Sources of International Law

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IN A TECHNICAL SENSE, the source of law governing any particular proceeding, whether arising before a judicial or an administrative authority, must be found within the legal system under which the court or the authority functions. For any national court, the legal system is necessarily the municipal law of the country of the forum which, for the purposes of the American lawyer, would mean the law of the United States and of its political subdivisions. In that connection, it may be noted that international law, whether of the public or private variety, is a part of the municipal law of the United States. The federal constitution makes this explicitly so in the case of public international law, while it is universally agreed that private international law, in those cases where there is a possibility of a conflict of laws, also forms part of the municipal law of each country. The rights concerned or the property involved in any given proceeding may also be directly affected by provisions of municipal statutes or by earlier judicial determinations in the form of case law, but this article is concerned with the “sources” of international law in

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1 Kent, Commentaries, 12th Ed., pp. 1-2, states: “When the United States ceased to be a part of the British Empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law.”

2 But see United States v. Curtiss-Wright Export Corp., 299 U. S. 304 at 316-8, 57 S. Ct. 216, 81 L. Ed. 255 at 261 (1936), where the court said: “As a result of the separation from Great Britain of the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence . . . . It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.”
the broader sense, that is with respect to the point as to where the rules included in the laws of nations originate and where they conveniently may be found.

A crisp summary of the entire topic is presented in Article 38 of the Statute under which the International Court of Justice presently operates. That article states that the court, whose function it is to decide in accordance with international law such disputes as are submitted to it, is to apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. 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.

But the enumeration so made was also said not to prejudice the power of the Court to decide a case "ex aequo et bono," if the parties agreed thereto.

This formal enumeration of the sources of international law is not dissimilar from various statements made by leading American jurists in characterizing the nature of international law under the federal constitution. One of the most frequently quoted statements has been that made by Chief Justice Marshall in the case entitled Thirty Hogsheads of Sugar v. Boyle. He there declared:

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which

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3 Article 59 of the Statute provides that the decision of the Court has "no binding force except between the parties and in respect of that particular case."
5 13 U. S. (9 Cranch) 191, 3 L. Ed. 701 (1815).
are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.\footnote{13 U. S. (9 Cranch) 191 at 198, 3 L. Ed. 701 at 703.}

Justice Story made a similar enumeration, while sitting as a circuit judge, in the course of his opinion in the case of United States v. La Jeune\footnote{Mason's Reports 409; 26 Fed. Cas. 832, Case No. 15,551 (1822).} wherein he said:

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.\footnote{26 Fed. Cases 832 at 846.}
Approaching the subject at hand from a slightly different standpoint, it might be worth while to arrange the sources so noted under the headings of (1) custom, (2) treaties, (3) case decisions, (4) juristic opinions, and (5) general principles, and then to discuss each in detail.

1. Custom

The older opinions on international law, particularly before the coming of the many treaties that characterize the modern relations of states, stressed with great frequency, and at great length, the customary nature of international law. In its origins, the law of nations was never far removed from the "law of nature," as is so clearly shown in the writings of the European publicists that were so frequently quoted by Marshall, Story and Kent. The requirements for a custom were frequently implicit. But custom is never fully equated with usage; it is, more nearly, "usage developed into a rule which is adhered to in the belief that an obligation so to act exists." Kopelmanas once concluded that there would be two factors in the formation of custom: (1) a material fact—the repetition of similar acts by states; and (2) a psychological element—usually called the opinion juris sive necessitatis—the feeling on the part of the states that in acting as they act they are fulfilling a legal obligation.

9 A modern appraisal of the "law of nature" may be found in United States-Mexico General Claims Commission, 1926, Opinions of the Commissioners (The Dredging Company Case), wherein the arbitral tribunal said: "The laws of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and cannot be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand." The quotation appears in Schwarzenberger, International Law (Stevens & Sons, Ltd., London, 1949), 2d Ed., Vol. 1, p. 14.

10 Wheaton, Elements of International Law, 6th Eng. Ed., (1929), p. 10. Westlake, International Law (Cambridge University Press, New York, 1910), 2d Ed., Vol. 1, p. 14, points out that custom "must not be confounded with mere frequency or even habit of conduct . . . . In other words, custom is that line of conduct which the society has consented to regard as obligatory."

These two elements are best amplified by an extended but much quoted description of the growth and function of custom provided in a modern casebook on international law. The author thereof, after noting that usage means no more than habitual practice, goes on to state:

The growth of usage and its development into custom may be likened to the formation of a path across a common. At first, each wayfarer pursues his own course; gradually, by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority; this route next assumes the character of a track, discernible but not yet well defined, from which deviation, however, becomes more rare; whilst in its final stage the route assumes the shape of a well-defined path, habitually followed by all who pass that way. And yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path.12

After pointing out that the growth of usage and formation of custom, both as between a community of individuals and the community of nations, proceeds much on the same lines, he continues:

As between nations, some particular practice or course of conduct arises, attributable in the first instance to some particular emergency or prompted by a common belief in its convenience or safety. But its observance is discretionary; and it exists side by side with other competing practices. Next, as between competing usages, the fittest, having regard to the needs of the time, generally tends to prevail. It gathers strength by observance. It comes to be recorded, and is appealed to in cases of dispute, although not infrequently violated. Finally, it comes to command a general assent; and at this stage it may be said to take on the character of a custom, which involves not merely a habit of action, but a rule of conduct resting on general approval.13

13 Cobbett, op. cit., pp. 5-6.
Despite this, the author, aware of the fact that the conditions of international life are constantly changing, so that new conditions tend to generate new usages which may, in their turn, develop into customs that could modify or supersede those hitherto observed, resolves the possibility of conflict between customs by indicating that within each political society and as between individual members of the community

the difficulty of ascertaining custom is met by the gradual establishment of some form of political authority which, through its various organs, assumes at once to declare what customs are binding and also to enforce them on its individual members. Out of this grows the national law. The two great difficulties with respect to custom are (1) the difficulty of proof, and (2) the difficulty of determining at what stage custom can be said to become authoritative.\(^{14}\)

The obligatory nature of customary international law, once the custom has been determined to exist, has been stressed by the United States Supreme Court through the medium of its opinion in the case entitled *The Scotia*.\(^{15}\) Speaking through Justice Strong, the court declared:

Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. . . . When, therefore, we find such rules of navigation . . . accepted as obligatory rules by more than thirty of the principal commercial

\(^{14}\) Ibid., p. 6.

\(^{15}\) 81 U. S. (14 Wall.) 170, 20 L. Ed. 827 (1871).
states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place. This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation.\textsuperscript{16}

Nevertheless, in recent times, it has become more difficult to establish a rule of international law on the basis of custom, as can be seen in recent cases coming before the International Court of Justice or determined by its predecessor, the Permanent Court of International Justice.

In the \textit{Lotus Case},\textsuperscript{17} for example, the French Government failed to make an "international custom" out of the fact there had been an abstention by states from instituting criminal proceedings in relation to collision cases occurring at sea, the court noting that only if it could be said such abstention was based on the idea that the states had been "conscious of having a duty to abstain" would it be possible to speak of an international custom.\textsuperscript{18} Similarly, in the 1950 decision in the \textit{Colombian-Peruvian Asylum Case},\textsuperscript{19} the International Court of Justice gave further indication of the difficulties of establishing conventional international law, saying:

Finally the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the

\textsuperscript{16} 81 U. S. (14 Wall.) 170 at 187, 20 L. Ed. 827 at 836.
\textsuperscript{17} S. S. Lotus (France v. Turkey, 1927), Hudson, World Court Reports, Vol. 2, p. 20. Note that the American member of the Court, Judge John Bassett Moore, dissented on other grounds. But see The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900), where the United States Supreme Court found, by reference to "ancient usage," that coastal fishing vessels were exempt from capture as prize of war.
\textsuperscript{18} Hudson, op. cit., Vol. 2, p. 20 at p. 42.
\textsuperscript{19} ICJ Reports 1950, 266; Am. Jour. Int. Law, Vol. 45, 179 and 781 (1951).
alleged rule of unilateral and definitive qualification was invoked—or if in some cases it was in fact invoked—that it was, apart from conventional stipulation, exercised by the States granting asylum as a right appertaining to them and not merely from the reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and, in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.  

One could not well leave this aspect of the subject without making one further quotation. Judge Manley O. Hudson, in a paper prepared for the International Law Commission in 1950, made some observations on customary international law. He indicated that the emergence of a principle or rule of customary international law would seem to require the presence of the following elements:

(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.

20 ICJ Reports 1950, 266 at p. 277. See also Hackworth, Digest of International Law (General Printing Office, Washington, 1940), Vol. 1, p. 15. The author there states that it is “sometimes difficult to determine whether the practice of states in a given respect has been of sufficient duration and uniformity to result in the development of a rule of international law.”

He added, of course, that the presence of each of these elements would have to be established by a competent international authority.

The work involved in showing the satisfaction of these tests would clearly not be an easy task to undertake and will tend to become more difficult with the further passage of time. It could be said, therefore, that the reign of customary international law is definitely on the wane and the reason for this is to be found in the tremendous growth of conventional international law. This very growth of conventional law, however, has opened a new door for a significant role of customary law, one in relation to the process of the interpretation of treaties.

2. TREATIES

A treaty, regardless of its name, establishes a rule of law intended to govern the particular relations of the states signatory to the treaty. Where the number of signatory states is large and the document is comprehensive in scope as, for example, the peace treaties following the Napoleonic Wars or resulting from World Wars I and II, the treaty has occasionally been designated as "law-making."\(^{22}\) To the extent that this purported distinction between "law-making" treaties and others implies that the other treaties are not "law" for the parties signatory, it may not be wholly satisfactory\(^{23}\) for international tribunals, whose decisions are admittedly "binding" only as between the parties to the proceeding, have obviously recognized that any treaty involved in a dispute before the tribunal operates as law with respect to that

\(^{22}\) Brierly, Law of Nations (Oxford University Press, New York, 1942), 3d Ed., p. 47, has defined "law-making" treaties as "those which a large number of states have concluded for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule of law for future conduct, or of creating some international institution." Oppenheim-Lauterpacht, International Law (Longmans, Green & Co., New York, 1947), 7th Ed., p. 26, supplements this by adding that usually "such treaties only are regarded as a source of international law as stipulate new general rules for future international conduct or confirm, define, or abolish existing customary or conventional rules of a general character."

The distinction may, nevertheless, still remain a useful one, for a consideration of the general applicability of a treaty may be a factor in appraising the treaty's significance in international law.

Even a bi-partite treaty may frequently assume a greater significance than might otherwise have been the case. This is particularly true where the terms thereof have become generalized through acceptance and imitation by other states and, to this extent, such treaties may become important evidence of a developing international custom. Examples of this trend may readily be found in the various commercial treaties embodying the "most-favored-nation" clause and, perhaps more clearly, in the series of extradition treaties with their varying definitions of offenses.

Paramount among the "law-making" treaties, of course, are those associated with the coming of peace after the great wars, with the holding of the great conferences at The Hague, Geneva, and Paris, and with the constructive work of the League of Nations and the United Nations. They cover such matters as the constitutional framework of the International Court of Justice and of its predecessors, the International Monetary Fund, the International Bank for Reconstruction and Development, and the various other international institutions or arrangements for par-

24 Hudson, The Permanent Court of International Justice (Macmillan, New York, 1943), pp. 608-9. Writing well before the great growth of international treaties of this century, Sir Frederick Pollock, "The Sources of International Law," 2 Col. L. Rev. 511 (1902), declared: "Treaties and conventions between particular states may define any portion of those rules, or add to or vary the existing rules, but any conventional rule so laid down is binding only on the parties to it. Acts of this kind may go to show, according to the nature of the case and the particular circumstances, the existence of a general usage which the parties wished to record for convenience in apt words and in authentic form (though this is not common), or the dissatisfaction of the parties with existing usage and their desire to improve on it, or the absence of any settled usage at all antecedent to the particular agreement. It is, therefore, impracticable, with one exception to be mentioned, to make any general statement as to the value of treaties and similar instruments as evidence of the law of nations. The exceptional case, which is of increasing frequency and importance, is where an agreement or declaration is made not by two or three states as a matter of private business between themselves, but by a considerable proportion, in number and power, of civilized states at large, for the regulation of matters of general and permanent interest . . . . There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among states which have never expressly consented to them . . . . As among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole."
ticular purposes, as in the field of transportation and communication.\textsuperscript{25}

Any analysis of the decisions of international tribunals on particular treaties must be undertaken with considerable care in the special light of the precise treaty provisions. Specific language or particular concepts contained within the treaties could well directly condition the judicial result which, for these reasons, may not be comparable, except superficially on the facts, with the judicial result attained in other controversies involving particular treaties of possibly varying terminology. It may be trite to stress the necessity for an examination of the procedural manner in which the controversy arose and the particular treaty framework applicable to it, but a failure to do this may lead to erroneous conclusions, especially where bi-partite treaties are involved.

3. Case Decisions

A rapidly growing body of case law possessing international implications has been developed by various international tribunals and agencies. In the first place, and during the past century or so, there have been the great arbitral awards of the \textit{ad hoc} tribunals, as in the \textit{Alabama Claims} (1872), the \textit{Behring Sea} dispute (1893), and the \textit{Pious Fund Case} (1902). It is, of course, important to note the specific terms of reference under which these arbitrations were made, or under which other arbitrations might be conducted, for these terms, as is the case with treaties, might serve to condition the result in a very specific manner, particularly in relation to whether or not the case was, or is to be, decided on the basis of \textit{ex aequo et bono} rather than under the rules of internal law.\textsuperscript{26} A most impressive body of case law has also been built up by the International Court of Justice and by its prede-


\textsuperscript{26} Moore, Digest of International Law (General Printing Office, Washington, 1906), Vol. 1, pp. xxxix-xl.
cessors, but the reporting thereof has been far from satisfactory. In 1952, Edvard Hambro, the then Registrar of the Court, privately issued, in digest form, a compilation of excerpts from the decisions of the court classified by principal topics which effectively shows the sweeping range of interests involved in proceedings before these international tribunals.

In a sense, the case decisions of international tribunals, when not narrowly circumscribed by treaty provisions and procedural limitations, may be the most important single source of international law, not even yielding to the "law-making" treaties for the full meaning of the latter may require implementation in the form of a decision of an international tribunal. Nor does their importance yield to the decisions of national tribunals for an international decision is often impressively fortified by that impartiality of interest that is so fundamental to the concept of justice.

In that connection, an eminent authority in the field of international law once said:

Awards of international tribunals such as courts of arbitration possessed of a neutral umpire (if not of entire neutral membership) afford impressive evidence of the requirements of international law. The impartiality and learning and acumen of the neutral members of such bodies have oftentimes been productive of decisions entitled to the respect of States generally. The awards of the Permanent Court of Arbitration at The Hague have afforded conspicuous examples. The judg-

27 In general, see Lauterpacht, Development of International Law by the Permanent Court of International Justice (Longmans, Green & Co., London, 1934), and Schwarzenberger, International Law as Applied by International Courts (Stevens & Sons, Ltd., London, 1945).

28 It is unfortunate that Hambro, in The Case Law of the International Court (Sijthoff, Leyden, 1952), p. vii, chose to exclude the "separate opinions of one or more judges . . . whether these be in the form of dissenting or individual opinions." He assigned, as a reason, that however notable they may have been and however great the learning and wisdom of the Judge in question, such statements do not represent the views of the Court." A common-law lawyer would add, however, that this would be true "only at the time of the actual decision," for he would be familiar with the frequency with which dissenting or concurring opinions, in time, often become "the views of the Court." Contrast Hambro's views with those expressed by Moore in the preface to his Digest.

29 An exception to the statement in the text should be noted where a national tribunal decides a close question against the immediate national interest of the state of the forum, or where a national law officer decides to yield to a foreign claimant.
ments and advisory opinions of the Permanent Court of International Justice bear testimony of the highest order as to what the law of nations really is.\textsuperscript{30}

But, important as these holdings may be, the lawyer is not confined thereto.

In large measure, the leading body of international law of particular interest in the United States is to be found, more nearly, in the decisions of the federal Supreme Court, the lower federal courts, and the holdings of various British courts.\textsuperscript{31} Decisions of national tribunals on international problems have occasionally been cited by international tribunals when dealing with similar problems, as was true in the Chorzow case (1926) and the Norwegian claims case (1922), which may be suggestive of a developing international common law.\textsuperscript{32} The contributions of Chief Justice Marshall, of Justices Story and Gray, and of Chancellor Kent have been particularly notable, as some of the earlier quotations herein have indicated. A unique body of law was also developed quite early by the British prize courts,\textsuperscript{33} at least in relation to maritime warfare. There is, of course, always the doubt that a national tribunal may not be impartial in deciding


\textsuperscript{31} Lauterpacht, "Decisions of Municipal Courts as a Source of International Law," The British Yearbook of International Law (1929), p. 65 et seq., notes that "quite apart from judgments of prize courts, there is hardly a branch of international law which has not received judicial treatment at the hands of municipal tribunals . . . They are the chief source of judicial authority on the nature, the conditions, and the effects of recognition of states, governments, and belligerency as well as on questions of state succession and succession of governments, not only in regard to private rights in their different aspects, but also on such matters of succession in obligations laid down in treaties."

\textsuperscript{32} Cardozo, J., in New Jersey v. Delaware, 291 U. S. 361 at 383, 54 S. Ct. 407, 78 L. Ed. 847 at 858 (1934), mentioned the fact that international law has, "at times, like the common law, . . . a twilight existence during which it is hardly distinguishable from morality or justice, until at length the imprimatur of a court attests its jural quality."

\textsuperscript{33} Hyde, International Law (Little, Brown & Co., Boston, 1947), Vol. 1, p. 13, states: "The decisions of the prize courts of a belligerent are often-times commended as entitled to great respect because of the function of such tribunals to determine, according to the requirements of international law, the propriety of acts of capture and other incidents thereto. It has been found, however, that even when not restrained by the influence of local statutory or other regulations the natural prejudices of the most enlightened and scrupulous tribunal established under belligerent authority tend to weaken its impartiality and to diminish foreign respect for its conclusions."
the conflicting interests of foreign and domestic nationals but evidence of bias is not frequently found present, hence national court holdings deserve attention.

4. Opinions of Jurists

The opinions of jurists and scholars, as distinguished from the opinions of judges sitting on tribunals, have been accorded varying weight as a source of international law. In earlier times in the United States, when case precedents were largely lacking and treaty law was in its primitive stage, great weight was given by American judges to the opinions of Grotius, Vattel and others. In particular, Justice Story and Chancellor Kent made great use of the writings of these foreign jurists in their commentaries and also in their opinions. Even as late as 1900, the United States Supreme Court gave considerable weight to juristic opinion when it decided the case of the *Paquete Habana and the Lola*, as is shown in the following quotation taken from that case, to-wit:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.\(^3\)

\(^{34}\) 175 U. S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900).
\(^{35}\) 175 U. S. 677 at 700, 20 S. Ct. 290, 44 L. Ed. 320 at 328-9. But see the opinion in the case of *The Adula*, 176 U. S. 361, 20 S. Ct. 432, 44 L. Ed. 505 (1900), where the same court said that the opinions of foreign writers could not be accepted as, in any particular, overruling.
The British courts, by contrast, operating with a singular degree of insularity, have been inclined to attach much less weight to the opinions of jurists. Somewhat contemporaneously with the Habana case, the King's Bench Division, in the case of *West Rand Central Gold Mining Company, Ltd. v. The King*,\(^3\) pointed out that

any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations . . . [E]xpressions used by Lord Mansfield, when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of textwriters upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts.\(^7\)

International tribunals, however, probably because they reflect the greater influence of continental law in the composition of their membership, tend to make substantial use of juristic opinion, in much the same manner as a continental law court would.

\(^{3}\) [1905] 2 K. B. 391.

\(^{7}\) Ibid., at pp. 407-8.
5. GENERAL PRINCIPLES OF LAW

In the formative period of the growth of international law, it must not have been easy to distinguish between custom and "general principles of law," at least from the terminological standpoint. The case-by-case method of growth, so characteristic of the common law, was applied to international law, both in the form of deductions drawn from general principles of accepted international law and in the form of analogies from other private systems of law with which the judges were familiar. An illuminating statement of this technique of growth is to be found in one of Arbitrator Nielsen's opinions in the course of which he said:

International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.

The formal recognition of "general principles of law" as a "supplementary" source of international law, to be applied by the International Court of Justice pursuant to Article 38 of the Statute, has been called by Professor [now Judge] Lauterpacht to be the "outstanding and, to a certain extent, revolutionary

38 In the S. S. Lotus Case, Permanent Court of International Justice Reports (Sijthoff, Leyden), Series A, No. 10, pp. 16-7, the court said: "Now the Court considers that the words 'principles of international law,' as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States... In these circumstances, it is impossible—except in pursuance of a definite stipulation—to construe the expression 'principles of international law' otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties."

39 See the opinion in Great Britain (Eastern Extension, Australasia & China Telegraph Company claim) v. United States, United States-Great Britain Claims Arbitration, Nielsen's Reports (1926), p. 73.
contribution made by the Statute to international law as a whole." The Statute of the Court makes it most explicit that the "general principles" there referred to are clearly distinguishable from the considerations *ex aequo et bono* which may be resorted to only with the express consent of all parties to the dispute. Lauterpacht, undertaking a systematic exploration of the meaning of the phrase, after pointing to the fact it was not identical with decisions *ex aequo et bono*, which were dealt with separately, indicated that there were three sources from which an answer could be drawn. In his opinion, the answer might be sought first in a

study of international arbitration before the establishment of the Permanent Court of International Justice. Such an investigation . . . shows that whenever international tribunals have recourse to "general principles of law" they apply, as a rule, a general principle of private law, *i. e.*, a principle not belonging to the system of law prevalent in one country, but expressing a rule of uniform application in all or in the main systems of private jurisprudence.

He continued by saying the query could be answered, in the second instance, on the ground of a simple logical inference drawn from the context of Article 38. In that connection, he stated:

The Statute refers here to such general principles of law as are neither international law proper nor considerations *ex aequo et bono*. This means that although the Court may apply, for the purpose of a particular case, a rule of criminal or administrative law of sufficient generality, it is of general rules of private law that, on the whole, we must needs think in this connection. For it is, as a rule, private law which gives shape and definite form to those general sources. Here

40 See his *Private Law Sources and Analogies in International Law* (Longmans, Green & Co., New York, 1927), p. viii. The wording of the Statute was proposed by Elihu Root after considerable discussion among the members of the committee of jurists: Permanent Court of International Justice, Advisory Committee of Jurists, Proces-Verbaux of the Proceedings of the Committee (July 24, 1920), pp. 331 and 344.
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lies the organising and ordering part played by it. Those "general principles" threaten otherwise to degenerate into altogether subjective natural law or legal philosophy.

With respect to the third source, he noted that

the utterances of jurists drafting the Statute do not fail to throw some light on the meaning of the clause in question. Thus the Chairman of the Committee, from whom the substance of the clause originated, explained its meaning by reference to the principle of res iudicata adopted by the tribunal in the Pious Fund case; and another member suggested, while referring to that case, that this was a rule which had the same character of law as any written law, and that all such general principles of common law, being a part of internal law, are applicable to international affairs.41

While a strong proponent for the use of analogy in the development of international law, Lauterpacht has clearly recognized the limitations of this technique. He has pointed out the pitfalls of giving a provincial concern to the principles of a single legal system as well as the untenability of any invariable assumption that international relations have their analogies to private law in every case.42 Having so recognized these limitations, Lauterpacht has nevertheless cited many concrete instances where useful concepts have been incorporated into international law by way of analogy, as has been the case in relation to such matters as prescription, res judicata, moratory interest, culpability, estoppel, finality of awards, the self-determination of a tribunal's competence, and the proper measure of damages in cases involving a loss of prospective profits.43

In direct contrast to the utilization made of general principles of law, it must be noted that, to this date, the International Court

42 Ibid., pp. 84-6.
43 Svarlien, An Introduction to the Law of Nations (McGraw-Hill Co., New York, 1955), pp. 149-52, also provides a number of illustrations with respect to the proper measure of damages.
of Justice, or for that matter its predecessor also, has never made use of the power given it, subject to the consent of the parties, to decide a case *ex aequo et bono*, although some cases may have come close to resolution on this basis.\(^4\)

6. **Priority Among the Sources**

The enumeration of the sources of law to be applied by the International Court of Justice contains within itself no precise statement of priority among the various sources. The Statute does indicate that the role of judicial decisions is regarded as a "subsidiary means for the determination of the rules of law,"\(^4\) which would seem to imply a repudiation of the rule of *stare decisis* in the area of international law. In the *S. S. Wimbledon Case*,\(^4\) involving the right of entrance to the Kiel Canal, the Permanent Court of International Justice did rule that treaties took priority over customary law, but this was a necessitous decision for otherwise treaties would not serve to change customary international law, hence there never would be a change until a new custom arose to replace the old one. It is perhaps an interesting paradox that almost the reverse situation prevails in the English courts. These courts recognize that customary international law will serve to override the common law or English statutory law, but treaties will not be given that effect unless they have been re-enforced by enabling legislation enacted by Parliament.\(^4\)

In the United States, on the other hand, it is clear that far greater effect will be given to judicial decisions than is suggested by the characterization of them as being only a "subsidiary means" to the achievement of a determination.\(^4\) To the extent,

\(^{44}\) See, for example, the Free Zones Case, PCIJ Order, Dec. 6, 1930, ser. A, no. 24.

\(^{45}\) Art. 38, Statute of International Court of Justice.

\(^{46}\) PCIJ Publications, ser. A, no. 1; Hudson, Cases (1936), 474.

\(^{47}\) Black., Comm., IV, *67, notes that, in England, "the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."

\(^{48}\) The publication of Hambro, The Case Law of the International Court (Sjthoff, Leyden, 1952), is suggestive evidence that, even among the continental-law scholars, more weight is increasingly being paid to case decisions in the development of international law.
therefore, that the existence of a degree of priority among the sources of law may be deemed important to the resolution of some particular controversy, it is likely that an American tribunal would pay the highest regard first to the provisions of treaty law, subject of course to the limitations of judicial construction; proceeding secondly to judicial decisions, including general principles of law and analogies insofar as they are not embraced in the former; and would give credence last of all to the general opinions of jurists.