beginning with President Truman's proclamation of an intention on the part of the United States to assert an exclusive control over the bed and subsoil of the so-called continental shelf of the United States, we have had a wealth of similar proclamations and have reached the position that every State is without doubt entitled to assert a control similar to that which the United States

¹ Oppenheim, *op. cit.*, vol. I, pp. 26-7.

² See Hurst, 'Whose is the Bed of the Sea?', *British Year Book of International Law*, IV (1923-4), p. 34.

claimed in a region bearing a similar relation to its own territory.¹ Is, however, this the example for which we seek?

In the first place, the rapidity of the process is troublesome. The Court, it will be seen, speaks of 'constant and uniform' practice, epithets which somehow suggest practice over a substantial period of time. The same overtone is of course carried by the words custom and usage. The notion of a 'custom' arising in so short a space puts one in mind irresistibly of the story of the students of a brand-new university who exhibited a notice reciting that 'A new tradition will begin today'.² At the same time, even an old tradition must have begun somewhere.

It may nevertheless be that, as a legal system develops, general custom, which may be or be thought to be its foundation, in a manner exhausts the creative capacity which is attributed to it. In this connection it is well to compare that other great customary system, the common law, with international law. The basis of the mass of the common law is said to be custom or customs—the general customs of the realm. But general custom as a source of English law is now either inoperative or imperceptible in its processes. When we consider custom as a source today we usually find we are referring to local or special custom. One of the reasons for this is that other methods of changing the law in general have sprung up, such as legislation and judicial development. This, however, is not the only reason. As Sir Carleton Allen puts it:

The relation between indigenous customary law and technical treatment of it is one of action and reaction. The materials with which the interpreter has to deal are not manufactured by him; they grow spontaneously out

¹ Cf. Oppenheim, *op. cit.*, vol. I, pp. 628–35. And see the draft Convention on the Continental Shelf (*U.N. Document A/CONF/13/L.55*) drawn up by the Geneva Conference on the Law of the Sea, 1958.

² Judge Fitzmaurice says, however, that 'A new rule of customary international law based on the practice of States can emerge very quickly, and even almost suddenly, if new circumstances have arisen which imperatively call for regulation—though the time-factor is never wholly irrelevant': 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law', *British Year Book of International Law*, XXX (1953), pp. 1, 31. Brierly suggested to the International Law Commission that 'in regard to the air, the moment the 1914 war broke out, the principle of sovereignty, which had been a matter of opinion up to then, was settled at once'. *Yearbook*, etc., 1950, vol. I, p. 5. Professor Jennings says: 'It may be harmless to think . . . of the law of the continental shelf as a sort of hot-house forced custom even if it is rather quaint': 'Recent Developments in the International Law Commission: Its Relation to the Source of International Law', *International and Comparative Law Quarterly*, XIII (1964), pp. 385, 389–90.

of fundamental legal relationships and out of a certain characteristic habit of mind of the community towards law. The interpreter's task is to find these fundamental principles in the materials available to him. . . . Existing custom is . . . law: if it is not called in question it operates as part of the general law of the land: if it is challenged, and is proved to exist as a local variation of the ordinary law, and further is shown not to violate a general legal principle, it is recognized by judicial authority as good law. If it is not proved to exist, it is necessarily declared not to be law and to have no validity . . .¹

We thus have an explanation as to why it is so difficult to point to general custom in the common law today. It *is* the common law itself—a set of largely unformulated principles fundamental to legal relations and considered inherent. And, that difficulty being admitted, we see why a custom comes before the courts under that name only if it involves an exception to the general law.² The lesson here for international lawyers is easy to read.

The lesson involves amongst other things that the transformation of custom which is not law into custom which is can be judged of only after the event. We find that what we have in fact done binds us.

The elements of custom

But we also find that only that which we have done in the conviction that it is already binding so binds us. Or to put it in the words of the Statute of the Court, what we seek is 'a general practice accepted as law'. A practice not so accepted will not suffice. What is relevant is only what was done because it was considered what must be done. Or, as Blackstone put it, a custom must be supported by the *opinio necessitatis*.³ International lawyers speak more often of this element as *opinio juris*.

There is relevant therefore something more than mere factual conduct. No conduct of rational beings, or of collectivities of such beings, is ever mindless. But to show that conduct is motivated by

¹ Allen, *Law in the Making* (6 ed., 1958), pp. 146-7. This is not an argument that custom derives its validity only from the authority of the courts. For, as the same writer also says: '[I]f a custom is proved in an English court by satisfactory evidence to exist and to be observed, the function of the court is merely to declare the custom operative law.' *Ibid.*, p. 137.

² The same writer, however, still distinguishes the common law from custom: 'A custom applying to all the Queen's subjects is not truly custom in the legal sense for, as Coke said, "that is the common law"'. But this involves no more than that in modern society, a custom is, as to content, an exception from the ordinary law. Its validity is nevertheless dependent on its acceptance as part of that law': *op. cit.*, pp. 126-7.

³ *Ibid.*, p. 124.

a conviction of obligation would seem to require something more than the statement of this proposition. A deliberate statement that conduct, factual conduct, *i.e.* not governed by the conviction of obligation is not unknown: a State, for instance, may resolve 'de passer outre'.¹ It is, however, rare. What, however, is to be presumed when nothing is said? The answer here would seem to be that repetition is significant. If a course of conduct is repeatedly followed, the only presumption, or at least a fair presumption, is that it was so followed, and another course not followed, because of the existence of a conviction of obligation. Repetition may, however, arise from mere imitation. But repetition may in time generate conviction.

No one State, it would seem clear enough, can make law for the world. What is relevant, therefore, is always what the generality of States do, not what merely one State does. Or, as the Statute puts it, we seek 'a general practice'. And herein may lie the distinction between the process of the growth or change of law through new custom and that of prescribing against the existing law for an exceptional right. Negative reaction or acquiescence may not imply so easily the existence of conviction.

In a paper prepared in connection with the work of the International Law Commission the late Judge Hudson summed up 'the elements which must be present before a principle of international law can be found to be established' as follows:

- (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- (b) continuation or repetition of the practice over a considerable period of time;
- (c) conception that the practice is required by, or consistent with, prevailing international law; and
- (d) general acquiescence in the practice by other States.²

Subject to what has been said, this would seem to convey the essence of the matter.

Proof of practice

The principal judicial indication as to what is involved in the proof of State practice seems to be that which was given by Judge Read in the *Fisheries* case, where, having said that 'Customary international law is the generalization of the practice of States', that Judge con-

¹ See for instance the example provided by the Anglo-American Liquor Treaty, discussed at p. 55 above.

² *Yearbook of the International Law Commission*, 1950, vol. II, p. 26.

tinued in relation to the problem in the case, the extent of territorial waters:

This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. . . . The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over trespassing foreign ships. . . .¹

Judge Fitzmaurice, in his literary capacity, has summed up this passage, which occurs in an individual dissenting opinion, as suggesting 'that the essential element in the practice of States [is] their overt actions, rather than such things as claims, declarations, municipal legislation etc.' And he comments:

while this point of view must probably not be pressed so far as to rule out the probative value, and the contribution to the formation of usage and custom, of State professions in their various forms (legislation, declarations, diplomatic statements etc.), it is believed to be a sound principle that, in the long run, it is only the actions of States that build up practice, just as it is only practice ('constant and uniform', as the Court has said) that constitutes a usage or custom, and builds up eventually a rule of customary international law.²

This verdict can be considered a narrow one. Strictly, it should in any event be narrowed still further. For, assuming only the actions of States which come in question, it is not all actions but merely actions done in the conviction of obligation. But the necessity for the verification of this, as well as the facts that, first, actions sometimes comprehend words and also inaction, and, secondly, that the State, being a corporate entity if not a fiction, must perform its actions through agents and may employ a variety of them, in fact involve that the net must be cast very much wider than the phrase 'actions of States' might suggest.

To illustrate the very first point: If we say that people originating in one part of the world very often have gone to other parts we make a purely factual statement. If we translate this statement into the proposition that nationals of one State have habitually entered the territory of others, we are guilty of allowing at least one foot to stray from the straight path of fact on to the adjoining meadow of thought. This trespass into the category of theory is, however, permissible since we postulate the existence of the State or we would not be

¹ *I.C.J. Reports*, 1951, pp. 116, 191.

² Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law', *British Year Book of International Law*, XXX (1953), pp. 1, 67-8.

talking about the actions of States at all. If we now go further and say that States habitually admit foreign nationals we have gone a step further into the delectable fields. We may even have falsified the facts. For we know very well that, though nowadays States erect barriers at which the passports of foreigners are examined, this was not always the case. The fact was that people simply arrived. They were at first merely people and only later classified as nationals of this or that State. Indeed they arrived at geographical points before these were characterized as the frontiers of States at all. And even when the theory of the State was conceived and put into practice the position was not necessarily that States affirmatively permitted the entry of each other's nationals. More often than not they merely abstained from interfering with an immemorial coming and going. Much water has gone under the bridge since that point in time was reached and much rationalization has taken place. Thus we are now accustomed to say that States habitually affirmatively permit the relatively free entry of foreign nationals to their territory. The fact cannot be gain-said. Despite immigration restrictions and Berlin walls, by and large the ancient wanderings are still tolerated. The process of toleration can be expressed, if it is desired, in terms of the actions of States. It is not, however, to be deduced that it is a rule of international law that States are under a duty to admit foreign nationals. Such is strenuously denied. What are construed to be the actions of States in tolerating the traffic must therefore be construed also to be actions undertaken otherwise than in the conviction of obligation.¹

This illustration is of assistance also for the purpose of demonstrating that actions must be deemed to include words and also inaction. Consider the position of a Frenchman arriving in England in the twelfth, the nineteenth and the twentieth centuries. In the twelfth century, no one thought to stand in his way because the distinction between English and French was not drawn nor was England more than a geographical expression. In the nineteenth century, both a Frenchman and England—or perhaps a French

¹ The World Court took a similar view in the *Lotus* case upon the French argument that the absence of criminal prosecution in maritime collision cases in courts other than those of the flag State pointed to a rule of international law that jurisdiction belonged exclusively to the latter State. The Court observed that such a circumstance, if proved, 'would merely show that States have 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'. *Publications of the Permanent Court of International Justice*, Series A, No. 10, p. 28.

national and the United Kingdom—were terms of art. But still no one thought to stand in his way for the reason that there were no immigration laws. In the twentieth century, he is granted permission to land by an immigration officer. If it be permissible to say that the facts are the same in each case, action must be conceded to include inaction.

In order to demonstrate that actions include words, it may be necessary to select a new example. It could be argued that the State merely *says* to the Frenchman in the twentieth century that he may land. But it could be objected that this is a mere intimation of proposed inaction: of putting no obstacle in his way. It is better perhaps to consider the institution of recognition of governments. Everyone agrees that recognition is a legal process. But, according to the general view, which however the British Government does not appear for the time being to share, recognition is no more than a form of words. The recognizing State is not bound to entertain an ambassador from the recognized entity. Nor is it bound to deal with the latter in any other way. Nor does recognition have any necessary effect upon the status of the entity which is recognized in the courts of the recognizing State—assuming this to be a matter at all relevant to international law.¹

Finally, it is often necessary to look to theory or to words to be sure that an action of the State has taken place. One day in 1838, 'a person named McLeod', to quote the description of him in Hall's *International Law*, arrived in the United States from Canada. Upon arrival he contrived to drown a citizen of the United States by cutting adrift the boat on which the latter then was, thereby causing it to go over Niagara Falls. But before we decide that this was a simple case of the entry of an individual foreigner into the territory of a State and his committing homicide there we should hear more. And, amongst other illuminating details we should learn the motive for this tourism and this whole escapade. So we read that, during the Canadian rebellion:

A body of insurgents collected to the number of several hundreds in American territory, and after obtaining small arms and twelve guns by force from American arsenals, seized an island at Niagara within the American frontier, from which shots were fired into Canada, and where preparations were made to cross into British territory by means of a steamer called the *Caroline*. To prevent the crossing from being effected,

¹ Cf. Oppenheim, *op. cit.*, vol. I, § 75.

the *Caroline* was boarded by an English force while at her moorings within American waters, and was sent adrift down the falls of Niagara.¹

And the 'person named McLeod' was a member of this force. His actions, therefore, as a result of implied authorization or subsequent ratification, are to be considered to have been the actions of the State and the incident has to do, in terms of law, not with immigration and homicide, but with the self-defence of States.

For evidence of the practice of States we must therefore look, at least sometimes, beyond the actions done to the intentions expressed, or even to the opinions held. To this it may be objected that no man should be judge in his own cause, that the declarations of States are frequently self-serving, and so forth. This may be admitted. But what comes to our rescue here is the inherent generality of the requisite enquiry and, equally, the nature of the State itself.

It obviously would not do to accept the interpretation put by Hitler himself on the movements of German troops into Austria and Poland in 1938 and 1939 as the sole basis for any conclusions as to what is or is not permitted according to international law. Yet curiously, intentions and expressions of intention are highly material to the proper evaluation of these two incidents. This was demonstrated at the Nürnberg trials when it came to the turn of von Papen. For all that could be proved against him were his machinations against Austria. Since Austria, unlike Poland, did not resist the invasion, it could not be said that any war with her resulted and von Papen could not in consequence be held guilty of concern in any war of aggression or in violation of treaties, such as the Tribunal was bound to consider a crime.² It may be argued, however, that what was relevant here was not Hitler's words, his denial of any warlike intention, nor Austria's silence, but Germany's action and Austria's action, the latter consisting in inaction. What was still material, however, was as much the *animus* of the parties as the *factum*, and the former is not always to be inferred from the latter without the consideration of statements about it.

But even taking Hitler at his face-value in the Austrian matter would not, one supposes, do great damage. For, as the Court says, what is necessary for proof and establishment of custom as law is a general practice, consistent and uniform. A single incident is relevant

¹ Hall, *International Law* (8 ed., 1924), p. 369. But it would appear to be in fact doubtful whether McLeod ever participated in the affair!

² *The Charter and Judgment of the Nürnberg Tribunal, 1946: History and Analysis* (1949), U.N. Documents A/CN. 4/5, p. 48.

only when set in its place among others, often many others. Moreover, if what has been said already about the creative role of general custom be correct, the process of the assessment of the evidence of it is always one which is *ex post facto*, and that process can be expected only to yield rather general rules.

Further, if States were individuals their statements of their own motives and intentions would indeed be often suspect. But they are not. They are essentially communities. The processes by which their intentions are formed and formulated are in consequence usually traceable through many stages and are evidenced by a great deal of material. One particular instance of this may be adduced which is of great interest. In considering the pieces of evidence which may permissibly be relied on, taken with others, to reflect the views or intentions of States, we shall have to consider the value of legal advice given to Governments. Anticipating that discussion, we may note now that it is frequently a mistake to imagine that an opinion was furnished by Sir XY, the Attorney-General, and was either acted on or not. If one looks to the way in which that opinion was in fact formulated one finds that it often represents the final outcome of an informal conference sometimes of considerable duration and made up of very varying elements. And it may well be very difficult to determine precisely when and by whom the sentiment receiving final expression was first uttered.¹

It requires also to be borne in mind that States, in relation to customary international law no less than treaties, are essentially laymen. What they do and say, to become explicable, must always, therefore, be subjected to a certain amount of professional interpretation. They habitually rely, moreover, on professional legal advice, which is often characterized by a certain measure of detachment.

Obstacles in the way of a comparative enquiry

There are two obstacles in the way of a thorough-going comparative enquiry into the practice of States. They are the question of access to the materials and the enormous bulk of the latter. The seriousness of the first of these, at least at that time, may be assessed upon an examination of the gallant but ill-starred venture associated principally with the name of Professor Makarov. This was the production, in the *Fontes Juris Gentium* series, of a *Digest of the Diplomatic Correspondence of the European States*. Five volumes of this were published, covering the years 1856-78. And the manuscript of

¹ Cf. *Legal Advisers and Foreign Affairs* (ed. Merillat, 1964), p. 148.

further volumes which would have carried the story up to 1885 was about to go to the printer when it was destroyed by military action. This work dealt with the practice of European States generally. It was not extended to the Americas because of the existence of Moore's work and the unavailability in Europe of Latin American materials. It was based exclusively on published materials. It is, in fact, a distillation of blue books: German, Austrian, Danish, Spanish, French, British, Italian, Dutch, Portuguese and Swiss. It is worth while noticing, by the way, that by far the greatest quantity of material used is British. The work is, if it is not patronizing to say so, extraordinarily effective. It suffers from two main defects: that the extracts printed are mere extracts and are often too short to make the context wholly clear; and the defect of incompleteness arising from the limited categories of materials upon which the compilers were able to rely. The first of these defects was to some extent corrected in the later volumes.

The *Fontes* series is based exclusively on 'diplomatic correspondence', though, as the compilers explain, that expression includes for their purposes

not only Notes submitted by diplomatic representatives in the name of their Governments to the Government of their State of residence, but also instructions from leaders of foreign policy to the diplomatic representatives of their countries, and also, on the other hand, the reports of diplomatic agencies to their ministries, as well as letters from sovereigns [and] minutes of congresses and diplomatic conferences . . .¹

The notable absentee here—explicable in that it was being dealt with in a different series of the *Fontes*—is the judicial decision.

But there is in fact possibly another absentee of significance, as we may see if we look to a much smaller and much more recent enterprise which, despite its modest dimensions, is of great interest. This is Mr. Lauterpacht's *British Practice in International Law*, which began in the pages of the *International and Comparative Law Quarterly* some years ago, but which has now acquired a separate existence of its own. This series is characterized by heavy, but not exclusive reliance upon Parliamentary statements and includes a great deal of interpretative comment.

Both these works, in their different ways, show to what a considerable extent the practice of States can be distilled from published materials alone. Their inadequacy, or at least their lack of exhaustive-

¹ *Ways and Means of Making the Evidence of International Law more readily available* (1949), U.N. Document A/CN. 4/6.

ness, is, however, clear when we compare them with the American digests. It is evident that there is much more to be had, if access can be obtained to it.

Most States observe, in relation to the giving of access to or the publication of, the documentation of their foreign affairs what is known as the 'fifty-year rule'. This rule is obviously not invariable. Many categories of material are not subject to it at all. And large exceptions are habitually made to it. As the series *Foreign Relations of the United States* bears witness, these extend even to diplomatic correspondence strictly defined, concerning which a sort of rule of etiquette applies: that the consent of the foreign State or States concerned is requisite to publication.

The fifty-year rule has much to be said for it. It is not designed altogether for the concealment of inefficiency or evil motive, as appears to be sometimes thought. It is designed to protect confidence. One aspect of it may usefully be considered in detail: its application to the legal adviser of governments. It is often asked why, if some of the opinions of the Attorneys-General of the United States can be published almost contemporaneously, those of comparable officials of other States cannot similarly be released. The answer is that they naturally can. But the result will be inevitably to produce a change in the character of the advice given. A man who knows his opinion is shortly to be published writes in a different way from a man who knows that his advice is going to be kept confidential for a great length of time, extending in most cases beyond his own lifetime. It does not follow that the advice of a man in the former position will be worse. But it is unquestionably likely to be more cautious and less dispassionate.

In fact the fifty-year rule, in relation to old-established States, is not so much an obstacle to the investigation of their practice as might appear. For in many if not most contexts the essential basis of that practice will have been laid down more than fifty years ago. It is worth noticing in this regard that, when the compilers of the *Fontes Juris* Digest did their work largely on the foundation of published British documents, they could in fact, with respect to the period with which they were dealing, have gone directly to the archives, these being already open in respect of that period. It is then to the second rather than the first of the two obstacles mentioned above, the bulk of the archives rather than their inaccessibility, that the absence so far of any new comprehensive comparative enquiry into State practice is now to be attributed. By inaccessibility in this context

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

I mean of course actual inaccessibility, not merely physical difficulty of access. It is probably true that the work can only be done within the archives themselves, and thus on the spot. But that is another question and is really related to the problem of bulk rather than to that of access. As to the latter, it is to be observed finally that the application of the fifty-year rule effectively to prevent investigation of the legal practice of States is under very strong attack in any event.

The initiative of international organizations

This attack has come about at least formally through the initiative of international organizations. The Committee responsible for the initial elaboration of the International Law Commission's Statute was advised by the United Nations' Secretariat that one of the ways in which the General Assembly might discharge its functions in the matter of progressive development and codification of international law was by commending to its members the desirability of each producing its own national Digest on more or less the American model. The precise direction of this recommendation is interesting:

It would seem that the work of ascertaining and compiling such digests should not be directed primarily towards obtaining the viewpoint of governments regarding certain points of international law. A more useful approach might be the consideration of methods whereby the materials containing such evidence can be made more widely available.¹

To assist the Commission at the outset the Secretariat produced a further memorandum, a notable document now familiarly known as *Ways and Means*, which upon the general issue said with some restraint only that 'The practice of some States is documented less adequately than that of others'. It suggested that there were four possible approaches to a remedy: the topical, the chronological, the approach by countries and the approach by the category of evidence. After a very careful review of the whole question from all points of view, the Commission in 1950 recommended that the General Assembly should call the attention of Members to the desirability 'of their publishing digests of their diplomatic correspondence and other materials relating to international law'. The Commission indicated indirectly what it thought these 'other materials' were

¹ Memorandum: Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, 1947, *U.N. Documents A/AC. 10/7*.

by the remarks it made on national digests generally, and on the value, in particular, of decisions of national courts, national legislation, and the opinions of national legal advisers.

But what was said about the first matter was simply to repeat Moore's observation that, to avoid false impressions, one must avoid unduly curtailed extracts. As to the relevance of national decisions, the Commission took the view that they had very little direct impact upon international law. This is a point we must consider again when we come to look at judicial decisions generally as a source of law. What interests us now is the Commission's alternative assumption, for which there seems little warrant on the face of it 'that the decisions of the national courts of a State are of value as evidence of the State's practice, even if they do not otherwise serve as evidence of customary international law'. The utility of national legislation the Commission took for granted. On opinions of national legal advisers it observed that

Reserve may be needed in assessing the nature of such opinions as evidence of customary international law, for the efforts of legal advisers are necessarily directed to the implementation of policy. Nor would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasions with reference to which they were given.¹

The preliminary national stage

The General Assembly, however, proved more interested in other aspects of the Commission's recommendations concerning 'Ways and Means', and in particular of those relating to the institution of a United Nations Legislative Series, containing the text of current national legislation of international interest, and to the production of a *répertoire* of the practice of the United Nations. This apparently negative attitude to the question is not to be misinterpreted. It reflects, it may be suspected, the inevitable conclusion to which one must come in the whole matter, that the investigation of the practice of States from all the several categories of evidence, whatever they may be, though it must ultimately be carried on comparatively, not a single State but States being concerned, must in the first instance be a national rather than an international process. Such is the practical conclusion to be drawn from the bulk of the material available, accessible or not, and from its varying character.

That this was the conclusion would seem to be indicated by the fact

¹ *Yearbook of the International Law Commission*, 1950, vol. II, pp. 367-74.

that, when in 1961 the Council of Europe came to consider a proposal that its member States should undertake the preparation of national digests of their practice, it was found that this was already being done, with some considerable relaxation of the fifty-year rule for the purpose, in some of them, and that all others were in principle agreeable to the suggestion. The appropriate organs of the Council thereupon adopted it and set up some co-ordinating machinery with a view to directing national efforts into parallel channels and the production, ultimately, of an international index.¹ With the details of all this we need not concern ourselves. But it is perhaps worth while dwelling on some of the practical problems involved which seem to suggest both that the approach adopted is the only one possible and at the same time to explain why progress with it is so slow.

The French Digest

It is most fitting for this purpose to consider first of all the French *Répertoire de la pratique française en matière de droit international public*. For three of the five volumes of this, the almost single-handed work of M. Alexandre Charles Kiss, have already appeared under the auspices of the Centre National de la Recherche Scientifique. This considerable enterprise owes its inspiration to Madame Suzanne Bastid. Its compilers found in the first instance that they were confronted with the following types of possibly relevant materials, apart from the decisions of the French courts: texts of laws and decrees with explanatory memoranda; Government statements in the two Chambers; replies to written Parliamentary questions; instructions to French diplomatic and consular representatives; diplomatic notes to foreign Governments; statements of French representatives at international conferences; minutes drawn up by the legal department of the Ministry of Foreign Affairs; written submissions and oral statements made by counsel for the French Government before international tribunals; and treaties entered into by France. In addition to this there was an embarrassingly large jurisprudence of courts of all sorts, including prize courts and administrative courts in addition to the ordinary civil or criminal courts, going back as far as 1790. A great deal of this mass had already been published in various places. Thus the laws and their explanatory memoranda were in the *Journal Officiel* as well as, very often, in the ordinary periodical legal literature. Parliamentary statements and the like were in the

¹ Cf. Recommendation 309 (1962) of the Consultative Assembly.

Journal des Débats. Much of the diplomatic correspondence was in the 293 Yellow Books published by the Ministry of Foreign Affairs, in the 29 volumes on the *Origines diplomatiques de la guerre de 1870-71*, in the 191 volumes of the *Archives diplomatiques*, covering the years 1861-1913, in the 72 volumes relating to the Peace Conference of 1919, or in similar smaller series. What French representatives had said before international courts or in international conferences or organizations was to be collected from the several series of records of those institutions. And there were some twenty series of domestic law reports. As for unpublished materials, the Ministry of Foreign Affairs was willing to supply

certain minutes taken from the records of its Legal Department provided the names of States and individuals are omitted. The Ministry points out, however, that internal documents of this type do not necessarily represent the Government's present views on an attitude to legal questions. The minutes in question, which are the earliest in the Department's records, cover the years 1934-1938 and provide some 10% to 15% of the total material used.¹

In going through this material the compilers evolved certain working principles which are of great interest:

The first principle was that the Digest must present as objective a view as possible of French practice. . . . This implies certain rules. . . . In the first place, it precludes any judgment being passed on the texts from the point of view of legal theory. Hence, in the text contradictory precedents are cited side by side, and the reader is given no further help towards appraising them than that afforded by a statement of the number of other precedents on either side and their dates. For example, when a contradiction of this kind is the way in which international law was evolved, the most the Digest does is to draw the reader's attention to the fact that that *may* be the explanation. The second rule is that the texts must be self-explanatory. Accordingly . . . long quotations are included. . . .

The third rule has been to avoid all reference to books on the theory of law, except where it is necessary to refer to practical examples cited. . . .

One of the most difficult problems has involved texts concerned with more than one point of international law which it was yet impossible to split up. The solution finally adopted has been not to quote any text in full more than once in the same volume. . . .

Some difficulty has been caused by terminological changes . . .

In deciding the best way of presenting the precedents quoted in the

¹ Cf. *Répertoire de la Pratique française en matière de Droit International Public* (1962), Tome I, pp. xiv-xv. And see *Digests of National State Practice in the Field of International Law*, Memorandum of M. Kiss. Council of Europe Document AS/Jur.(13)16, (1961).

Digest, the chronological and the alphabetical were excluded from the start. There were two desiderata: first, ease of reference for the reader, and, second, adaptation to the type of material.

The first requirement was fulfilled by basing the plan of the Digest on a comparative study of the indexes of various treaties and monographs on international law (e.g. G. Gidel's *Droit International de la Mer*).

The second requirement was to take due account of the nature of the material. Law books contain a certain amount of theory for which no practical illustrations exist. For example, there are very few precedents concerning the basis of international law, in addition to other matters which no one writing a treatise could possibly fail to mention, but for which precedents are very rare, for example, the continental shelf. . . .¹

What has been said and quoted indicates that here is an enterprise of the first magnitude which has been undertaken with luminous intelligence. But the first reaction to it must be that the materials available for a comparable approach in the United Kingdom are significantly different and that the differences must cause one at least to question some of the principles the compilers of the French Digest have laid down.

The projected British Digest

Looking first to the question of materials: At the very outset it is to be noticed that United Kingdom statutes are not accompanied by explanatory memoranda or *exposés des motifs*, though statutory instruments in recent years have acquired something very like them. And the fact that what the Government said it meant in introducing, or Parliament said it meant in enacting, a British statute is, strictly, irrelevant to its interpretation in English law. This consideration immediately raises the question of the value to be attached to other Parliamentary material. The ministerial statement in Parliament and the Parliamentary question are of course as familiar here as in France. But are such statements and the answers to such questions relevant evidence? Are they not simply part of the necessary process of inter-communication between co-ordinate branches of government to which the separation of powers compels us? Admittedly, the fact that accommodation has been available in Parliament for foreign diplomatic observers off and on since the days of Henry VII and the Venetian ambassadors would suggest that foreign States do, and are expected to, take note of what is said in Parliament. But why stop there? Is not Germany expected to take note of the proposal of a naval holiday when made in a speech at the Lord Mayor's Banquet

¹ *Digests of National State Practice etc.*, cited in the preceding note.

—and this although the speech is not made by the Secretary of State for Foreign Affairs but by the Chancellor of the Exchequer?

The diplomatic material will of course be much the same, though the matter of instructions to diplomatic and consular officers does in fact raise a little question. Are merely general instructions in question here, or specific instructions given with reference to a specific matter? If the latter the field of enquiry is immediately widened. The possibility that it must be is in any event brought to mind when it appears that the French digest is based exclusively, in so far as it is based on diplomatic correspondence, on such as is published. The tale of 293 Yellow Books is impressive enough, but the hue of the latter must pale beside a Century of Diplomatic Blue Books¹ and what stands behind those Blue Books, in the manuscript or other archives: is the purpose in view served by the confinement of attention to published correspondence?

One may pass over the question of the proceedings of international tribunals and organizations without comment except that the Anglo-Saxon tradition suggests superficially that the United Kingdom may have appeared before the former more often than France. As for case law, however, though twenty series of law reports will not seem many to the English practitioner, familiar with the apparently innumerable nominate reporters, a brief glance at the *International Law Reports* suggests that, contrary to common expectation based on the difference between the common law system and the system of the codes, there are more French than English decisions on points of international law. However, in England we cannot start only at 1790 as we would then omit even *Tricquet v. Bath*,² to say nothing of *Calvin's* case.³ That apart, we must reserve the question of whether this judicial material has any relevance at all.

When we come to the minutes of the Legal Department of the Ministry of Foreign Affairs, however, all our questionings become acute. We have already noted the International Law Commission's monition that these may not always be wholly objective. We note now that the minutes emanating from the French Ministry date only from 1934, and we must wonder what that Ministry did for legal advice before that date, when the records of its Legal Department apparently begin.

Passing from the materials to the method, though we may accept

¹ Temperley and Penson, *A Century of Diplomatic Blue Books*.

² (1764) 3 Burr. 1478.

³ (1608) 7 Co. Rep. 1a.

most of what is laid down, can we accept the exclusion of the text-books? If national decisions may or must be referred to in order to convey the *opinio juris* of the State, as the International Law Commission seem to imply, cannot the same thing be said of the text-books? Can the atmosphere in which the Government of the United Kingdom has conceived the law be conveyed without any reference to Hall, and Westlake, and Phillimore, Lorimer and Twiss, and Oppenheim? If the scheme of systematic arrangement is taken from the national literature is not this in itself highly influential? Is it not more than a mere matter of arrangement when, as in French text-books and in the French Digest, treaties are dealt with as it were at the beginning as a source of laws, whereas English writers think of them rather as transactions under the law?

Considerations such as these have led to the adoption of somewhat different methods for the projected British Digest. These are dominated by the availability and the state of the materials, exactly as in France, with, in consequence, a different result. As to the question of availability, the fifty-year rule still prevails in principle here as elsewhere. But it is thought that, even if it were adhered to absolutely inflexibly, that would not affect matter very much. The main lines of the story were clear more than fifty years ago. Indeed it is essential to go back much further than that to discern the groundwork. If one takes the familiar topic of diplomatic immunities, for instance, it is obvious that one must go back at least to the story of the Czar's ambassador and the Act of Queen Anne. The law of extradition is still governed in the main by the Extradition Act, 1870. The law governing the admission of aliens cannot be understood without an investigation of the question of the so-called right of asylum and the events of 1848. Any question as to territorial waters inevitably leads us back to the *Franconia*¹ case. We cannot even begin to examine the law of prize without reference to the decisions of Lord Stowell and Dr. Lushington. If we wish to know the rules respecting the acquisition and loss of territorial sovereignty even the *Minquiers and Ecrehos*² case will take us back into the Angevin era. And all this, or its equivalent, is now in the public domain.

So long as there has been a Foreign Office one can, it might be thought, in principle confine oneself to its papers—subject to what has been said about the use of Parliamentary materials and judicial decisions. But this principle may be so much qualified by the actual

¹ *R. v. Keyn* (1876), L.R. 2 Exch.D. 63, 162.

² *I.C.J. Reports*, 1953, p. 4.

pattern, or by something at the basis of that pattern, of the administration of government as scarcely to be valid at all. In the United Kingdom, for instance—and in fact in most States—the principal department preoccupied with nationality questions, with the admission, reception and expulsion of aliens, and with extradition, is not the foreign department but the home department. And in fact it is the latter department and neither the foreign department nor the courts which has most to do with the perennial question of diplomatic immunities. The views of the Admiralty, moreover, are material in any question of a maritime sort. Consular officers, in the exercise of their functions in relation to shipping, have to deal not only or indeed primarily with the Foreign Office but also, now with the Ministry of Transport, formerly with the Board of Trade.

These results flow not so much from the affection of a particular State for a particular pattern of administration, though that is highly material. They follow ultimately from the circumstance that foreign affairs are not distinct in kind from home affairs but are, very often, simply different aspects of the same things. This must be sufficiently clear if thought be given to the question of control of the foreign department. It does not function as an independent empire, but as a co-ordinated part of the whole governmental machine. Where a classic separation of powers obtains, as in the United States, it may indeed be sufficient to look to the activities of the foreign department, of its head, and of the chief of State—though even there we note that the Attorney-General plays a role. In a State where matters are otherwise ordered, the sources to which one must go may turn out to be very different.

Bearing all this in mind and applying it specifically to the United Kingdom we find that we are confronted with an apparently almost hopeless task. For here is a State with a singular continuity in its history to begin with, which has, moreover, played a world-wide role since the world widened beyond Europe. The published documentation of its foreign relations from the Congress of Vienna to the outbreak of the Second World War is the richest in the world. Yet manifestly this mass of published material does not exhaust the mine. This is particularly the case in so far as concerns the matter of technical legal advice. The reason for this is in a sense an accident of history and legal tradition—the tradition that, like an English house of business, the State ‘puts out’ its legal problems to the expert—to the Law Officers; and the further tradition that the opinions of

the latter are not disclosed. To a degree this tradition is maintained notwithstanding that the Foreign Office has now its own legal advisers. The latter thus advise the several branches within the Foreign Office much as the practitioner advises his clients. Paradoxically, this has the result of complicating the whole enquiry. For it involves that there is no segregation of legal papers from others, at least for the greater part of the relevant period.

Thus behind the Blue Books stands a most formidable collection of archives. The size of this collection can be guessed at, though not with any great accuracy, from a few figures. The Foreign Office central archive alone for the year 1924, the closing year of the first quarter of this century, occupies some 1,200 large volumes of some 300 pages each. In 1913 the Foreign Office registered some 68,000 incoming despatches; in 1938, 224,000. The annual printed index of the Foreign Office papers, which has been produced internally since the early years of this century, is of about the size and style of the four volumes of the London telephone directory. Already in 1852 it was estimated by the then Queen's Advocate that there were in existence some 7,000 Law Officers' opinions on questions of international law later in date than 1792. These opinions, up to the year 1861, occupy some 200 bound volumes in the Public Record Office. These are in manuscript. Since 1861 the opinions rendered to the Foreign Office have been printed for internal purposes. Some fifty fattish annual volumes of them were produced before, owing to the acquisition of its internal legal advisers, the Foreign Office ceased to rely to the same extent on the Law Officers. There exists a parallel series of printed opinions rendered to the Colonial Office, many of them of international legal interest. The unprinted files of the Home Office abound in similar opinions. The printed Index of Foreign Office Library Memoranda produced in 1905 already listed 7,000 memoranda, many of them of high legal interest. But one could go on indefinitely.

This, then, is what stands behind the Blue Books. Beside them stand the statute book, the collections of Orders in Council, the law reports, Hansard's *Parliamentary Debates*, the files of the *London Gazette*—and anything else that is considered relevant.

But in practice the task is not all that formidable. It is enormously simplified by the satisfactory condition of the general literature of English law, including foreign relations law; by the comparatively short life of the Foreign Office; and by the fact that the light of publicity has ever beaten on its affairs. Thus, though it is true that

we cannot confine our attention to judicial decisions after 1790 only, the numbers of decisions to be taken into account are not large. There are probably only some 1,200 English cases of any importance relevant to the law of both peace and war.¹ Then again, though the Foreign Office was established in 1782 and though its business has in recent times been enormous, it would be a mistake to imagine that this last has always been the case. Indeed it is rather a sobering thought that in 1812 there were only three British diplomatic missions abroad. In practice papers from before the time of the Congress of Vienna are of very little significance. And for most of the nineteenth century the work of sifting them has been done for us in the great series of Confidential Print.

A word must be said about this series. If we consider it only from the date of its inception, in the 1830's to the outbreak of the First World War it consists in some 12,000 items consecutively numbered. The printed catalogues of it—and two exist, one arranged by countries and one, very much inferior, by subject—take us up to the number 10,000, that is about the year 1910. They reveal that its content is very various. It seems to consist in four main categories of items. First those not originating in the Foreign Office at all, such as offprints of pages of the *London Gazette* containing the texts of Orders in Council. These are by far the most numerous. They are not really archival items at all. The Public Record Office Collection of the print, which does not contain them, is thus reduced, for the period covered by the catalogues, to something like 4,000 items. Secondly there are other items, not of Foreign Office but usually of foreign origin—such as very bulky proceedings of international tribunals. These again are not really archival items. Thirdly there are relatively short papers, such as memoranda or single despatches. And finally there are collections of papers on special incidents or topics or relating to the affairs of individual countries. It is amongst these last that the main matters of legal interest are to be found—be they the annual prints of the Law Officers' reports, each one of which, though it may contain some three hundred opinions, represents but a single number in the printed series, or be they prints of all the correspondence leading up to the conclusion of a particular treaty, such as a treaty of extradition. The great flowering-time of the print

¹ These, at least in so far as they relate to the law of peace, are in process of being reprinted in collected form in the series *British International Law Cases*, prepared in connection with the *British Digest of International Law*, vols. I and II, appearing in 1964.

is from 1861 to 1906. After the latter date, though it persists, and persists in fact to this day, it becomes less useful.¹

Perhaps not more than five hundred thousand pages of print are comprised by the last two categories of items described. And a very great proportion of that can be discarded after a brief examination as of no legal interest. The remainder gives one, in concentrated form, the essence of the papers. This is clear if one considers why the print was ever made. No one motive has consistently underlain the order to print. Obviously on some occasions self-importance has played its part: it has been a feather in someone's cap to have his memorandum printed. But the principal clue to the system is provided by the inclusion within the series of the items of other than Foreign Office origin which have been described. This makes it apparent that the print was in general a device resorted to, before the days of typewriters, for purposes of copying and circulating documents for current use. When a Blue Book is prepared, the whole correspondence is not necessarily included. Judicious omissions are made. It has been averred that very occasionally like omissions were made from the print. Such, however, has not been my observation where any matter of legal interest is involved. The observable principle seems to be that, where a matter has been important enough to merit some discussion, the papers have been ordered to be printed. And, since only an internal circulation was intended, no omissions were made. After about 1906, it is true, owing apparently to reactions to some unguarded minutes made by the then Legal Adviser, and to his reactions to those reactions, minutes came to be omitted from the print. But by that date for other reasons, and notably the Foreign Office's importation of the typewriter, the print has ceased to be exhaustive of the manuscript. For the period of its prime, however, the print will suffice.

What it comes to, therefore, is that in order to approach the exhaustion of the available materials on the practice of the United Kingdom, one must (1) read the Foreign Office print so long as that is reasonably exhaustive of the papers, and then (2) read the papers themselves, and (3) collate the results with the ordinary published sources. This is a formidable but not an impossible task—up to any given year. What makes it tolerable, if undertaken at all, is the knowledge that its completion can only ever approach, not reach,

¹ A catalogue of the confidential print is at present in preparation, again in connection with the work for the *British Digest of International Law*, under the auspices of the Public Record Office.

the point of exhaustion—and that it will not yield anything particularly startling.

The reason why the completion of the task is never possible is twofold. In the first place, as one reads the archives go on piling up. I shall have more to say on that point in a moment. But, secondly, what has to be borne in mind is what has been said already concerning the artificiality of the distinction between foreign and home affairs, and what follows from the existence of other than archival materials. It is no good, for the purpose which is in view, looking to the Foreign Office archives alone. The business of other departments—the Home Office, the Colonial Office, the Admiralty, the War Office—has to be looked to also in a measure. Correspondence with these other departments is to be found in the Foreign Office to some extent, it is true. But one needs often, at least ideally, to go further. It is no good, either, confining oneself to archival materials alone. One must look, as the French do, elsewhere as well.

And here at length we come to the real compensating factor. Just as we have seen that the practice of a single State will not yield all we should know about the practice of States as a source of law, so we see that the records of a single department will not give up the secrets of the practice of a single State. We may pause and reflect, however, that the practice of States is not wholly unknown already. On the contrary, a great deal is known about it. In so far as the practice of the United Kingdom is concerned, as I have said, the fierce light of publicity has ever beaten on it in modern times. Therefore the method of an archival search is not that of blind excavation in a mountain of documentation. On the contrary, one has a very shrewd idea of what one is looking for. We will not search, for instance, for material on belligerent rights in the years of peace. Nor will we examine the German rather than the Latin American files for materials on the recognition of revolutionary governments. Nor must we read every page of the files we turn over. We already know the main course of history. And we already know the main lines of development of the international legal system. With these to guide us, the task is mechanical enough. All we are seeking, very often, is evidence of what was thought, and what was said and written confidentially, concerning matters and incidents which are quite notorious. And the importance of each single item which is thus discovered—or is missed—cannot be enormous. It cannot alter the broad pattern of history. The outlines of what the State did must already be known. And it is but one State among many.

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

If I am right in my assumptions here I may now describe briefly the progress of this particular enterprise. For its purposes the whole of the Foreign Office archives have been examined from the year 1898 for some 40 years, and the whole of the confidential print from its beginnings has been examined. Something over one hundred thousand extracts or copies have been made from this mass. On their basis, and that of the abundant materials already published, as well as of forays into the papers of other Departments in relation to particular topics, an attempt is being made to write the story of the United Kingdom's international legal transactions. I put it no higher than that. For the present, though the archival search goes on, the attempt is only to tell the story up to 1914. For the purposes of its writing much reference is being made to other than archival materials. This includes, where little or nothing else is available, the opinions of the writers of textbooks. Reliance on judicial decisions, on the other hand, is less direct. For most often they influence the executive arm only obliquely. Reliance on Blue Books and Parliamentary debates is but moderate. For it is found that the archival material tends to include everything which is to be found in them and a good deal more. So far as is possible, the source material is being made to speak for itself. It is realized, however, that the very arrangement of it must inevitably have its influence.

The four volumes which are the first-fruits of the application of this method and which will appear this year,¹ and the two or three companion volumes in which are merely reprinted what seem to be the most important judicial decisions and which either have already appeared or are about to appear, must of course be allowed to stand on their own feet. I am bold enough to predict for them, however, that they will be found to reveal a great deal of fascinating detail in relation to a well-known story: the story of the practice of one State which has conducted itself in the field of foreign relations in the conviction of obligation. Of such is the practice of States accepted as law in the sense of the Statute of the International Court.*

¹ It is proposed to publish the first four volumes to appear, relating to the First Phase to be treated (to 1914), of the *British Digest* this year. These will be volumes 5 and 6, comprising Part VI: The Individual in International Law and dealing with Nationality and Protection, the Condition of Aliens, and Extradition and Rendition of Fugitive Offenders; and volumes 7 and 8, comprising Part VII, Organs of States in their International Relations, and dealing with the Central Organs of the State, Diplomatic Envoys, Consular Officers and Functions of Envoys, etc., in Relation to Foreign Marriages.

Chapter IV

THE REMAINING SOURCES

The general principles of Law

It is something of a relief to turn from the question of custom or the practice of States, concerning which there seems so much to say, to the third source referred to in Article 38 of the Statute: 'the general principles of law recognized by civilized nations'. For, concerning that, I have little to say and must confess that I am scarcely out of the first stage of Mr. Root's thinking in the Advisory Committee of Jurists, which drafted the Statute. When Baron Descamps proposed that the Court should be directed to apply, after treaty and custom, 'the rules of international law as recognized by the legal conscience of civilized nations', Mr. Root said he did not understand the phrase. But Mr. Root subsequently joined with Lord Phillimore in proposing the amended formula, which was eventually adopted, so he presumably understood that. And Lord Phillimore is clear enough when he says he meant by that formula 'maxims of law, or principles accepted by all nations *in foro domestico*'.¹ Dr. Cheng's observation, too, seems just and relevant: that 'Principles are to be distinguished from rules'.²

The general object, then, of inserting the phrase in the Statute seems to have been, essentially, to make it clear that the Court was to be permitted to reason, though not to legislate, and by, for instance, the application of analogies from the law within the State, to avoid ever having to declare that there was no law applicable to any question coming before it. This was a problem which troubled the Continental jurists³ who assisted in the drafting of the Statute,

¹ Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), pp. 7-18, 24.

² *Ibid.*, p. 24. 'A rule answers the question "what": a principle in effect answers the question "why"': Fitzmaurice, 'The General Principles of International Law considered from the standpoint of the Rule of Law', *Recueil des Cours*, XCII (1957), p. 7.

³ As to the existence of parallel prescriptions of the general principles of law as a source of municipal law, see Cheng, *op. cit.*, pp. 16-19 and Appendix 2. As to the derivation of such prescriptions from the Digest Title *De diversis regulis iuris antiqui* (50.17), see Stein in *Essays in Jurisprudence in Honour of Roscoe Pound* (1962), pp. 1-20.

but did not trouble the Anglo-Saxons, who of course expected judges to reason without express instructions.

Thus understood, the general principles of law are certainly not law as such and the only question about them is whether they constitute a distinct source of law at all and, if so, whether a source of the same category as those we have considered already—treaty and custom or the practice of States. As to this, it might appear that the general principles require no distinct mention since they must be already part of customary international law, though to say so may involve admitting that they are rules and not principles. The alternative is presumably to hold that the Statute, in making mention of the general principles, is prescribing not so much a source as a method of applying other sources and is thus departing from a scheme of ‘formal’ sources. But this is not wholly clear and can really only be tested by finding one of Lord Phillimore’s maxims and examining it. If, when found, it proved to be something like the old Court’s famous pronouncement in the *Chorzow Factory* case: ‘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’,¹ then it would seem that one was in possession of something more like a rule than a principle—and incidentally, according to the Court, an existing rule of customary international law. But if one had in mind something more like the proposition on which the Court relied to decide that South Africa was not bound to place South-West Africa under the trusteeship system, it might be permissible to speak rather of a principle. For there the question was what Article 77 of the Charter meant when it laid down that it should be a matter for ‘agreement’ as to which territories should be trust territories and when it also stipulated that the trusteeship system ‘shall’ apply to *inter alia*, mandated territories. And the Court said that ‘An “agreement” implies consent of the parties concerned. . . . The parties must be free to accept or reject the terms of a contemplated agreement.’² This principle, if such it be, was not, incidentally, unqualified in classical international law if one looks in a certain way at the rule that treaties of peace were binding despite duress.

Dr. Cheng, who has the distinction of having produced the only considerable monograph in English on the general principles of law,

¹ *Publications of the Permanent Court of International Justice*, Series A, No. 9, p. 21.

² *I.C.J. Reports*, 1950, pp. 128, 139.

seems to start out with the idea that their prescription in Article 38 is a direction as to method rather than source and thus does constitute a departure from a scheme of 'formal' sources. But it is not wholly clear that he does not confuse form with formulation—as in the following passage:

The adoption of Article 38 of the Statute of the Court is, in fact, a repudiation of the theory that only rules created by means of a formal process are valid. It upholds the view that, like municipal systems of law, international law contains a number of unformulated principles.¹

After four hundred pages in which he formulates a great number of them, and incidentally disposes with some effect of the general view that the Court has not relied on general principles to any great extent, he concludes, however, that the first function of the general principles is that 'they constitute the source of various rules of law, which are merely the expression of these principles', and only secondly form guiding principles of judicial interpretation and application, and thirdly apply to the facts of a case governed by no formulated rule. Of course he may not intend any order of merit here. Indeed he goes on to say that 'In a system like international law, where precisely formulated rules are few, the third function . . . acquires special significance . . .'²

The upshot may thus be that the term general principles may be used variously. Sometimes it connotes actual rules of international law which are, however, of so broad a description that it is not improper to call them principles. The rule or principle adverted to in the *Chorzow Factory* case is of this description. So also is the rule or principle that *pacta sunt servanda*. Otherwise they are maxims of the order of the injunction *audi alteram partem*, of universal application in municipal law, which obviously ought to or must apply in the international sphere also. If this be correct, then the source of the former category would seem to be custom or the practice of States: they are simply rules of customary international law.

The matters within the second category still cause difficulty, however. What precisely are they and what rules of international law do they give rise to? In this connection it is to be noted that Dr. Cheng, unlike most writers on the subject, does make an attempt to state what the general principles of law, or some of them, actually are. And his list is of high interest. For apart from the principle of good faith in the performance of engagements and the exercise of rights

¹ Cheng, *op. cit.*, p. 23.

² *Ibid.*, p. 390.

(which is said by some others with some justice not to be an independent principle or rule at all but to be inherent in the notion of obligation and right),¹ and two principles on State responsibility of which one is that laid down in the *Chorzow Factory* case, all his principles relate to the conduct of international judicial proceedings. Of this category are the maxims *nemo iudex debet esse in propria causa* and *audi alteram partem*. Not all items in this category correspond, however, to the so-called rules of natural justice sometimes invoked by English courts, as the two mentioned do. The 'principle' that the court shall examine the law *proprio motu* and not restrict itself to a consideration of the arguments made before it, or that a decision is binding only upon the parties to the suit, are thus of a somewhat different character, though equally rooted in conceptions of absolute justice or fairness. None of the principles cited by Dr. Cheng,² however, which is not identifiable as being already an actual rule of customary international law, seems to have any relation to the intent of the draftsmen of the Statute that the Court should be free to reason so as to avoid a *non liquet*—a confession that it could find no law available to decide the case before it.

It seems an eminently fair proposition, for instance, that both parties to a suit should be entitled to be heard by the tribunal. And, if the *compromis* or other instrument constituting the tribunal does not mention the matter, one would agree that the latter ought to be free to infer such a proposition. Once inferred, one supposes that it may fairly be described as a rule of international law. And since international judicial proceedings have been infrequent one can perhaps admit that there is no customary rule about the matter, so that the rule, when we have it, is not only a new rule but is not immediately derived from the source of custom or the practice of States. That it is derived from a general principle of law directly does not, however, necessarily follow. It could be looked upon simply as a necessary interpretation of the *compromis*, which is essentially a treaty and therefore, according to some, a source of law in itself, or, in the alternative, a source of obligation deriving its force from customary international law.

Again, if it be agreed that both parties to a dispute are entitled to be heard, if that is considered to result from a general principle of law, it does not much matter whether one says that that proposition is the principle itself, or that it is a rule of law which is derived from it or which is the expression of it.

¹ See p. 46 above, note 3.

² Cheng, op. cit., Appendix 1.

THE REMAINING SOURCES

But are there no more substantive, as opposed to adjective, principles than these? Have the general principles of law to do only or principally with rights and remedies—and rights and remedies in international judicial tribunals at that? Alternatively, if there are indeed substantive general principles of law or substantive rules of international law derived from general principles, can any agency other than a court apply or, as the case may be, create them?

Until very recently, one suspects, these questions, if they had been put at all, would have been answered in the negative. Only courts seemed to have had any concern with the general principles of law, and their concern with them has been either in the field of adjective law—which would include the question of the validity of the notion of abuse of rights and possibly that of unjust enrichment—or in that of interpretation of terminology of a general legal flavour—such as the expressions ‘mandate’ and ‘trust’.

But now, to quote Lord McNair,

There is some evidence that it [that is, the category of the general principles of law] is likely to acquire another sphere of operation, namely, as affording in certain cases the choice of a legal system for the regulation of some of the new numerous contracts made between corporations (or, less commonly, individuals) belonging to countries which have capital and skill to spare, and the Governments of certain countries which have the natural resources waiting development but not enough capital or skill available for that purpose . . .¹

Further Dr. Jenks, in considering *The Proper Law of International Organizations*, by which he means

the ‘personal’ law of international organizations, the internal administrative law governing their legal relations with their officials, employees and other agents, and the principles of the conflict of laws governing the choice of law applicable to their legal transactions with third parties,

and which he holds to be international law, feels that this broadened scope of the latter system must affect the relevant rules as to its sources, including the general principles of law. And though he himself would find a necessary ‘active principle of growth’ in natural law, he nevertheless says somewhere that the general principles represent a vein the richness of which has only begun to be tapped, and further that

The process whereby international law recruits itself from general principles of law must be expected to be intensified; the range of legal systems with

¹ McNair, ‘The General Principles of Law recognized by Civilized Nations’, *British Year Book of International Law*, XXXIII (1957), p. 1.

a claim to consideration when such general principles are deduced has widened; the adoption of general principles of law as the proper law of certain international transactions is increasingly common; international law will tend to draw, but should draw with caution, on municipal systems of administrative law and jurisdiction.¹

Here then are two new developments, apparently, concerning the general principles of law which merit some little examination. As to the first of them, it amounts to a claim that the general principles, so far from being a method of development of international law, are not even a source of that system but in themselves a substantive body of rules, distinct, it may be, though related to international law generally. The first literary formulation of this view is apparently that of Mr. Fawcett who wrote in 1953 that there were perhaps:

three bodies of law to which an international agreement may be subject; the rules of public international law, the general principles of law recognized by civilized nations, and some specific systems of municipal law; . . . where the parties have not directly or indirectly shown their intentions as to the governing law, the rules of public international law will govern inter-State agreements, while State contracts [i.e. agreements between States and foreign corporations or individuals] will be governed by the general principles of law.²

Lord McNair's thinking is evidently on the same lines. For, as has been observed by Dr. Mann, he 'somewhat surprisingly considers the general principles as affording, in certain cases, "the choice of a legal system"', and, indeed, describes them as a system of law'.

Dr. Mann himself comments:

Yet it is hardly open to doubt that, unless they are equiparated to public international law, the general principles are not a legal system at all, and Lord McNair clearly refuses so to equiparate them. For he submits that the contracts he has in mind are not 'governed by public international law *stricto sensu*', but 'should be governed by the general principles of law recognized by civilized nations'. The contrast so created is not one of terminology, but of substance.³

No doubt two views are possible upon the validity of Dr. Mann's criticism. That does not concern me here. I quoted it because it expresses with great clarity the nature of the doctrine it attacks: the thesis that the general principles of law constitute a distinct legal system.

¹ Jenks, *The Proper Law of International Organizations* (1962), p. 260.

² Fawcett, 'The Legal Character of International Agreements', *British Year Book of International Law*, XXX (1953), pp. 381, 391.

³ Mann, 'The Proper Law of Contracts concluded by International Persons', *British Year Book of International Law*, XXXV (1959), pp. 34, 45.

THE REMAINING SOURCES

That thesis is constructed on the basis of clauses in various concessionary contracts and the like, excluding the application thereto of particular systems of municipal law. The best known of such clauses is that which fell to be applied in the *Abu Dhabi* arbitration, though in fact it is less obviously related to the general principles of law than others. For it reads merely—or was contended by one of the parties to read, there being an alternative version: 'The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner.'¹ The *Lena Gold Fields* Concession similarly provided that 'the parties base their relations with regard to this Agreement on the principle of good will and good faith as well as on reasonable interpretation of the terms. . . .'² By contrast, Lord McNair states, 'a certain concession granted by a Government in the Middle East' provides more specifically in its arbitration clause that 'The award of arbitration shall be consistent with legal principles familiar to civilized nations'.³

What gives the clause in the *Abu Dhabi* agreement its place in legal history is Lord Asquith's interpretation of it as excluding the application to the agreement of any system of municipal law and as inviting and in fact prescribing, instead, 'the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of "modern law of nature"'. . .⁴ Dr. Mann concedes that this statement 'provides the most authoritative support for the doctrine of the "internationalization" of contracts', but he interprets it as being one which 'rightly regards words of a very general character as a sufficiently clear reference to public international law'. On the other hand he concedes that in the *Lena Gold Fields* case the arbitrators decided that in certain respects 'the general principles of law prevailed'—a decision which he criticizes.⁵ Others tend to regard both cases as establishing the general principles of law as a distinct and substantive system.⁶

Others besides Dr. Jenks, too, and without his caution, maintain that it is, expressly or implicitly, the general principles of law recognized by civilized nations 'from which a substantive body of legal rules has to be developed' in relation to a field of 'international administrative law', the development of which is called for by the

¹ *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* (1951), *I.L.R.* 1951, 144, 148.

² McNair, *loc. cit.* at p. 8.

³ *Ibid.*

⁴ *I.L.R.* 1951, 144, 149.

⁵ *Loc. cit.* at pp. 52, 55–6.

⁶ Jenks, *op. cit.*, p. 152.

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

creation of numerous international organizations for the discharge of 'welfare' functions on an international basis.¹

Both the new departures adverted to occur, it is to be noted, in the area of the 'changing dimensions',² or increasing 'scope'³ of international law: in the area that is, beyond the traditional field of exclusively inter-State relations, be it in that of 'transnational law' or of international organization. They are not necessarily improper developments, but it would seem important to recognize that they are new developments. They can of course be discounted altogether. It is easy to argue, for instance, not only that when arbitrators refer expressly or impliedly to general principles they really mean international law generally, but equally that when they invoke general principles they are simply engaged in the exercise of interpretation: that they are merely indulging in the privilege of reasoning which the original inclusion in the Statute of the mention of general principles was intended, apparently, to give.⁴ It is equally easy to argue that the whole of international administrative law so-called, including the resort to the general principles of law 'as a kind of equity in administering staff regulations',⁵ is no more than a facet of the *traité organisé*. Such arguments, however, may be merely destructive.

At the same time, an uncertainty as to whether the general principles are principles or rules, and whether if the latter rules of international law or not, and above all as to what their content is, is somewhat disconcerting. It makes it difficult altogether to resist the suspicion that all, including the draftsmen of Article 38, who have talked about the general principles of law have been talking about something which is easily enough, and with less confusion, assignable to another category. Was not Judge Alvarez right, when he said in the *Anglo-Norwegian Fisheries* case that 'Up to the present, th[e] juridical conscience of peoples has been reflected in conventions, customs and the opinions of qualified jurists'? In other words, we may find our general principles soon enough under other heads.

¹ Cf. Friedmann, 'The Use of "General Principles" in the Development of International Law', *American Journal of International Law*, 57 (1953), pp. 279, 282.

² Cf. Friedmann, 'The Changing Dimensions of International Law', *Columbia Law Review*, 62 (1962), p. 1147.

³ Cf. Jenks, 'The Scope of International Law', *British Year Book of International Law*, XXXI (1954), p. 1.

⁴ 'Interpretation' and 'analogy' can of course be—and have been—claimed to be 'sources'.

⁵ Fawcett, 'The Place of Law in an International Organization', *British Year Book of International Law*, XXXVI (1960), pp. 321, 341.

THE REMAINING SOURCES

But he went on to say also that custom no longer reflects the general principles—for such he seems to mean—so quickly, and that we must now look for them primarily in ‘the resolutions of diplomatic assemblies, particularly those of the United Nations’, in the jurisprudence of the International Court, and, as well, in ‘the recent legislation of certain countries, the resolutions of the great associations devoted to the law of nations, the works of the Codification Commissions set up by the United Nations, and finally, the opinions of qualified jurists’.¹

Professor Johnson’s conclusion that this passage means ‘that the exigencies of modern life have tended to give greater prominence to “the general principles of law recognized by civilized nations” than to custom as a source of international law’² may, according to one’s point of view, be adopted without qualification or with the qualification that it all depends on the conception one has of custom. If, for instance, one accepts national legislation and national literature as elements in the practice of States,³ then two of the new sources Judge Alvarez mentions are but old ones. Professor Johnson’s own criticism that Judge Alvarez confuses or fails to distinguish between the sources of international law and the means of determining its rules is again acceptable or not according to one’s view of the validity of the distinction between law-creating and law-determining agencies.⁴ The implications of the acceptance of that criticism would seem to be the relegation of the general principles of law to the status of a method rather than a source.

Judicial decisions

Whether or not Article 38 of the Statute, in stipulating that the Court shall apply the general principles of law, is departing from a system of categorization of sources of international law which at the outset it appears to be employing, some change occurs when one comes to the last two items the Article lists—judicial decisions and the teachings of publicists. For these are expressed to be applicable as, and by implication only as, ‘subsidiary means for the determination of rules of law’. Professor Schwarzenberger has explained the difference between the last sub-paragraph which refers to these things and what goes before as follows: ‘Sub-paragraph (a) to (c) are

¹ *I.C.J. Reports*, 1951, pp. 116, 148–9.

² Johnson, ‘The Effect of Resolutions of the General Assembly of the United Nations’, *British Year Book of International Law*, XXXII (1955–6), pp. 97, 116.

³ See pp. 63, 76 above.

⁴ See p. 6 above.

concerned with the pedigree of the rules of international law. In sub-paragraph (d) some of the means for the determination of alleged rules of law are enumerated.' He says further that the first three sub-paragraphs specify the 'formal' sources of international law. But he does not tell us directly, or not immediately, what kind of sources, if any, the fourth sub-paragraph specifies. Indeed, at this point he abandons the concept of 'sources' altogether and draws a distinction between law-creating and law-determining agencies. He does however observe, most acutely, that the designation of certain means for the determination of rules of law as subsidiary involves that there must be principal means for such determination also. And he finds the principal means in the case of treaties to be the parties to such treaties themselves; in the case of customary law the collective international community; and in the case of the general principles of law either all civilized nations or a substantial number of them. Now all these are composite bodies, whose members may and often do disagree. When they do so, courts and writers come into play as 'subsidiary law-determining agencies'.¹ This is both logical and ingenious. And its author carefully protects himself from any criticism on the score that the distinction between law-creating and law-determining agencies has no absolute value. He admits, if I follow him correctly, that States both create and determine treaty and customary international law: they both make it and say what it is, as it were. But he says in effect that courts and writers do not make law: they only say what it is. Thus, again if I understand him aright, if he were to tolerate the concept of sources at all, he would characterize not only the teachings of publicists but also judicial decisions as mere 'literary' sources.

That this is so would appear to be confirmed by what he says in answer to the question 'why the views expressed by international judges in their official capacity should carry greater weight than if contained in private studies'. This is inexplicable on the basis of *stare decisis*, the principle that judicial precedents are binding, for that is expressly excluded by Article 38, which directs the application of judicial decisions subject to Article 59, wherein it is laid down that a decision of the World Court is binding only upon the parties before it in the particular suit. No; 'the true answer lies first in the greater degree of responsibility and care that the average lawyer shows when he deals in a judicial capacity with real issues as compared with private comments on such issues as the discussion of hypothetical

¹ Schwarzenberger, *International Law* (3 ed., 1957), vol. I, pp. 26-8.

THE REMAINING SOURCES

cases'. In addition the judge has the benefit of argument.¹ In a passage which has been quoted already Judge Fitzmaurice takes a very similar view.² But he goes very considerably farther.

The additional thesis here is that it is fairly obvious in practice that a decision often is of considerably more consequence than the Statute of the Court would suggest. Thus, according to the latter, the United Kingdom alone is bound to accept that the extent of Norwegian territorial waters is as indicated by the straight base-line in issue in the *Anglo-Norwegian Fisheries* case. But it is unrealistic to maintain that other States would not be similarly bound, or that any State could, after the decision, successfully contest the application of a similar system of admeasurement in similar topographical and economic circumstances.³

Though this is unquestionably true, it may nevertheless be objected that it is only partly as a result of the decision. The deliberations of the International Law Commission and the proceedings of the Geneva Conferences on the Law of the Sea enter into the matter too.⁴ Further, if the Court in the *Fisheries* case is to be considered to have based itself largely on the absence of objection over a period of many years to the Norwegian system—on acquiescence, that is—the degree to which the rule to be extracted from the decision is to be considered binding on other parties or in other situations would depend on this. And this, of course, Judge Fitzmaurice sees. What he does not mention, however, is where exactly, if the decision is to be taken, as apparently it is, to be in effect new law, that law comes from. Ought not the Court, agreeably to the Statute, to have applied simply the old law from the old sources?

At all events, Judge Fitzmaurice makes the point that a judicial decision or at least an international judicial decision is a fact, as an opinion is not, and therefore, if not a 'formal' source, quasi-formal, or, alternatively, formally material. In the last guise it would appear, however, to be no more than a 'literary source' as distinct from literature.

The problem as to the extent to which a judge makes new law or merely declares what existing law is being well known and well explored, though with what success it is of course a matter of opinion, we may at this point leave international judicial decisions with two

¹ Ibid., pp. 31-2.

² See p. 11 above.

³ Fitzmaurice, 'Some Problems regarding the Formal Sources of International Law', *Symbolae Verzijl* (1958), pp. 153, 170-3.

⁴ See p. 22 above.

final observations. Firstly, it should be noted that the circumstance that such a decision as the *Anglo-Norwegian Fisheries* case cannot practically be ignored in relation either to other irregular coasts inhabited by fishermen besides the Norwegian, or by other States than the United Kingdom, involves that such decisions, to whatever extent they are held to be sources of international law, are sources of which not only courts but other organs of the international community must take note. And, secondly, it may be observed that further exploration of the precise status of international decisions ought to take account, not so much of the parallels offered by the common law, wherein the principle of *stare decisis* applies, but of those systems of law, and notably the German and the French, where judicial decisions play a large part notwithstanding that that principle does not apply.

Turning back to the Statute, we may note that it does not speak of international judicial decisions but of judicial decisions *tout court*, though the reference in Article 38 to Article 59 may create some sort of a presumption that only the former were in the draftsmen's mind. Any such presumption is no doubt rebuttable because, strictly, it would involve the proposition that the World Court could only refer to its own decisions and not to those of other international tribunals, which, before the former had given any decisions at all, cannot have been the intent. The question thus arises upon the Statute which has been adverted to already several times: What is the status of decisions of municipal courts in relation to the doctrine of the sources of international law?

They are almost totally unregarded by the World Court. Yet there is a great number of them. The series now known as the *International Law Reports*, formerly the *Annual Digest (and Reports) of International Law Cases*, covering the period from 1919 only, thus extends already to almost thirty volumes, though admittedly it contains the decisions of international as well as municipal courts. The municipal decisions collected are no doubt of differing intrinsic merit. But so are international decisions. And so, one must reflect, are all human products. The principal practical objection to reliance on them is commonly stated to be that their value varies in proportion to the independence of the judiciary which pronounces them. In countries where the independence of the judiciary is conceded they have a greater chance of objectivity. But curiously this practical doctrine collides with a possible objection of theory which has already been touched on.

THE REMAINING SOURCES

For it may be asked whether, if municipal decisions are of no direct weight, may they not still be taken into account as elements of the practice of the States from which they emanate. To this it may be objected, however, that, if the judiciary be independent, it is at least a hypothetical possibility that the courts may be taking quite a different view of a matter from that entertained by the executive. The possibility of this is less remote than that of a divergence between legislature and executive, since the separation of legislative and executive powers is seldom as marked as that between the judicial and the other branches of government.

Something like a practical example of the possibility sketched is to be found in the famous *Franconia* case¹ in regard to the fundamentals of the relationship between international law and municipal law. That case, as is well known, concerned the extent of the State's criminal jurisdiction in territorial waters, and the upshot of the innumerable judgments given in it was that no particular court in England was in fact invested with that jurisdiction although it was, by international law, permitted to the State generally. Sir Henry Maine considered this to imply a denial of the duty of the State and its organs to observe any rule of international law which could not be shown to have been adopted by the legislator, 'by the alternative legislation, within certain limits, of the English Courts, or by conformity of the rule with some provable usage',² a view not of course taken by the executive. But the example is not perfect since what was involved was at most a permissive rule of international law: no State is bound to assume jurisdiction within its territorial waters or indeed to claim any such waters,³ though presumably if it does so it is expected to maintain some sort of order within them.

Even apart from divergences arising from the handicap under which a municipal court may labour in applying international law because of the restriction the categories of its formal sources may impose, it is not hard to find traces of differences of view between the judiciary and the executive upon points of international law. One instance of such a difference of view has been given already: the Australian courts appear to consider that it is contrary to international law to impose military service on foreign nationals. The executive government in the United Kingdom has consistently

¹ *Reg. v. Keyn* (1876) L.R. 2 Ex.D. 13.

² Maine, *International Law* (1888) p. 38.

³ *Sed quaere*. See *The Anglo-Norwegian Fisheries Case*, I.C.J. 1951, pp. 116, 160 per Judge McNair.

assumed the opposite.¹ Similarly, at one time at least the English, and also the American courts, were apparently unwilling to concede even the possibility of plural nationality, a phenomenon of which the executive has taken due account for centuries.² And, historically, it is possible to discern rather different lines of development of thought and doctrine among the judges as compared with the executive in relation to such topics as the nationality of corporations,³ the effect of transfer of sovereignty of territory,⁴ and the effect of war upon private transactions.⁵

Other observable divergences follow rather from the frequent inability of municipal courts to apply international law as a whole. For such a court can only draw upon the sources of law which are prescribed for it. Where a prize court is concerned this may indeed be international law *in toto* and exclusively.⁶ In such a case it may well deserve the praise given by Kent to the 'accurate and comprehensive views of general jurisprudence' taken by the High Court of Admiralty.⁷ Where an ordinary civil court is concerned, however, it may, for instance, have to apply its sources in the prescribed order and thus prefer local statute to general international law, as the Court of Session conceived itself bound to do in *Mortensen v. Peters*,⁸ with the result that it upheld the imposition of a penalty

¹ See p. 41 above.

² Cf. Parry, *Nationality and Citizenship Laws of the Commonwealth* (1957), pp. 127-8.

³ Thus the English courts did not resort to a 'piercing of the veil' and held that an enemy-controlled corporation could be regarded as an enemy until the decision in *Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd.* [1916] 2 A.C. 307. But the executive Government had some time previously adopted as their practice the rule that British interests in a corporation must preponderate before the right of protection would be exercised on its behalf. See *British Digest of International Law* (1965), vol. 5, pp. 514-23.

⁴ Particularly in relation to the effect of such transfer on nationality, see Parry, *op. cit.*, especially ch. 12.

⁵ It is an odd fact that Lord Stowell, in his judgment in *The Hoop* (1799) 1 C.Rob. 196, wherein he laid down the doctrine that when the Crown is at war the whole nation is at war, and therefore trading with the enemy is prohibited, found it necessary to bolster up the doctrine that contracts across the line of war are void with the argument that, because of the enemy's lack of *persona standi in judicio*, they could not be enforced in any court! Whether the judicial view that 'the whole nation is embarked in one bottom' antedates a similar executive view is difficult to discern. But at any rate some divergence of view is observable.

⁶ *The Elsebe* (1804) 5 C.Rob. 174; *The Recovery* (1807) 6 C.Rob. 341; *The Odessa* [1915] P. 52; *The Zamora* [1916] 2 A.C. 77.

⁷ *Commentaries on American Law*, vol. I, p. 70, quoted in Schwarzenberger, *International Law* (3 ed., 1957), vol. I, pp. 32-3.

⁸ 1906 14 S.L.R. 227.

THE REMAINING SOURCES

on foreign fishermen for fishing in an area which formed part of the high seas. Or again, it may be compelled to prefer binding precedents, which possibly accounts for the fact that English courts give a wider scope than international law strictly requires to the doctrine of the immunity of one State from the process of the courts of others.¹ Or certain factors material to the assessment of the State's obligations under international law, such as treaties, may be outside the categories of sources the court may rely on.²

Yet other circumstances which are held to impair the objectivity of decisions of municipal courts do not necessarily tend to any divergence between their views and those of the executive, but rather the reverse. Among these are the existence of such rules as that the courts must or will accept as irrebuttable the certificate of the executive as to situations of fact—whether a particular person has the status of a foreign diplomatic envoy, whether a foreign State or Government is recognized, whether a state of war exists, whether a particular place falls within the territory of a State, and so on.³ The incidence of a doctrine that Acts of State so-called are judicially unexaminable has also to be taken into account here.⁴

It is nevertheless a possible view that these various qualifications upon the freedom of municipal courts to apply international law as would an international court have received too much attention. They have been particularly explored in relation to the common law jurisdictions. But they seem to exist less generally than might be thought. And in any case they would seem to be capable of plotting as it were; in other words, if the jurisprudence of each country were examined in the light of the exact conditions under which it is framed, a much clearer idea of its objective value could be framed.

The compilers of the collections of national decisions have been singularly cautious in their claims as to the status of what it is they collect. Thus those responsible for the *Fontes Juris* series said no more than that their collection would provide a basis for the discussion of the question.⁵ And the principal editor of the *Annual*

¹ Oppenheim, *International Law* (8 ed., 1955), vol. I, p. 273 n. 4.

² As in the United Kingdom, cf. *ibid.*, p. 40.

³ Cf. *ibid.*, pp. 765–6.

⁴ Cf. *ibid.*, p. 336n.

⁵ 'And if the undertaking includes the decisions of the highest courts of the individual states, this does not mean that an opinion is hereby expressed to the effect that the decisions of municipal courts contain principles of international law. These publications on the contrary are intended to procure a reliable survey of the decisions . . . in order that the question may be investigated . . . ' *Fontes Juris Gentium*, Series A, Section I, Tomus I, Preface, p. xxii.

Digest waited until the appearance of his sixth volume before venturing even thus far:

Like its predecessors, the present volume includes digests of decisions which are concerned with the interpretation of municipal statutes on matters bearing upon international law. . . . A municipal statute and the way in which it is interpreted in a specific case do not, of course, constitute in themselves a direct source or an authoritative illustration of international law. . . . At the same time, however, such cases are clearly of interest in showing how international law is understood and applied by various countries and how far there exists a uniform national practice. . . . As such they are of importance for ascertaining whether and to what extent any particular question is, in the language of Article 38 of the Statute . . . , governed by one of 'the general principles of law recognized by civilized nations'. And there may be room for the view that, to use again the language of Article 38 of the Statute, they are evidence of that 'general practice accepted as law' which constitutes international custom.¹

This modest attempt to relate municipal decisions to Article 38 or the Statute—and not, be it noted to the mention of 'judicial decisions' therein but to those of general principles of law and of custom—is made with respect only to decisions upon municipal statutes reflecting international law. No explanation is offered, here or elsewhere, of the standing of municipal decisions purporting to apply either customary international law or the provisions of treaties directly.

The International Law Commission, however, has given, as has been briefly said, some attention to this question. The point fell to be discussed because of its mention, in a manner which seems almost to pre-judge the issue, in Article 24 of the Commission's Statute. That Article, as has been seen, directed the Commission to consider ways and means of making the evidence of customary international law more readily available: 'Such as the collection and publication of documents concerning State practice and the decisions of national and international courts on questions of international law.' In his working paper on the matter Judge Hudson, the Chairman of the Commission, observed that this wording 'seems to depart from the classification in Article 38 of the Statute of the Court, by including reports of judicial decisions . . . among the evidence of customary international law'. But he considered that the departure might 'be defended logically . . . , for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary law. Moreover, the practice of a State may be indicated by the decisions of its national courts'.

¹ *Annual Digest of Public International Law Cases*, 1931-2, p. ix.

THE REMAINING SOURCES

Developing this point, he said further that the text of the Commission's Statute seemed 'to set off national court decisions from State practice', and thus to adopt a view which the Commission might wish itself either to affirm or to deny. In his opinion national courts applied national law, so that their decisions 'on questions of international law' were based on the latter system only to the extent that it might be incorporated into national law, a process which was necessarily limited and which involved at most the incorporation of 'the national view of international law'. The Commission adopted this view *in toto*, together with the conclusion 'that the decisions of the national courts of a State are of value as evidence of the State's practice, even if they do not otherwise serve as evidence of customary international law'.¹

This negative conclusion neglects the question of the application to national decisions of the distinction between a decision and an opinion. Indeed the Commission thought it 'unnecessary to assess the relative value of national court decisions as compared with other types of evidence of customary international law'—other elements of the practice of States, that is. It may be suspected that it neglects a great deal more than that.

What, in fact, lies at the bottom of the relegation of national decisions to the status of an element of the practice of the States whence they emanate is an unconscious assumption that the State is a unity. This view has been criticized already in the context of the question whether the executive of a State necessarily shares the view of international law entertained by the courts of that State. Looking at the whole matter now somewhat more widely, must we not recognize that the conception of the international community as made up exclusively of executive governments of States represents an oversimplification? States consist not only in executive governments but in communities and territory as well. And it is today denied that the international community consists exclusively of States: organizations are indeed strident in their claims to consideration as well. But even when attention is confined to States, which, one must never cease to emphasize, are the primary category of international organs and international persons, it will not suffice to consider them solely in their executive role.

The maxim that 'the State may speak with only one voice in international law' may conjure up a vision of the ideal State in which the Head is an all-powerful and all-wise Solomon in whom all the

¹ *Yearbook of the International Law Commission*, 1950, vol. II, pp. 25, 28, 368.

powers of government are combined. The importation into the international sphere of the doctrine of the separation of powers may, too, lead to a good deal of misconception. It may thus lead to an overvaluation of the capacities of the international judicature, which could only be regarded as in any way comparable to those of a national judicature if a basis of universal compulsory jurisdiction existed. It may lead also to a hasty assimilation of the functions of international organizations to those of legislatures, an assimilation which ignores that States, members of organizations, largely regard their foundations and their operations as resting essentially upon contract rather than on law. It is not, however, to be denied that the doctrine of the separation of powers represents a fundamental principle of organization within the State and always has done so during the period in which modern international law has existed.

International law, as has been pointed out, had perforce to accept the State—rather like the lady who accepted the universe. It also accepted, it may be averred, the triple-headed character of the State—its division into legislative, executive and judicial functions. As has again been pointed out, the division between legislature and executive is not commonly so marked as the division which marks off the system of judicature from those two branches. Whether legislatures control executives or executives control legislatures in practice is an open question. Their intimate association with each other, however, excludes the possibility of their separation making much impact upon the international legal system—though it may be suspected that there are in fact more problems in this area than meet the eye immediately.

The greater degree of separation of the judicial function, however, both does and does not give rise to greater problems. That is to say, it creates greater problems in that those rules of international law which exist to regulate and control the relations between States in their executive aspect very often obviously will not apply as between them in their judicial aspect. But at the same time the system for the reconciliation of local laws and local judicial jurisdictions with one another, which is older than the pattern of territorial States and still frequently fails to coincide with that pattern, is so well worked out and works on the whole so smoothly that it neither does break down nor is very often recognized to be capable of doing so. I have raised earlier the question why the books on international law say nothing of the limits of national civil jurisdiction when they commonly deal with questions of criminal jurisdiction. And the explanation is that

the rules respecting the exercise of civil jurisdiction, though they are diverse, have enjoyed a harmony since Roman times.¹ A similar harmony is observable in various areas of substantive law. States, by which we mean here primarily the courts of States, do not proceed from the basis of exclusive sovereignty in these areas. It is not in general necessary, when leaving one sovereign territory for another, to prove one is a corporation, or that one is married, or that one has title to one's possessions in terms of the law of the territory to which one goes. That State, or in other words its courts and its legal system, will be utterly content that these matters shall be judged of in practice, whatever the fashionable theory, according to the law and institutions of the State whence one comes.

This truth can be expressed in several ways. It can be said that the ancient *jus gentium* still persists in large measure, and that so-called modern international law is called into play only when it breaks down. Thus we may say that international law developed no rules about nationality until States resorted to different and colliding principles for the attribution of nationality. Or it can be said that the harmony observable is really dependent upon the principle of the exclusiveness and parity of States: they do not really allow foreign law and foreign rights to be imported with the stranger but, of their own power and motion and in their magnanimity attribute, in accordance with their own institutions, exactly equivalent local status to him.

But there is another and perhaps a more realistic way of looking at the situation: that the rather different pattern of jurisdictions or 'law districts' forms the basis of the international community no less than the pattern of territorial executive competence. We must take account of two systems of sub-division of the world, not one. Admittedly, the State, as more normally conceived of in its role as a legislative-executive complex, can interfere with this secondary pattern. The latter, however, is secondary only in the sense that it is susceptible to such interference; historically, it is the older pattern. Or, to put the whole matter in a slightly different way: the manner in which curial jurisdiction and the inter-action of the several 'municipal' or 'internal' legal systems shall be regulated is determined or

¹ See Parry, *op. cit.*, p. 20 n.18. Judge Fitzmaurice regards the unconcern of public international law with the limits of civil jurisdiction as more apparent than real, and its concern therewith as masked, firstly, by the fact that the danger in this area is that States will assume too little rather than too much jurisdiction, and, secondly, by the harmony in the matter which has been alluded to: 'The General Principles of International Law considered from the Standpoint of the Rule of Law', *Recueil des Cours*, XCII (1957), pp. 5, 219-20.

capable of determination according to the rules which apply as between States considered as sovereign entities. But, subject to such determination as is made in this way, the resultant pattern, which may not and does not in practice coincide with what a strict notion of sovereignty would lead us to expect, is left to work itself out. This is the result of a tacit bargain not unlike that which for centuries characterized the relations of Parliament and the courts and the law in England: the courts acknowledged the supremacy of Parliament and thus its power to make or change the law; but Parliament in practice refrained to a great extent from exercising its supremacy in this regard. Such an equilibrium is not of course eternal. In England it came to an end with the Benthamite reforms, first of Parliament, then of the law by Parliamentary means. The fact that it can be upset deprives it of formal validity. But such an equilibrium may nevertheless exist in fact.

If it does so exist the decisions of national courts must perhaps be regarded in a different light from that in which they have been looked at hitherto. Those of any particular jurisdiction constitute indeed the practice of that jurisdiction—as it were of the individual ‘judicial State’, much as acts of the executive constitute the practice of the executive State. But they constitute also the product of what is essentially a universal system and have in consequence a universal validity. They have an interpenetrating quality which the practice of the individual executive State frequently lacks. They are the grand repository not only of ‘the general principles of law’, not only of the *opinio juris* of States and of incidental observations upon the limits of the competence of the executive State in regard to such matters as the delimitation of territorial waters or the immunities of other States and their envoys, but of the whole body of rules governing those international legal relations which do not pass through the executive channel.

To say this is not to accept the notion of ‘transnational law’ and to confine in a manner its sphere to the sphere of activity of municipal courts. For that notion, I apprehend, embraces all international legal relations, including those of executive States. But to say it is to accept as being properly called international law something besides the rules governing the relations of executive States.

It involves, too, the thesis that the body of decisions of municipal courts which is relevant to international law is not confined to those which have to do only with what is now called ‘foreign relations law’—with the definition of territory, with nationality, with diplomatic

THE REMAINING SOURCES

immunities, and so forth. What comes in question has a much greater substantive content though, in another sense, it must all be adjective law. It should comprehend matters relating to the limits of civil no less than criminal jurisdiction, or personal status generally no less than nationality, and of the recognition of foreign judgments no less than that of foreign acts of State.

Nor are the organs of exposition of this kind of international law confined to municipal courts proper. They include quasi-international or supra-national institutions, such as the courts of the Coal and Steel Community and the European Court of Human Rights, to say nothing of the former mixed arbitral tribunals. They may include also the tribunals of international organizations. This is not to say that all decisions of those tribunals, any more than all decisions of municipal courts proper, are relevant, still less that the internal law of international organizations deserves the title of international law in any but a figurative sense. To take up an expression which has been abandoned and to give it a particular application, what is material is still only 'foreign relations law', in the sense of the law of the relations not only of different sovereign executives but of that, in addition, of the relations of different jurisdictions.

The teaching of publicists

In the Court's Statute 'the teachings of the most highly qualified publicists' are assigned the same subsidiary status, whatever that may be, as judicial decisions. Upon a long view, there would seem to be no legal order wherein the publicist—a peculiar term—has played a greater part than international law. Grotius is the father of the law of nations. And we have noticed already how, at the beginning of the last century, all States seemed to rely heavily on Vattel. Indeed both the books and the opinions of the nineteenth century seem often to resemble catalogues of the praises of famous men. 'Hear also what Hall sayeth. Hear the comfortable words of Oppenheim' is an incantation which persists even into this century.

The credit is to be given to Judge Jessup¹ for finding a truly devastating example of the opposite point of view: that of the Court of Admiralty, expressed in the case of *The Renard*² in 1778. It deserves to be quoted more fully than Judge Jessup quotes it. The question was how long a prize must be in the captor's hands for the original property in her to be divested. Opposing counsel offered opposing opinions of Grotius and Bynkershoek. And the Court 'observed that

¹ *Transnational Law* (1956), p. 11.

² Hay & M. 222.

there was something ridiculous in the decisive way each lawyer, as quoted, had given his opinion. Grotius might as well have laid down, for a rule, twelve hours, as twenty-four; or forty-eight, as twelve. A pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him. The usage is plainly as arbitrary as it is uncertain; and who shall decide, when doctors disagree? Bynkershoek, as is natural to every writer or speaker who comes after another, is delighted to contradict Grotius . . .'

It is difficult not to see truth as well as humour in this. And it is also no doubt true that, as the body of judicial decisions increases, the authority of the commentator is diminished. The quality of actuality which a decision, we have seen, possesses as compared with an opinion, plays its part here. Kent's contrast of the 'intrinsic argument, more full and precise details, more accurate illustrations' in municipal decisions with the 'loose diction of elementary writers'¹ was thus justified.

Perhaps it is necessary to place emphasis on the use of the word 'elementary' in this evaluation. It is to be recalled that, during the last century and even well into this, writers nearly always attempted to deal with the whole law of nations. The day of the single-handed treatise which pretends to cover the whole field in anything but the most frankly elementary fashion is now gone by, Hyde's work, which first appeared in 1922 being the last American work of this character and Oppenheim's, appearing in 1905, the last English work. It is significant, too, that the only such treatise which continues to be kept up to date in the English language is Oppenheim. We have passed out of the age of the institutional writer into that of the specialist monograph. The law of nations has become too big to be compassed in a single work. We have, as it were, reached the end of the age of the Abridgments.² The literature of international law, to which the majority of the World Court at least pays scant lip-service, possesses evident defects. One of the most frequent charges brought against it is that it displays a great deal of national bias. The charge is probably exaggerated. The fact is that international lawyers are inevitably

¹ *Commentaries on American Law*, vol. I, p. 70, quoted in Schwarzenberger, *International Law* (3 ed., 1955), vol. I, p. 33.

² At least this is true of the English-speaking world. The single-handed comprehensive textbook is still a feature of Continental literature. For a list of the principal treatises up to the date of that work, see Oppenheim, *International Law* (8 ed., 1955), vol. I, pp. 99-105. Mr. W. A. P. Steiner, of the Squire Law Library, Cambridge, has kindly provided me with an additional list of general treatises in French, German and Italian (see Appendix II).

municipal lawyers first of all. The law, furthermore, is inevitably a somewhat conservative training. The writers of one country thus reflect their national legal tradition and technique rather than any national political viewpoint. But it is exceedingly strange that, in the long history of the literature of international law, that literature has remained so essentially national. Under the auspices of the Carnegie Endowment there is now in preparation an elementary textbook which is to be contributed to by writers of different countries and which, when it is completed, is to represent their combined rather than their collected views. The sponsors of this venture are much to be congratulated upon their scheme, which appears to be wholly without precedent.

Another criticism which it is easy to make of the literature of the past and which must to some extent be valid when applied to current literature, is that it is unduly theoretical, insufficiently practical, and prone to over-simplification. Many causes combine no doubt to produce this result. In the first place, there is the question of the market. Even yet there can scarcely be said to be an international legal profession and in the nature of things it can never be very large. Thus there is scarcely room for the 'practitioner's book'—the Chitty on Contracts as opposed to the Anson on Contracts. The discipline of the law of nations must indeed have starved had not the universities adopted it and supported its principal exponents. One result of this is that the literature is necessarily aimed primarily at the student. Maine, Westlake, Lawrence, Hyde, Holland, Smith, Fauchille, Lorimer, Borchard, Triepel—they were all professors, to speak not at all of the living. But there has been more to it than the fact that practically the only way to make a living as 'an international lawyer' has been to teach the subject, and that the only market for the writings of even the most highly qualified publicists has been the academic market.

One of the most striking things about international law as it appears to a ministry of foreign affairs is how different it is from the law of the books. To a less extent there is similar difference between the law as expounded by, and to, international tribunals and the law of the books. This is especially striking if one examines the position as it was in the latter half of the nineteenth century. For the literature of that period is by and large indeed elementary and often most repetitive. Yet that was the period, we now find, when the privileged category of officials was at its most learned. One has only to compare Moore's or Wharton's *Digests* with the unofficial

literature of the United States in their time to see the difference at once. The same comparison can be made between the majority of the English writers and what the revelation of their opinions discloses the stature of the Law Officers of the Crown of that time to have been. Occasionally one finds exceptions which, however, but prove the rule. There are thus indications in the writings of Hall and of Phillimore—the latter of course most certainly a man of affairs—of a firm grasp and sure feel.

The explanation of all this must be that the writers have not very often had enough to go on or enough practical experience, whilst those who have had the materials and the practical experience have seldom written. Perhaps the limited literary market and the fact that international lawyers are first trained as municipal lawyers have played their parts here too. And perhaps linguistic difficulties have entered in also. There can unquestionably be little incentive to produce a very technical monograph if a publisher can scarcely be induced to take it because it is of no use to students. And here we must remember the very great services which the publishers have rendered to the discipline in very recent years, services often as valuable as those of the publicists themselves.

It is, too, to be acknowledged that even published State papers have been an unfamiliar category of material for lawyers. They are perhaps to be blamed less for failure to exploit sooner the riches of unpublished archives. For the historians were scarcely less tardy: modern diplomatic history based on original materials is a very new discipline, scarcely half a century old. It is now difficult to realize what a sensation was caused by the discovery, the credit for which belongs to the late Judge Sir Hersch Lauterpacht, of the existence of the English Law Officers' opinions. And it is now only amusing to note how the late Dr. H. A. Smith, who was the first to exploit that rich vein,¹ overlooked very largely the at least commensurate wealth of the Blue Books, as a study of the *Fontes Juris Digest of Diplomatic Correspondence*² must show that he did.

All this, however, is in the past now. A comparison of the volumes of the *British Year Book of International Law* appearing after the Second World War with those which appeared before will show most eloquently how rapid the professionalization of the literature has been and how high a standard of technical detail and practical grasp has now been attained. Indeed one is tempted to suspect that in

¹ Smith, *Great Britain and the Law of Nations*, vol. I (1932), vol. II (1935).

² See p. 67 above.

some areas the former imbalance between those who were permitted to know and those who were impelled to write has been not merely redressed but reversed. Certainly some official publications today are markedly inferior to those which private enterprise contrives to produce.¹

Avoiding studiously all mention of the living, one cannot forbear to point out that this change has, in the English-speaking world, followed largely from the devotion of a very few. It would be wrong indeed not to allude to the very great influence of, besides Moore, two others who, though primarily teachers, as it happens both followed him as Judges of the World Court: Manley Hudson and Hersch Lauterpacht. For Hudson's organization of the *Harvard Research*, his rescue operation which saved the *League of Nations Treaty Series* from extinction, and his *International Legislation* represented indirect or direct contributions to the professionalization of the literature of a very high order. Equally, Lauterpacht's own four monographs, his editions of *Oppenheim*, his editorship of the *British Year Book of International Law* and his main part in the production of what are now the *International Law Reports* place him among the immortals.

It would not be difficult, moreover, to show how these writers, and others, have very directly influenced the law. It is easier and perhaps less indiscreet to do this with a slightly earlier generation. Borchard's book, *The Diplomatic Protection of Citizens Abroad*, published in 1916, comes first to the mind in this connection. For anyone who has examined the details of State practice in the matter of the protection of nationals cannot fail to be impressed at the extent of the literary contribution to this topic. Here in especial is a law-book subject now generally viewed according to the system and arrangement the writers have endowed it with, previously singularly formless and inchoate. There are other such topics, too. State succession is one.²

To deny to the literature the title of a source of international law is thus simply not possible. It does not appear whether it was Sir George Hay or Sir James Marriott who, so long ago, dismissed Grotius as a pedant whom everybody quoted and nobody minded.

¹ For a list of the periodicals of international law, not wholly up to date, see Oppenheim, *International Law* (8 ed., 1955), vol. I, pp. 113-14.

² It would be both impossible and invidious to give here a list of the principal monographs on particular aspects of international law which have appeared in the single State of the United Kingdom during the past thirty years. A study of the catalogue of Messrs. Stevens & Sons Ltd., whose services to international legal literature are eminent, can, however, be most rewarding.

THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW

One suspects, however, that there are today writers whom everybody minds and nobody quotes by name. But, as has been rightly said, it is as difficult to decide who 'the most highly qualified publicists' are as it is to say what is a peace-loving nation within the meaning of the Charter of the United Nations.

It is also possible to point still to certain defects in the literature of international law. One which affects the English-language literature particularly is a failure to take sufficient account of sources in other languages. There are notable exceptions to this tendency and a certain excuse is afforded for it by the advance of English to the status of the language, if not of diplomacy then nevertheless effectively of international organization. There is no doubt, however, that the tendency is there and that it has demerits.

In the second place, it is hazarded that contemporary writers are a little too prone, in their reasonable anxiety to be practical, to follow fashion and to proliferate footnotes. Again with notable exceptions, they write, for instance, too much about international organizations and tell us too often in very small print what the Ruritanian delegate said in the 75th meeting of the Plenary. This is not the main work which still remains to be done.¹

¹ As to the question of the status of the teachings of publicists as an element in the practice of States—as evidence of the *opinio juris*, see p. 76 above.

Chapter V

CONCLUSION

Matters which Article 38 omits

IF the term sources be employed in its widest sense, it becomes obvious upon the conclusion of a survey of the stipulations of Article 38 that that Article does not exhaust them all. It thus does not refer, or at least by those names, to either natural law or equity. But these belong to the category of material rather than formal sources and we need not, therefore, treat of them. A final word, however, is appropriate on the question of international organizations.

The practice and pronouncements of organs of international organizations

Article 38 of the Statute of the Court is silent altogether concerning the activities of international organizations. Yet the draftsmen must have been aware of such activities since they were themselves an Advisory Committee set up by resolution of the Council of the League of Nations in direct pursuance of a provision of the Covenant. They had before them, moreover, such things as the unratified Hague Convention XII, contemplating the setting up of an International Prize Court, a proposal indeed wrecked upon the rock of disagreement as to what law the Court should apply. Yet the effort to find such a law had resulted in the drafting of the Declaration of London which, though also unratified, had actually been applied by the principal belligerents in the first months of the First World War.

The explanation of the ignoring both of international organizations and of the products of international conferences amounting to something less than formally ratified treaties is a mixed one. In the first place, the position assigned to the projected World Court in the League scheme implied a fairly clear distinction between the legal settlement of disputes, which was a matter for the Court, and political settlement, which was for the Council or Assembly. As a consequence it was not unnatural to think of the whole business of the organs of the League as extra-legal. In the words of Lord Phillimore: 'The Council is the body which must give satisfaction in cases

which cannot be dealt with according to law.' But, in the second place, the thinking of the Committee was dominated by a somewhat rigid conception of 'international legislation'. Lord Phillimore said also, that where the Court was faced by a dispute not covered by existing law, as an alternative to its submission to the Council 'the Assembly may be asked to fill the gap by legislation'.¹ But this has to be understood in the light of the tradition of the international conference, out of which the international organization grew, and of such doctrines as that propounded by the British official commentary on the Covenant that: 'At the present stage of national feeling, sovereign States will not consent to be bound by legislation voted by a majority, even by an overwhelming majority, of their fellows.' What the Assembly might decide, that is to say, demanded unanimity, just as the traditional diplomacy of the Concert and Congress required that, however much the terms of what was to be agreed upon were influenced by Great Power pressure, the Final Act embodying them should be signed and ratified by every State, including those whose rights were disposed of.² In short, legislation so-called by the Assembly meant nothing else than treaties, and treaties were already mentioned in Article 38.

In its life the League of Nations of course had much, unexpectedly much, to do with international law. And to some extent, by the technique of abstention, it got away from the unanimity rule. But, as it was complained, 'the League is they, not it': the League partook essentially of the character of a continuing conference of States. And if we must seek in the activities of organizations the seeds of legislation by a majority we must look to organizations other than the League. Much energy was indeed devoted to such a search or to the advocacy of the institution of an international legislature.

This prevailing approach is still reflected in the text of the Charter of the United Nations and that document was at first discussed largely in the light of the question whether it did or did not create a 'stronger' League or a 'true' international legislature.³ The confiding of primary responsibility for peace and security to the Security Council, acting by majority vote, gave ground for taking the affirmative view. The veto provision on the other hand, and the use or

¹ *Procès-verbal of the Proceedings of the Advisory Committee of Jurists*, pp. 316-20.

² Cf. Tammes, 'Decisions of International Organs as a source of International Law', *Recueil des Cours*, XCIV (1958), pp. 265, 270-3.

³ Cf. Brierly, 'Covenant and Charter', *British Year Book of International Law*, XXIII (1946), p. 83.

CONCLUSION

misuse made of it, pointed in the opposite direction. It looked for a time as if the negative view must prevail. In a sense it has. But though the United Nations has not revealed itself to be an international legislature in the expected sense, it has unexpectedly come to have a great and growing influence upon international law, so that certain of its operations obviously constitute an important source of that law.

It is not to be ignored in this connection that, in spite of its first setbacks, the United Nations has still contrived to be an 'it' rather than a 'they' to a greater extent than the League ever did. It has thus contrived to establish its international personality and to escape from the very odd objection levelled against the League that it could not be a State. And the General Assembly, stepping into the gap left by an impotent Security Council, under the leadership, largely, of a Secretariat with a will of its own, has so reinvigorated the procedures of collective action that we have finally been presented with such remarkable spectacles as, for instance, a United Nations 'presence' in the Congo. Thus the United Nations has become an organ of the international community, distinct from its members, with its own contribution to make to the practice of the organs of that community.

But it is more especially in other directions that the United Nations has come to have an impact upon international law. Time has in fact had a bizarre and gratifying revenge upon the framers of the Charter. They conceived, as it were, what was essentially a police organization, to be guided by principles of expediency in the essential task of preserving peace, rather than by principles of law and justice. Even the solitary mention of international law in the Charter other than in Article 13, the statement in Article 1 that a purpose of the organization is to bring about by peaceful means, 'and in conformity with the principles of justice and international law' the adjustment of disputes, is understood to have had no place in the original draft and to have been inserted only at the insistence of China! And marks of a disregard of, even a contempt for, law are observable throughout the text. Thus Article 2(6) represents a very questionable attempt to infringe the old doctrine that *pacta tertiis nec nocent nec prosunt*. Paragraph (7) of the same Article, the celebrated exception of domestic jurisdiction, stands in strong contrast to Article 15(8) of the Covenant, which made the determination of the extent of domestic jurisdiction a question of law and not, as it is under the Charter, one of argument. Chapter VII, moreover, made the question of

whether there ever is a breach of the peace—in other words a war—or an act of aggression, a matter for the determination by the Security Council—so that when that body passes over in silence such an event as the invasion of Goa, we are presumably to take it that there has been no breach of the peace.

The Charter did indeed constitute the World Court a principal organ of the United Nations itself—with the result that, technically, the practice of the Court is comprehended within that of the organization. It also gave to the General Assembly, as we have seen, by Article 13, the task of initiating studies and making recommendations for the purpose, *inter alia*, of promoting the progressive development and codification of international law. In the discharge of that task the Assembly has established the Commission. But this, on the bare text of the Charter, might have meant anything or nothing. As respects the Court, owing to the omission to provide further for a compulsory jurisdiction, it has not meant very much more than existed before, in the time of the League. What has happened with the Commission, it may be hazarded, has happened in large measure as a result of a grander metamorphosis, and should be considered in that context.

The Charter, though it departed from the vision of a law-governed society enshrined in the Covenant in the sense that it seemingly put a supreme value on peace at any price, followed the earlier scheme in distinguishing between legal and other disputes. But, though it did away with the unanimity rule, it made no attempt to invest the General Assembly with legislative power. The General Assembly was in fact placed at the head of the list of the principal organs of the organization. In view, however, of the emphasis later placed on the Security Council, which gave the impression of confining the role of the General Assembly to that of a body of restricted competence instead of a body co-ordinate with the Council such as the League Assembly had been, this appeared to be mere lip-service on the part of the Great Powers to the doctrine of the equality of States.

But as Professor P. B. Potter most acutely commented in this connection, many a true word is spoken in jest.¹ And the remarkable influence of the United Nations has come largely from the dexterous exploitation of the General Assembly. Thus in the political sphere that body has to a great extent arrogated to itself the functions the Security Council, because of the veto, was found unable to discharge,

¹ Potter, *An Introduction to the Study of International Organization* (5 ed., 1948), p. 261.

CONCLUSION

and has saved the United Nations from going down to defeat as an 'it', in contrast to a 'they', which proved to have no unified will. Of course all this has been 'contrary to the spirit of the Charter', even, in the view of some, 'illegal'. And because of the strict terms of the Charter, it has had to be achieved by indirection, by, if we like to put it thus, moral persuasion rather than legal power.

What has really happened is that the essential nature of relations between States, in which there is no sharp division between legal and political obligation, has asserted itself within the United Nations. Those who rely on it and those who study it have abandoned the somewhat restricted categories of thought which have for so long dominated questions of international organization. We have ceased to look for a 'super-State' or for an international 'legislature' and are content that the United Nations should be 'they' rather than 'it'. But we have caused, or something has caused, a rather larger proportion of the world's diplomatic business to be conducted, in whole or in part, within the General Assembly than was expected. No doubt a concatenation of influences has been at work here. We live in very disturbed times. If there is scarcely an area whose affairs have not been at one time or another under review in the General Assembly, this is but evidence that fire is nowadays liable to break out everywhere—a circumstance to which, in turn, technological progress plainly contributes. We live in an age which has witnessed an extraordinary growth in the numbers of States and many of the newcomers obviously find the company of their fellows in the world's forum a source of strength which would be unavailable to them in the lonelier processes of bilateral negotiation.

If these are the facts, it would appear clear that the most important aspect of the United Nations is that of a continuing conference of States. And if so, when it comes to assessing its proceedings as a source of international law there is no need to attempt to force the whole operation into the shape of a function of a treaty, or even to ponder particularly upon the 'binding force' of resolutions of the General Assembly or of any other international body. All falls very adequately into place as part of the practice of States. Sometimes that practice results in the conclusion of treaties: of agreements intended to affect legal relations. Sometimes, more often indeed, it does not, but produces political agreements, still intended to be binding but lacking any strict legal content, or simply expressions of view.¹

¹ Cf. p. 49 above.

Reverting now to the Commission, we have seen that its drafts, even when accorded the least authoritative form of expression available, represent the teachings of the most highly qualified publicists.¹ If that were all, it would not, however, serve to secure them much attention from, for instance, the Court, which, as again has been seen, accords little overt respect to such teachings. But the work of the Commission, it is to be observed, even when considered only as work in draft or work in progress, has two features which the writings of publicists normally lack.

In the first place, it has an international quality about it. It represents the work of persons with many national viewpoints rather than one. It is thus not open to the objection which can be levelled against the literature of international law in general: that it is really national rather than international literature. Admittedly the method of work which the Commission has chosen to follow generally, that of appointing individual rapporteurs for the various topics with which it has to deal, puts some individual stamp on its productions. The first drafts of individual members of the Commission are, however, usually submitted to very minute examination by their colleagues, as the records of the proceedings sufficiently show, and are frequently modified as a result.

Secondly, though the Commission is composed of scientifically qualified persons, they are not pedants in a closet. On the contrary, their political role is almost paramount. As Professor Jennings has well said, they represent 'a confrontation on the scientific plane of the varied interests of different States'.² The Commission and the Sixth Committee to which it reports have, moreover, at least in the past, been inter-penetrating bodies. There is perhaps something to provoke a smile in the circumstance that the expressions of warmest approval of the work of the Commission uttered in the Committee emanate so very often from persons who are also members of the Commission. But, even if it is a little unrealistic to explain this away by saying that views expressed in the Committee are views of Governments and not of individuals, it must be recognized that the actual state of things imparts a reality to the proceedings of the Commission which they would not otherwise have.

Because of the quasi-political character of the Commission, or

¹ See pp. 23-4 above.

² Jennings, 'Recent Developments in the International Law Commission; Its Relation to the Sources of International Law', *International and Comparative Law Quarterly*, XIII (1964), pp. 385, 390.

CONCLUSION

what it might be better to call its quasi-diplomatic character, there is less of a distinction between its influence and that of the strictly political organs of the United Nations, or of other international organizations, than might have been expected at the outset. The Commission's business, concededly, is 'international law'. But that proves in a loose sense at least to be the business also of other organs and other organizations.

That this is the case is admirably demonstrated in Mrs. Higgins' recent study of the development of international law through the political organs of the United Nations.¹ What is required now is a similar study of other organizations. In this connection attention may be drawn in especial to the Universal Postal Union, the proceedings of whose Congresses are a veritable mine of information on general international law despite the pathetic cry of the delegates thereto that 'Nous ne sommes que postiers'.²

¹ Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

² Cf. Parry in *British Year Book of International Law*, XXV (1948), pp. 457-72.

Appendix I

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;
 - 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.

* I.e. to the provision that 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

Appendix II

RECENT GENERAL TREATISES IN FRENCH, GERMAN AND ITALIAN¹

French:

- BASTID, S., *Droit des gens* (1954).
 CAVARÉ, L., *Le droit international public positif* (2 ed., 1961-2), 2 vols.
 COLLIARD, C. A., *Les institutions internationales* (1956).
 DELBEZ, L., *Manuel de droit international public* (2 ed., 1951).
Juris-Classeur de Droit International (Paris) loose-leaf, 5 vols.
 LA PRADELLE, P. DE, *Cours de droit international public* (1955).
 PINTO, R., *Institutions internationales* (1956).
 REUTER, P., *Droit international public* (1958).
 — *Institutions internationales* (1955).
 ROUSSEAU, C., *Droit international public* (1953).
 — *Droit international public approfondi* (2 ed., 1961).
 VISSCHER, C. DE, *Théories et réalités en droit international public* (3 ed., 1960).

German:

- BERBER, F., *Lehrbuch des Völkerrechts* (1960-2), 2 vols.
 DAHM, G., *Völkerrecht* (1958-61), 3 vols.
 HEYDTE, F. A. VON DER, *Völkerrecht: ein Lehrbuch* (1958-60), 2 vols.
 MENZEL, E., *Völkerrecht* (1962).
 SAUER, E., *Grundlehre des Völkerrechts* (3 ed., 1955).
 SAUER, W., *System des Völkerrechts* (1952).
 VERDROSS, A., *Völkerrecht* (4 ed., 1959).
 WENGLER, W., *Völkerrecht* (1964), 2 vols.

Italian:

- ANZILOTTI, D., *Corso di diritto internazionale* (4 ed., 1955), vol. I.
 BALLADORE BALLIERI, G., *Diritto internazionale pubblico* (8 ed., 1962).
 CANSACCHI, G. P., *Istituzioni di diritto internazionale pubblico* (2 ed., 1960).
 MIELE, M., *Principi di diritto internazionale* (2 ed., 1960).
 MONACO, R., *Manuale di diritto internazionale pubblico* (1960).
 MORELLI, G., *Nozioni di diritto internazionale* (5 ed., 1958).
 OTTOLENGHI, G., *Corso di diritto internazionale pubblico* (1956).
 PERASSI, T., *Lezioni di diritto internazionale* (1962).
 QUADRI, R., *Diritto internazionale pubblico* (4 ed., 1963).
 SERENI, A. P., *Diritto internazionale* (1956-62), 3 vols. in 4.

¹ See p. 104 n. 2.

INDEX

- Act of Settlement, 37
- Acts of Parliament
 - application by courts, 6
 - as sources of law, 3
- Acts of State, judicial examination of, 97
- Admiralty, 77
- Agard, Arthur, 47
- agencies, law-creating and law-determining, 92
- aliens, law as to admission of, 64, 76
- Allen, Sir Carleton, 60f.
- alliance, treaties of, 55
- Alvarez, Judge, 90, 91
- Amery, Rt. Hon. L. S., 52
- archives, United Kingdom, 78
- Army Annual Acts, 38
- Asquith, Lord, 89
- Austria, Nazi invasion of, 66

- Balance of Power, 39
- basis, of international law, 2, 4
- Bastid, Suzanne, Mme., 72
- Baty, 8
- Bill of Rights, 37
- Blackstone, 61
- Borchard, 105, 107
- Brierly, 5, 20, 60n.
- Bynkershoek, 103f.

- Canadian appeals to Privy Council, 16
- Carnegie Endowment, 105
- cases:
 - Anglo-Iranian Oil Company Case, 41
 - Anglo-Norwegian Fisheries Case, 58, 61f., 90, 93, 94
 - Asylum Case, 58
 - Calvin's Case, 75
 - Chorzow Factory case, 84, 85, 86
 - Daimler Co. Ltd. v. Continental Tyre and Rubber Co. Ltd., 96n.
- Franconia, 76, 95
 - re Labrador Boundary, 25
 - Lena Gold Fields, 89
 - Lotus, 64n.
 - Minquiers and Ecrehos Case, 76
 - Mortensen v. Peters, 96
 - Petroleum Development Ltd. v. Sheikh of Abu Dhabi, 89
 - Polites v. Commonwealth and Another, 41
 - The Renard, 103
 - Rights of U.S. Nationals in Morocco, 58
 - S.W. Africa, 21, 43
 - Tricquet v. Bath, 75
 - Tunis and Morocco Nationality Decrees, 33
- cause:
 - of international law, 2
 - and source, differentiation, 2f.
- Chalmers, 47
- Cheng, Dr., 83, 84ff.
- civil jurisdiction, limits of, 100f.
- code systems of law, 35
- colonialism, U.N. Assembly resolution on, 22
- Commission on Human Rights, 26
- common law system, 35f.
 - and custom, 60f.
- Concert of Europe, 39
- conferences, resolutions of, 22
- Confidential Print, 79f.
- Congo, 111
- conscription, of foreign nationals, 41, 95
- consent, as basis of international law, 17
- Constitution, United States, 35
- Constitutions of Clarendon, 37
- continental shelf, 59
- contracts,
 - inter-State, 30
 - lay and legal attitude to, 50
 - treaties as, *see* treaties
- conventions, international, *see* treaties
- Corbett, Prof., 2, 4f., 56
- corporations, nationality of, 96
- Cottons, the, 47
- Council of Europe, 72
- custom,
 - as exception to general law, 61
 - general and special, 58f.
 - international, municipal law as evidence of, 10

INDEX

- Oppenheim's definition, 4
- treaties and, 53
- customary law, formation of new, 57f.
- Debrett, 47
- decisions,
 - judicial, as source of international law, 91ff.
 - of municipal courts, 13, 94f.
 - and opinions, distinction, 99
- Declaration of London, 109
- Denmark, British treaties with, 47
- Derby, 47
- Descamps, Baron, 83
- digests, national, 70ff.
- diplomatic conferences, U.N. and, 22
- diplomatic immunities, 57, 76
- England, law of, and international law, 26
- equilibrium, of parliament and courts, 102
- equity, 109
- Europe, origin of international law in relation to, 17, 18
- European Coal and Steel Community, 26, 103
- European Convention of Human Rights, 26
- European Court of Human Rights, 26, 105
- evidence, of international law, 2
- exceptions, to existing law, 59
- executive,
 - and judiciary, differences of view, 95f., 100
 - statements of fact, 97
- extradition,
 - law of, 76
 - treaties of, 55
- Extradition Act, 76
- Fauchille, 105
- Fawcett, Mr., 45, 49, 88
- federal states, relations of parts of, 25
- fifty-year rule, 69, 76
- Fitzmaurice, Judge, 6, 23, 53, 60n., 63, 93
- Fœdera*, Rymer, 47
- foreign nationals, States and entry of, 64
- Foreign Office Treaty Register, 48
- foreign relations law, 13, 102f.
- France, digest of practice, 72f.
- general principles of law, the, 83f.
- Geneva, General Act of, 32
- Geneva Conventions, 32
- Geneva U.N. Conferences, on law of the sea, 22
- good faith, treaties and, 46
- Grotius, Hugo, 16, 39, 103f., 108
- Habeas Corpus Act, 37
- Hague Convention XII, 109
- Hague Conventions on land warfare, 32
- Hall, 57, 65f., 103, 106
- Hardy, Sir T., 47
- Hay, Sir George, 107
- Herslets, the, 47f.
- Higgins, Mrs., 115
- history, legal, 38
- and general, 39
- Hitler, 66
- Holland, 105
- Holmes, 36
- Home Office, 77
- Hudson, Judge Manley, 62, 98, 107
- Human Rights, Commission on, 26
- human rights and U.N. Charter 64,
- Hyde, 104, 105
- inaction, as included in action, 64f.
- India Act, 37
- institutions, international, *see* organizations
- International Court of Justice, *see* World Court
- International Labour Organization, 24, 25
- international law,
 - application by municipal courts, 12f.
 - and municipal law, 10
 - new States and, 17
 - purpose of enquiry into sources, 7
- International Law Commission, 15, 23, 70, 98f., 112, 114f.
- International Law Reports*, 94
- Iran, 41f.
- Ireland, Republic of, 43
- Jenkinson, 47
- Jenks, Dr., 87f., 89
- Jennings, Prof. R. Y., 60n., 114
- Jessup, Judge, 103
- Johnson, Prof., 20, 21, 22, 91
- judges, and application of law, 6
- Judge Conservator, 44

INDEX

- Judicial Committee of Privy Council, 16
 judiciary, and executive, differences of
 view, 95f., 100
jus gentium,
 and *jus inter gentes*, 38
 persistence of, 101
- Kelsen, Prof., 6, 21, 43
 Kent, 46, 104
 Kiss, M. A. C., 72
 Klaestad, Judge, 21
- Lauterpacht, Judge Sir Hersch, 20, 21,
 46, 68, 106, 107
- law,
 agencies of application and of
 creation, distinction, 6
 general principles of, 83ff.
 law-creating and law-determining
 agencies, 92
 Lawrence, 105
 League of Nations, 109ff.
 Covenant, and treaties, 36f., 42f.
 legal advice, to States,
 as evidence of international law, 71
 early publication of, 69
 and internal law, 71
 in United Kingdom, 77f.
 method of formulation, 67
 legislation, international, 32, 110
 legislature, international, extent of
 competence, 8
- Libel Act, 37
 limitation rules, in international law, 43
 Liquor Treaty, Anglo-American, 55
 literature, sources of international law,
 1, 104ff.
 of defects in, 108
- Lorimer, 105
 Lushington, Dr., 76
- McLeod's Case, 65f.
 McNair, Lord, 87, 88, 89
 Magna Carta, 37
 Maine, Sir Henry, 12, 95, 105
 Makarov, Prof., 67
 Mann, Dr., 30, 88, 89
 Marriott, Sir James, 107
 Marshall, Chief Justice, 10
 Ministry of Transport, 77
 Moore, John Bassett, 2, 68, 105, 107
 municipal courts,
 application of international law,
 12f., 94
 recognition of judgments, 11
 values of collections of decisions, 13
- municipal law,
 jurisdiction of, 7
 relation to international law, 10ff.,
 31, 95ff.
 and treaties, 29f., 35
- nationalism, contemporary, 9
 nationality, plural, 96
 natural law, 109
 New Deal legislation, 16
 North Atlantic Treaty, 45
 notes, exchanges of, inter-State, 48
- opinions and decisions, distinction, 99
 Oppenheim, 2, 3, 12, 53, 57, 59, 103-104
 organizations, international, 9, 109ff.
 administrative tribunals of, 25f.
 and international law, 25
 and the practice of States, 70
 compared with legislatures, 100
 new, 15, 19
 and treaties, 30f.
- von Papen, 66
 Paris, Treaty of, 37, 39f.
 Parliament,
 and courts, relation in England, 102
 and evidence of State practice, 74
 see also Acts
Parliamentary Papers, 48
 parties, hearing of both, 86
 peace, treaties of, 54
 Permanent Court of International Jus-
 tice, *see* World Court
 personality, international, 24f.
 Philippine Islands, 43
 Phillimore, Lord, 83, 84, 106, 109f.
 Portugal, British treaties with, 47
 Potter, Prof. P. B., 20, 112
- practice,
 and custom, 56
 and departmental records, 81
 as evidence of custom, 2
 judicial decisions as evidence of, 71
 of organizations, 25
 Prof. Corbett's concepts, 4
 State, nature of, 14
- principle, legal, 7
 principles,
 general, of law, 83ff.
 and rules, 83
 Privy Council, and Canada appeals, 16

INDEX

- Prize Court, the proposed International, 109
- prize courts, 11, 96
- International, 109
- prize, law of, 76
- Provisions of Oxford, 37
- publicists, writings of, 5, 10, 14, 24, 103ff.
- Read, Judge, 62
- recognition, of governments, 65
- Reform Act, 37
- Root, 83
- Ross, Alf, Prof., 6, 7, 27
- Ruhr, Statute of the, 32
- rules, *see* principles
- Ryan, Sir Andrew, 55
- Rymer, Thomas, 47
- Salmond, 1, 2, 5
- Sanderson, Robert, 47
- Schachter, Mr., 20, 25
- Schwarzenberger, Prof., 56, 91f.
- sea, international law of, 22, 93
- self-help, in international community, 8
- separation of powers, in international law, 100
- Sloan, Mr., 20
- Smith, H. A., 105, 106
- Sørensen, Prof., 4
- sources, of international law, 2
 - and cause, differentiation, 2
 - challenge to notion of category of, 5
 - literary, 92f.
 - material, 5
 - possible extra-European, 19
- sovereignty,
 - territorial, acquisition and loss of, 76
 - transfer of, effects, 96
- Spain,
 - British treaties with, 46
 - trial of British subjects in, 44
- State,
 - assumption of unity of, 99
 - as litigant, 9f.
 - nature of, 9ff.
- States,
 - growth in numbers of, 9, 15
 - and international law, 8f.
 - longevity of, and sanctity of treaties, 51
 - new, international law and, 17
 - succession of, 12
- Statute of International Court of Justice,
 - Article 34, 10
 - Article 38, 5, 27, 28, 57, 85, 92, 109, 116
 - and treaties, 17, 31, 34, 36f., 53f.
 - Article 59, 11, 92
- Statute of Wales, 37
- statutes, place in legal systems, 35
- Stowell, Lord, 10, 76
- Sweden, British treaties with, 47
- Switzerland, neutralization of, 39, 40
- terminology, 1ff.
- territorial waters, law of, 76
- textbooks, as evidence of practice, 76, 82, *see also* publicists
- transfers of title, validity of, 11
- transnational law, 102
- treaties,
 - ancient, 44
 - breaches of, 34
 - British, 46ff.
 - as contracts, 29ff., 36
 - definition, 29
 - evidence regarding, 42f.
 - historical role, 37ff.
 - indirect influence on international law, 54
 - international organizations and, 25
 - legislative and other, 32f.
 - and municipal law, 29f.
 - numbers of, 40
 - outliving of meaning, 44
 - overlap of, 42
 - paramountcy of, 36
 - as source of international law, 17f., 25, 29ff.
 - standard forms in, 45
 - status in international law, 33ff.
 - status in State practice of, 48ff.
 - as statutes, 32f.
 - vagueness of, 44ff.
 - why binding, 52f.
 - see also* alliance; extradition; peace
- Triepel, 105
- Truman, President, 59
- trusteeship system, 84
- Turkey, entry into European Concert, 39, 40
- United Kingdom,
 - proposed digest of practice of, 74ff.
 - treaties of, 46ff.

INDEX

- United Nations, 15, 19ff.
 - Charter, 19ff., 34, 46, 110f.
 - General Assembly, binding character of resolutions, 21
 - and international law, 21, 110ff.
 - personality of, 19f., 24f.
 - practice of, 112ff.
 - privileges of, 19
 - Secretariat, legal opinions of, 20
 - and specialized agencies, 45
- United Nations Legislative Series*, 71
- United States,
 - Constitution, 35
 - treaties, 42
- United States Supreme Court, 16
- Universal Postal Union, 115
- usage, and custom, 4, 57
- Utrecht, Treaty of, 37
- validity, of law, the concept, 6
- Vattel, 39, 103
- Versailles, Treaty of, 52
- Vienna, Peace of, 37, 39f.
- war, and private transactions, 96
- Ways and Means*, 70f.
- Webster-Ashburton Treaty, 43
- Westlake, 105
- Westphalia, Peace of, 37, 39
- Whaling Convention, International, 33
- Wharton, 105
- Wheat Agreement, International, 33
- Williamson, Sir Joseph, 47
- words, actions as including, 65
- World Court, 112
 - abstention of States from, 16
 - nature of authority, 15
 - possibility of error by, 16
 - see also* Statute of International Court of Justice