3.5.2 Equity

Amongst these general principles it could be argued that equity, in the sense of justice and fairness, is included and in a number of cases it has been used indirectly to affect the way in which substantive law is applied. The application of equity as a general principle should not be confused with Article 38(2) which states that if both parties to a dispute agree, the court can decide a case *ex aequo et bono*, ie the court can apply equity in precedence to all other legal rules.

> During the period under review [1960–1989] there has been a striking increase in references to equity in the work of the Court – not only in the pleadings of the parties, but in the judgments themselves; so much so that one observer has felt able to declare that 'after 50 years of hesitation the World Court has clearly accepted equity as an important part of the law that it is authorised to apply'.[78] Concepts of equity have certainly had a very extensive influence in one particular domain – that of the delimitation of maritime areas; but it is probably premature to see in the decisions of the Court even in that specific field the application of any consistent and mature theory of equity. In matters unconnected with maritime delimitation, equity has been referred to and applied sporadically, but in ways which paradoxically are easier to reconcile with classical concepts of equity than the specialised use of it in disputes of maritime areas.[79]

The ICJ itself has on a number of occasions indicated that it considers the principles of equity to constitute an integral part of international law. In the *Diversion of Water from the Meuse* case (1937), Judge Hudson declared:

> What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals.[80]

Over 40 years later the ICJ confirmed this view in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (1982):

> Equity as a legal concept is a direct emanation of the idea of justice. The court whose task is by definition to administer justice is bound to apply it ... [The Court] is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result.

For a particularly full discussion of the place of equity within international law readers are referred to the judgment of Judge Weeranmantry in the *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)*(1993).

3.6 Judicial decisions

In the event of the court being unable to solve a dispute by reference to treaty law, custom or general principles, Article 38 provides a subsidiary means of

78 Sohn, *The Role of Equity in the Jurisprudence of the International Court of Justice*, 1984, *Mélanges Georges Perrin* (1984) at p 311.

79 H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' Part One (1989) 60, *BYIL* (1989) at p 49.

80 PCIJ Ser A/B, No 70.

judicial decisions and the teachings of the most highly qualified publicists of the various nations be employed – although the increase of treaty law has led to a decline in the use of the subsidiary source.

Judicial decisions may be applied subject to the provisions of Article 59 which states:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.[81]

In other words, there is no *stare decisis* in international law. Nevertheless the ICJ does look at earlier decisions and take them into account. Value is seen in judicial consistency. But caution should be exercised when looking at a particular decision. Decisions are by majority. In the event of even division a decision may have been made by the President using a casting vote. Some dissenting judgments may be made more for political than for legal reasons. Arbitration decisions depend for their weight on the subject matter involved and the agreement between the states to submit the dispute to arbitration. The procedure of international tribunals is considered in more detail in Chapter 12.

Article 38 does not limit the judicial decisions that may be applied to international tribunals. If a municipal court's decision is relevant it may be taken into account – the weight attached will depend on the standing of the court – eg the US Supreme Court is held in high regard, particularly in disputes on state boundaries; similarly the decisions of the English Prize Courts contributed to the growth of prize law – the law relating to vessels captured at sea during war. Municipal court decisions may also be evidence of state practice for the purpose of establishing the rules of customary international law.

3.7 The teachings of the most highly qualified publicists of the various nations

Historically, writers have performed a major role in the development of international law. The significance of jurists such as Grotius, Suarez and Gentilis has already been discussed in Chapter 1. Even today states make plentiful reference to academic writings in their pleadings before the Court. Writers have played an important part in the development of international law for two main reasons, the comparative youth of a comprehensive system of international law and the absence of any legislative body. In the formative period writers helped to determine the scope and content of international law. However as the body of substantive law has increased so the influence of writers has decreased – although writers still have an important role in developing new areas of law, eg marine pollution. Who are the most qualified writers is a matter for subjective assessment – as usual in these matters death is often seen as an important qualification! It should be noted that the Court itself does not usually make reference to specific writers.

81 Article 59 of the Statute of the ICJ.

3.8 Other possible sources

Over the last 30 years there has been increasing support for the view that Article 38 should not be understood as a comprehensive and complete list of the sources of international law. On the one hand, examples can be found from the more recent decisions of the ICJ which seem to be based on rules of law not readily falling within the triad of sources created by the statute. On the other hand it is argued that international law does not simply consist of the decisions of the ICJ. Indeed, between 1966 and 1980 the work load of the court decreased dramatically following the decision in the *South West Africa* case, Second Phase (1966).[82] The decision was heavily criticised by the newly independent states who were already distrustful of what they perceived as a European and American bias within the Court. Rather than submit disputes to the ICJ they preferred to seek remedies through the political organs of the UN. As the work of the UN has increased it can be seen to have had a profound effect on the behaviour of states which cannot be ignored in any analysis of international law. For both these reasons, it is argued that the discussion of the sources of international law can no longer be confined to the provisions of Article 38. Support for this view can be found among the judges of the ICJ:

> We cannot reasonably expect to get very far if we try to rationalise the law of today solely in the language of Article 38 of the Statute of the International Court of Justice, framed as it was in 1920. It too needs urgent rethinking and elaboration ... To use Article 38 as it stands, as we constantly do still, for the purposes of analysing and explaining the elements and categories of the law today has a strong element of absurdity.[83]

It is therefore necessary to consider a number of other sources of international law.

3.9 Resolutions of international organisations

The exact status of resolutions of international organisations, in particular resolutions of the United Nations General Assembly, has long been an area of controversy. Nonetheless it is certainly true that the resolutions passed by the UN General Assembly have a far more significant role to play in the formation of international law than was envisaged in 1945, let alone in 1920 when Article 38 was drafted. When discussing the effect of resolutions it may be useful to consider the categories suggested by Sloan, who identifies three main categories of resolution:

- Decisions

By virtue of Article 17 of the UN Charter, the General Assembly may take decisions on budgetary and financial matters which are binding on the members. Failure to abide by budgetary decisions can ultimately lead to suspension and expulsion from membership. In addition, Article 2(5) of the Charter provides that:

82 [1966] *ICJ Rep* at p *6.*

83 Jennings, 'The Identification of International Law' in *International Law, Teaching and Practice*, Bin Cheng (ed), 1982, at p 9.

> All members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

Thus arguably, resolutions that commit the UN to taking 'action' can be binding on member states.

- Recommendations

> Article 10: The General Assembly may discuss any questions or any matters within the scope of the present Charter ... and ... may make recommendations to the members of the United Nations or to the Security Council or to both on any such questions or matters.

The essence of 'recommendations' is that they are non-binding. They cannot, therefore, instantly create binding rules of international law in themselves. However, recommendations can be used as evidence of state practice and thus go towards the creation of customary rules of international law.

- Declarations

> Declarations are a species of General Assembly resolutions based on established practice outside the express provisions of Chapter IV of the Charter ... While the effect of declarations remains controversial, they are not recommendations and are not to be evaluated as such.[84]

Since 1945 the General Assembly has adopted a number of resolutions which have been termed declarations and have expressed principles of international law. Such declarations have often been adopted by unanimous vote or by consensus (ie without voting). The most comprehensive was Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states (GA Resolution 2625 (XXV) (1970)). Other significant declarations have been the Declaration on the Granting of Independence to Colonial Territories and Peoples (GA Resolution 1514 (XV) (1960)); Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (GA Resolution 1962 (XVIII) (1963)). Certain other resolutions, although not designated as 'declarations' have affirmed principles of international law. One example is the resolution entitled Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal (GA Resolution 95 (I) (1946)). It should also be noted that some 'declarations' by the General Assembly are not intended to express legal rights and obligations, an important example being the Universal Declaration of Human Rights (GA Resolution 217 (III)) which is expressly stated to proclaim 'a common standard of achievement'.

It seems to be almost universally accepted today, therefore, that in certain situations UN resolutions can be used to establish binding rules of international law. Whether a particular resolution will be regarded as valid international law will depend on a number of criteria including the context in which the resolution was passed, voting behaviour and analysis of the provisions concerned. In *Texaco Overseas Petroleum Co v Libya* (1978),[85] an arbitration which

84 Sloan, 'General Assembly Resolutions Revisited' (1987) 58 *BYIL* 93.

85 (1978) 17 ILM at pp 1–37.

arose after Libya had nationalised the property of two American oil companies, the arbitrator, Professor Dupuy, had cause to discuss the international law relating to nationalisation of foreign owned property. In particular, he referred to the General Assembly Resolution on Permanent Sovereignty over Natural Resources 1962 (GA Res 1803 (XVII)) and the Charter of Economic Rights and Duties of States, 1974 (GA Res 3281 (XXIX)). Resolution 1803 had been adopted by 87 votes to 2, with 12 abstentions. France and South Africa had voted against the resolution and the Soviet bloc, Burma, Cuba and Ghana had abstained. The resolution recognised the right to expropriate foreign owned property where it was carried out for reasons of public utility, security or national interest and where compensation is paid. Arbitrator Dupuy, who had been appointed by the President of the ICJ commented:

> On the basis of the circumstances of adoption ... and by expressing an *opinio juris communis*, Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field ... The consensus by a majority of states belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated. [86]

He then turned to consider the status of the Charter of Economic Rights and Duties of States 1974. This resolution was adopted by 120 votes to 6 with 10 abstentions. The states voting against were Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the UK and the USA; those abstaining were Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain. The provisions of the Charter were much more favourable to the developing states. Arbitrator Dupuy found that there were several factors which mitigated against recognising the Charter as a source of international law:

> In the first place, Article 2 of this Charter must be analysed as a political rather than a legal declaration concerned with the ideological strategy of development and, as such, only supported by non-industrial states ... The absence of any connection between the procedures of compensation and international law and the subjection of this procedure solely to municipal law cannot be regarded by the Tribunal except as a *de lege ferenda* formulation, which even appears *contra legem* in the eyes of many developed countries.[87]

Since it now seems to be accepted that resolutions are capable of constituting rules of international law, debate now is focused on whether such resolutions constitute a source of law in their own right or whether they merely provide evidence of customary law or general principles of law. One resolution which has been the subject of much analysis is the Declaration on Outer Space which was passed in 1962. The main aim of the resolution was to establish a legal regime for outer space which incorporated the principles that space exploration was to be carried out for the benefit of all mankind, that 'outer space and celestial bodies' were not to be the subject of national appropriation, and that the use and exploration of outer space was to be carried out for peaceful purposes only. During the discussions leading to the adoption of the resolution

86 *Ibid*, p 30.

87 *Ibid*, p 32.

delegates to the General Assembly considered the legal effect of declarations in general and support was offered for the view that a declaration of legal principles, adopted unanimously could be, in effect, legally binding. A significant number of states expressed the view that the binding nature of such declarations was based on the fact that the declaration constituted state practice and also the necessary *opinio juris* to create a rule of custom. Such resolutions constituted, in the words of Bin Cheng, 'instant customary law'.[88] In the *Nicaragua* case (1986) the ICJ expressed the view that UN Resolutions could constitute *opinio juris* which together with evidence of state practice could constitute a rule of custom. Until the provisions of Article 38 of the Statute of the ICJ are amended it seems likely that international tribunals will continue to refer to resolutions in terms of evidence of international custom. Whether that is an accurate description of the procedure remains open to doubt.

3.10 Resolutions of regional organisations

Regional organisations, for example, the European Union, the Council of Europe, the Organisation of American States, and the Organisation for African Unity can, via their internal measures, demonstrate what they, as a regional group, consider to be the law. This is especially important in the area of human rights law, which is discussed in Chapter 15.

3.11 The International Law Commission and codification

The major difficulty with customary law is that it is diffuse and often lacks precision. In the light of this, attempts have been made to codify international law, an early example of which is provided by the Hague Conferences of 1899 and 1907 which did much to codify the laws relating to dispute settlement and the use of armed force. The codification and development of international law was a concern of the founders of the UN and that concern is reflected in Article 13(1) of the UN Charter which provides:

> The General Assembly shall initiate studies and make recommendations for the purpose of:
>
> (a) promoting international co-operation in the political field and *encouraging the progressive development of international law and its codification*' (emphasis added).

In 1947, under the auspices of the UN, the International Law Commission was set up and charged with the task of progressively developing and codifying international law. The ILC is made up of 34 members from around the world who remain in office for five years each and who are appointed from lists supplied by national governments. The members of the ILC sit as individuals rather than as state representatives. Generally the Commission works on its own initiative. Draft articles are prepared and sent for comments, a conference may then be convened at which the draft articles are discussed with the aim of producing a finished convention which can then be opened for signature. Conferences can last for some time – the Third Law of the Sea Conference had

88 Bin Cheng, 'UN Resolutions on Outer Space: Instant International Customary Law?' (1965) 5 *Indian Journal of International Law* 23.

its opening session in New York in 1973 and the Law of the Sea Convention was finally opened for signature in December 1982. Ratified conventions are clearly a source of law, while the drafts are often highly persuasive statements of present state practice in a particular area of law.

Although the ILC is the most important international body engaged in the development and codification of international law, there do exist a number of other public organisations which are involved in the same mission. Such organisations generally specialise in particular areas of law – eg the UN Commission on International Trade Law (UNCITRAL); the International Labour Organisation (ILO); the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Additionally there are also some private, independent bodies engaged in the development of the law eg the International Law Association and the Institut de Droit International are two of the best known today, while the various Harvard Research drafts produced before the Second World War are still of value today.

3.12 'Soft law'

A recent development in the study of the sources of international law has been the claim that international law consists of norms of behaviour of varying decrees of density or force. On the one hand there are rules, usually contained in treaties, which constitute positive obligations binding states objectively. On the other hand, there are international instruments which, while not binding on states in the manner of treaty provisions, nonetheless constitute normative claims and provide standards or aspirations of behaviour. Such instruments can have an enormous impact on international relations and the behaviour of states but would not be considered law in the positivist sense. A growing body of writers has argued that both types of norms should be considered law and the distinction between the two is indicated by the terms 'hard law' and 'soft law'. The concept of soft law has been used significantly in the area of environmental protection which is discussed more fully in Chapter 17.

One particular benefit of soft law is that it allows states to participate in the formulation of standards of behaviour which they may not feel, at the time of formulation, ready to implement fully. For example, the Universal Declaration of Human Rights 1948 might be considered to be soft law since it was expressed to be non-binding and instead set down aims for achievement. Since that time it can be argued that most, if not all, its provisions have transformed into rules of hard law. Another example might be the Charter of Economic Rights and Duties of States 1974 which has already been mentioned. This has undoubtedly had an effect on the behaviour of states but is certainly a long way from hardening into a binding rule of law. It is clear that within soft law there will be varying degrees of hardness. Other examples of soft law would include the Final Act of the Conference on Security and Co-operation in Europe 1975 (the Helsinki Declaration) which was expressed to be non-binding, the OECD Guidelines for Multinational Enterprises and the Gleneagles Agreement on the Sporting Boycott of South Africa. All undoubtedly have some legal effects without being creating legally binding obligations.

3.13 *Jus cogens* or peremptory norms

Having discussed the distinction between hard and soft law it seems appropriate to turn to consideration of a duality of levels within hard law itself. Many municipal systems distinguish between *jus cogens*[89] (rules or principles of public policy which cannot be derogated from by legal subjects, often referred to as *ordre public*) and *jus dispositivum* (norms which can be replaced by subjects in their private dealings). The idea that there are certain non-derogable fundamental norms in international law is not new. Even before the First World War many writers had expressed the view that treaties which contravened certain fundamental norms would be void. The doctrine of international *jus cogens* was heavily influenced by natural law theories. Unlike the positivists who argued that sovereign states enjoyed an almost complete freedom of contract, natural lawyers argued that states were not completely free in their treaty-making powers. They argued that there were certain fundamental principles underpinning the international community which all states were obliged to respect.

In preparing the draft articles on the Law of Treaties the ILC gave considerable thought to the doctrine of *jus cogens*. The ILC supported the idea that treaties conflicting with peremptory norms of international law would be void but it proposed no clear criteria by which such norms could be identified. An attempt at definition was made at the Vienna Conference and the result was seen in Article 53 of the Vienna Convention on the Law of Treaties 1969 which provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The identical provision was included in the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations 1986. The doctrine of *jus cogens* is further reflected in the Draft Articles on State Responsibility prepared by the ILC which propose the notion of an international crime resulting from the breach by a state of an international obligation 'essential for the protection of fundamental interests of the international community'.[90] Support for the existence of peremptory norms is also to be found in a number of judgments of the ICJ, notably in the *Nicaragua* case (1986) where the Court identified the prohibition on the use of force as being 'a conspicuous example of a rule of international law having the character of *jus cogens*'. Other activities that have been identified as contravening *jus cogens* include slave trading, piracy and genocide.

Although it seems to be undisputed that international law recognises the concept of *jus cogens*, what is less clear is the way in which rules of *jus cogens*

89 See also the more detailed discussion in Chapter 4.

90 (1976 – II) *YBILC* 73.

may be created. Since *jus cogens* has the status of a higher law binding all states it should not be possible for rules of *jus cogens* to be created by a simple majority of states and then imposed on a political or ideological minority. During discussions at the Vienna Conference on the Law of Treaties a number of states stressed the need for universal acceptance of norms of *jus cogens* while the Austrian delegate argued that rules could only be regarded as having the status of *jus cogens* if there was 'the substantial concurrence of states belonging to all principal legal systems'[91] and the US representative argued that such a norm 'would require, as a minimum, the absence of dissent by any important element of the international community'.[92] It therefore seems that the creation of a rule of *jus cogens* must, at the very least, meet the requirements of the establishment of a rule of customary law. As the Russian jurist, Gennady Danilenko, has written:

> As 'higher law' *jus cogens* clearly requires the application of higher standards for the ascertainment of the existence of community consensus as regards both the content and the peremptory character of the relevant rules. Only such an approach may ensure the required universality in the formation and subsequent implementation of rules designed to reflect and to protect the fundamental interests of the World Community.[93]

91 UNCLOT I at p 388.

92 UNCLOT II at p 102.

93 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 *EJIL* at p 65.

CHAPTER 4

THE LAW OF TREATIES

The significance of treaties as a source of international law has already been discussed in Chapter 3. This chapter is concerned with the mechanics of treaties: how they are concluded, interpreted, observed, and terminated.

4.1 Introduction

Prior to 1969, the law of treaties consisted of customary rules of international law. Many of the rules relating to treaties between states were codified in the Vienna Convention on the Law of Treaties 1969 (VCT 1969) which was concluded on 23 May 1969 and entered into force on 27 January 1980, following receipt of the 35th ratification. The VCT 1969 is an early and important example of the codifying work of the International Law Commission. Additionally of interest is the Vienna Convention on Succession of States in Respect of Treaties 1978 (VCS 1978), concluded on 23 August 1978 and not yet in force, and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986 (VCIO 1986), concluded on 21 March 1986, also not yet in force. The VCIO 1986 repeats most of the substantive rules contained in VCT 1969 and applies to those treaties which involve international organisations. In this chapter reference will generally only be made to the relevant provisions of the VCT 1969. The VCT 1969 is not retroactive and only applies to treaties concluded after 27 January 1980. The rules of customary law still have an important role and it is important to decide the extent to which the Vienna Conventions codify existing customary law and the extent to which they introduce new rules of law. When studying the law of treaties it is therefore important to be clear as to which rules are contained in the various Vienna Conventions and which rules are to be found in international custom.

At its first session in 1949, the International Law Commission included the law of treaties in its provisional list of topics selected for codification.[1] The ILC then completed a special report on reservations to treaties in 1951,[2] and participation in general multilateral treaties.[3, 4]

VIENNA CONVENTION ON THE LAW OF TREATIES[5]

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

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1 (1949) *YBILC* at p 281.

2 (1951) *YBILC* ii at pp 125–131.

3 (1963) *YBILC* ii at pp 217–223.

4 See further on multilateral treaties UN Doc A/35/312. For ILC Draft Articles and commentary, see (1966) *YBILC* ii at pp 173–274. For VCIO Draft Articles see (1982) *YBILC* ii pt 2 at pp 9–77.

5 UKTS No 58 (1980), Cmnd 7964; 1155 UNTS 331; (1969) 81 ILM 679; (1969) 63 AJIL 875. The Convention entered into force on 27 January 1980.