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General Principles of Law, 'Soft Law' and the Identification of International Law

Olufemi Elias
Chin Leng Lim, *University of Hong Kong*

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'GENERAL PRINCIPLES OF LAW', 'SOFT' LAW AND THE IDENTIFICATION OF INTERNATIONAL LAW*

Olufemi Elias and Chin Lim*****

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** Lecturer in Law, King's College, University of London.
*** Lecturer in Law, University of Wales, Aberystwyth.

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1. INTRODUCTION

Treaties and custom are generally regarded as the major sources of international law. They derive their validity more or less directly from the consent of those subjects of the law which also possess the institutional authority to make law.[1] The perceived limitations of the consensual nature of these two sources have resulted in doctrinal controversy concerning, *inter alia*, the existence of sources of international law which are not essentially consensual. This is the rationale for the inclusion of general principles of law recognised by civilised nations alongside treaties and customary international law in Article 38 of the Statute of the International Court of Justice, as one of the sources of international law to which the Court may refer.[2] Similarly, the phenomenon of 'soft' international law is, by and large, a response to the failure to generate the full measure of State consent required for attributing full legal status to the 'soft' norms in question, often in relation to developing fields of international concern.[3] It is often said

1. The following is a representative view of the traditional law-making process: 'Ever since the beginning of the international community States have spontaneously evolved two methods for creating legally binding rules: treaties and custom. Both were admirably suited to the exigencies of their creators. Both responded to the basic need of not imposing duties on such States as did not wish to be bound by them. No outside "legislator" was tolerated: law was brought into being by the very States which were to be bound by it. Consequently there was complete coincidence of law-makers and law-addressees. Treaties in particular, being applicable to the contracting parties only, perfectly reflected the substantial individualism of the international community. As to custom, it did admittedly give rise to norms binding on all members of the community, but any member could object to the applicability of a customary rule at the moment of its formation, thereby avoiding being restrained by any rule which was not to its liking. Custom too, ultimately resorted to a consensual basis.' (A. Cassese, *International Law in a Divided World* (1986) p. 169, para. 93). Even according to less-consensual theories of customary law, there must be consent of at least certain States; in Judge Lachs' words, 'for to become binding, a rule or principle of international law need not pass the test of universal acceptance . . . The evidence is to be sought in the behaviour of a great number of States, possibly the great majority of States, in any case the great majority of interested States.' (see ICJ Rep. (1969) p. 229).

2. Cassese, op. cit. n. 1, at pp. 170-174, para. 94.

3. For a discussion of the problem of 'soft' law, see A. Cassese and J. Weiler, *Change and Stability in International Law-Making* (1986) pp. 66-101.

that these non-consensual sources have an inferior status when compared with the consensual ones. The purpose of this paper is to consider critically the basis and the form of the differentiation between these two apparently non-consensual phenomena (i.e., 'general principles' and 'soft' law) on the one hand, and the paradigmatic (because consensual) types of international law (i.e., treaties and custom) on the other.

1.1 The problem

Both non-consensual phenomena identified here, i.e., 'general principles' and 'soft' law, have generated vast amounts of doctrinal debate. In relation to general principles, the main areas of concern have been the determination of the kind(s) of principles covered by the category and the identification of the particular principles which qualify for inclusion within those classes of principle. In the case of 'soft' law, the main concern has been the legal quality of the norms in question, whether as a result of vagueness of the language in which the legal demands are couched or the non-legal nature of the form in which they are expressed. It may thus seem that the nature of the problems presented for international law by these two phenomena are quite distinct. The apparent distinction between the two is in part due to the fact that in as far as Article 38(1) of the Statute of the International Court of Justice is taken as the starting point of analysis, the legitimacy of the category of 'general principles' is assured. This shifts the emphasis of any likely controversy to the identification of the content of the category of 'general principles'. In the case of 'soft' law, however, controversy is focused upon the legitimacy of the category itself. Nevertheless, the two categories do share several important characteristics which justify the joint treatment of both phenomena, as they represent different manifestations of the same problems for the international legal order, in the following way.

The thrust of the objection to a thriving category of general principles not derived directly from State consent is that it would threaten the stability and structure of the international legal order, in which law-making is based on the consent of States. Similarly, claims made to ascribe normative legal effect to norms having the character of 'soft' law challenge the recognised methods of international law-making, and thus blur the distinction between law and non-law, in other words, between what has been consented to as law by the law-makers on the one hand, and what has not. Thus Weil's concern, that '[a]bsent

voluntarism, international law would no longer be performing its functions,'[4] applies to both 'general principles' and 'soft' law; neither is based on State consent, at least not in the same sense as treaties and custom are. The problem, then, is largely a debate between those who take a strict, consensual and narrow view of what constitutes international law and those who advocate a broader conception of the international law-making process. This is why both phenomena, while being distinct, merit joint treatment of the kind proposed in this paper.

1.2 The structure of the debate

The debate, whether it is about 'general principles' or 'soft' law, revolves around two kinds of distinction between the major (because consensual) examples of law and these two, more problematic, sources. These are described here as *hierarchical* differentiation and *logical* differentiation.

Hierarchical differentiation is used here to refer to the differentiation between norms on the basis of their relative importance of their subject-matter. For example, as will be seen later in relation to the debate about 'general principles',[5] it has been argued that the phrase refers to (i) fundamental principles of the international legal order, (ii) those legal principles immanent in legal logic, and/or (iii) certain 'natural law' principles. Similarly, some examples of 'soft' law, as will be seen later,[6] are the bone of contention because they deal with important social values perceived within the international community. Those who argue for the legal validity, and even superiority, of such norms are distinguishing between them and other norms on the basis that the function that the rules perform or the social interests for which they stand, are fundamental or particularly important, and that is what should make them legal. This superiority, as can be seen, may be systemic ('general principles' as 'constitutional' rules), logical ('general principles' as those principles logically presupposed by the concept of law itself) and/or substantive (that ordinary positive laws must bow to certain 'higher' natural law principles, even if these principles are 'soft').[7]

4. P. Weil, 'Towards Relative Normativity in International Law?', 77 AJIL (1983) p. 413, at p. 420. See also G. Tunkin, *A Theory of International Law*, translated by W.E. Butler (1974) Chapter 7; L. Henkin, *International Law: Politics and Values* (1995) p. 40.

5. See section 2 below.

6. See section 3 below.

7. O. Schachter, *International Law in Theory and International Practice* (1991) p. 49, has written, in relation to general principles and equity, that '[w]hat they have in common is an appeal to reason and moral ideas. Because of that, they can be presented as normatively superior to rules or goals . . . There is concern, on the one side, that they allow too much room for subjective and unilateral judgments and on the other side, that they introduce standards that may supersede State needs or goals.'

Logical differentiation, in contrast, is used here to refer to a differentiation between logical forms, or more precisely, legal categories, or kinds of (sources of) law.[8] For example, the view that the phrase 'general principles of law' refers to (or includes) (i) equity, (ii) principles of municipal law, or (iii) legal norms which have not satisfied the formal requirement of treaties and custom (inchoate custom), are all arguments that general principles possess an altogether different logical form from treaties and custom. This last category (i.e., inchoate custom) can also be described as 'soft' law. The more general argument that 'soft' laws are different because they embody an altogether different (because indeterminate) logical form from treaties and custom is of the same character. The argument is that these logically different norms of 'general principles' and 'soft' law may take the form of open-ended principles designed to perform the role of achieving justice on a case-by-case basis and through substantive reasoning, or that they embody a different logical form from treaty and customary norms by virtue of the fact that a nascent customary rule is itself a distinct logical-legal form and just not an imperfect achievement of the logical form of a customary rule.

Viewed from this aspect, the perceived problems raised for international law by the category of 'general principles' are the same as those raised by 'soft' law. As illustrated, both kinds of differentiation (i.e., hierarchical and logical) serve to re-inforce the idea that both general principles and soft law are somehow different from treaties and custom. But they are tools open to use by opinion on either side of the line, as the result of the differentiation is always to suggest a difference from the main (because consensual) categories of law. On a narrow conception of the law-making process, the fact that general principles and 'soft' law are different means they are viewed with scepticism, whilst, on a broader view, the difference is a reason for suggesting that they merit the attention of lawyers, even to a greater degree than treaties and custom.

It will be argued in this paper that the differentiation between consensual (treaties and custom) and non-consensual law ('general principles' and 'soft' law) is, in a very large measure, unconvincing. It will be argued that, at a deep level, the problems posed for the international legal system (and international legal method in particular) by these examples of non-consensual law are very much the same as those raised by consensual law.

8. Logical differentiation is different from hierarchical differentiation in the sense that the latter, unlike the former, is not concerned with the differences between legal categories; rather, it is concerned with the substance of a given rule. To illustrate, two rules of custom cannot be logically differentiated because they are rules of the same logical form, i.e., custom; but they can be differentiated hierarchically, on the basis that one of them protects a much more important value than the other. Both kinds of differentiation are, however, not mutually exclusive. One rule of custom could be both hierarchically and logically differentiated from another.

1.3 The paradox of consensualism in international law: treaties and custom

In this section, the nature of the problems raised in trying to identify the law in the context of consensual sources of international law, i.e., treaty and custom, will be discussed, as a prelude to a comparison between them and the non-consensual sources under consideration.

1.3.1 *The nature of (international) legal disputes*

As mentioned above, the explanation of the dominance of rules of treaty law and customary law in the international legal system is the fact that they reflect the consent of States in one way or another. States are still the major addressees of rules of international law, and they retain a monopoly over the law-making process.[9] Nevertheless, there are problems which pervade the determination of the precise normative demands made on legal subjects by treaties and custom. These will now be examined.

There are a number of kinds of dispute which may arise in situations where treaties and custom are applicable. One kind of dispute is about 'what happened', i.e., the determination of the factual situation which requires the application of a treaty rule or a rule of custom. It might be thought that this kind of dispute is not illuminating, because such disputes are concerned with facts, so that they may be seen as not raising *legal* questions. But this would not be a good reason for not dwelling on such disputes, because it is simply not possible to rule out the legal dimension even in relation to such 'factual' disputes. After all, the selection of pertinent facts is what enables applicability of one legal rule rather than another. The legal rules are there to govern particular facts.[10] The more

9. See for example, I. Brownlie, *Principles of Public International Law*, 4th edn. (1990) p. 287, who identifies as one of the corollaries of the principle of sovereignty [of States] 'the dependence of obligations arising from customary law and treaties on the consent of the obligor.'

10. Jerome Frank has written, in the context of municipal law: 'If one accepts as correct the conventional description of how courts reach their decisions, then any decision of any lawsuit results from the application of a legal rule or rules to the facts of the suit. That sounds rather simple, and apparently renders it fairly easy to prophesy the decision, even of a case not yet commenced or tried, especially when as often happens, the rule is definite and precise . . . But particularly when pivotal testimony at the trial is oral and conflicting . . . the trial court's 'finding' of the facts involves a multitude of elusive factors. First, the trial judge in a non-jury trial or the jury in a jury trial must learn about the facts from the witnesses; and witnesses being humanly fallible, frequently make mistakes in observation of what they saw or heard . . . Second, the trial judges or juries, also human, may have prejudices . . . In that respect, neither judges nor jurors are standardized . . . The chief obstacle to prophesying a trial-court decision is, then, the inability, thanks to these inscrutable

convincing reason for not dwelling on this kind of dispute, rather, is that they are but an essential prelude, and thus an important part of, two further and deeper kinds of legal dispute.[11]

1.3.1.1 'Empirical' disputes

The first of these are disputes about finding out whether there is a given treaty or customary rule applicable to the case at hand. Such disputes are about whether there is a rule which meets the established conditions for the creation/existence of rule of treaty or customary law. To take a familiar example, in the *North Sea Continental Shelf* cases,[12] the dispute about the 'equidistance-special circumstances' rule could on one level be described as being a dispute of this kind. The Federal Republic maintained that the equidistance method was not applicable as a treaty rule because it had not ratified the treaty requiring its application, and also that the equidistance method had not passed into the corpus of customary law because it had not satisfied the standard requirements of State practice coupled with *opinio juris*, while the two Kingdoms disagreed. It was thus a dispute about whether the requirements for the creation of a treaty or customary law obligation had been satisfied. The assumption in this kind of dispute, then, is that the meaning of the concepts of treaty and custom, and, in particular, the requirements for their creation are well-established. It was not disputed that treaties had to be consented to, or that there had to be sufficient State practice and *opinio juris* for the creation of a customary law obligation. What was disputed was whether the treaty had been consented to in the appropriate manner,

dispute was thus an empirical one: it was about whether the factual circumstances

indicated that the established conditions required for treaty and customary law had been met.

1.3.1.2 'Theoretical' disputes

The second kind of dispute goes one stage further, and concerns the truth-conditions for the existence of a rule of treaty or customary law. Disputes of this kind are about what the requirements for the creation/existence of treaty rules and customary rules are, as distinct from the kind discussed in 1.3.1.1, which assume that these requirements are known. Examples of the present kind of dispute are those about whether certain kinds of agreement are really treaties,[13] or whether practice alone is sufficient for the establishment of a rule of customary law without any need for *opinio juris* accompanying that practice,[14] or how widespread practice needs to be for the establishment of general custom, or whether the consent of a particular State is required for the applicability against it of a rule of customary law.[15] This kind of dispute, then, involves questions as to the meaning of a legal category; in other words, what it means, without

13. See the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Rep. (1994) p. 112, where the issue was whether the Doha Minutes, being the agreed record of a meeting between the States concerned, constituted a treaty in international law. See also the *North Sea* cases (ibid.), where Denmark and the Netherlands argued that, while the Federal Republic had not ratified the 1958 Geneva Convention on the Continental Shelf, it was nevertheless bound by it '. . . because by conduct, by public statements and proclamations, and in other ways, the Republic ha[d] unilaterally assumed the obligations of the Convention' (para. 27 of the Judgment, ibid.). This is an argument about the creation of treaty obligations, to the effect that non-ratification by a State does not preclude the applicability of a treaty against that State. The two Kingdoms may appear to be arguing on the basis of custom or estoppel, rather than treaty; but the fact that the Court dealt with custom (paras. 37-82) and estoppel (paras. 30-32) separately from its response to the treaty argument (paras. 28-30), as well as the fact that the two Kingdoms argued on the basis of custom and estoppel separately from the passage under consideration (see the remainder of para. 27), would suggest that this was a treaty argument, i.e., an argument about the truth-conditions for the existence of treaty obligations.

14. See for example, the Dissenting Opinions of Judges Tanaka (ibid., pp.176-179), Lachs (ibid. pp. 230-232, esp. 231) and Srrensen (pp. 246-247), doubting the need for strict insistence of proof of *opinio juris*.

15. See e.g., the Court's paraphrasing in the *North Sea* cases (ibid.) of the argument of the two Kingdoms to the effect that even if Germany was not bound as a matter of treaty, it was bound by the equidistance rule because that rule had passed into the body of customary law, '. . . and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independent of any specific assent, direct or indirect' on Germany's part (para. 37). The Court did not rule specifically on this point; as it found that there was insufficient evidence of a custom, there was no need to consider whether Germany's specific consent thereto was required.

any necessary reference to the circumstances of a given case, to say that there is a treaty rule or a rule of custom. While 'empirical' disputes are about whether the circumstances indicate that the conditions for the creation/existence of a treaty or customary rule/obligation have been met in a given case, theoretical disputes are about what those conditions are.

1.3.1.3 The paradox

As has been seen,[16] treaties and customary law are the dominant sources of international law because they more or less directly reflect the consent of States. Their consensual basis is their legal pedigree. There are two difficulties raised by this. The first is that in the case of empirical disputes, the consensual basis of treaties and custom should answer any question as to whether the requirements for the formation of such rules have been satisfied. If it is true that the law is to be derived from what States have consented to in the past, one would imagine that the States in question should know whether a particular rule of treaty or custom has met these conditions, unless it is the case that somehow international tribunals are in a better position than States to deal with this question. This seems somewhat unlikely as a matter of fact; the States participating in law-creation must know better than a third party what it is that they have consented to. The second difficulty is the same as the first, but it concerns theoretical disputes: if there is a reservoir of past practice, i.e., State consent, determining the meaning of the concepts of treaties and custom, it would seem unimaginable that theoretical disputes could arise. If States and their legal advisers all use (i.e., have consented to) the same criteria for deciding whether a rule of treaty or customary law exists or is applicable, then the only kind of disputes which will arise are empirical ones. Basing international law-making on such agreement or past consent as to the criteria for determining the law does not seem to allow for the existence of empirical or theoretical disputes. But such disputes, as has been shown, do arise in fact. There are a number of arguments which can be advanced as a response to this apparently disquieting problem.

1.3.1.3.1 It could be argued, firstly, that the problem posed is really illusory. This is because one could simply characterise such disagreements as being, in essence, arguments for law reform, albeit clothed in the language of law as it is. On this view, the arguments in the *North Sea* cases about the customary law status of the equidistance rule were really arguments about whether the rule should be a customary law rule, even though they were presented as arguments

16. See n. 1 above.

as to whether the equidistance rule was or was not already a customary law rule. The strength of this view is that it is well-known that, as a matter of argumentative strategy, a view presented as description is likely to be more persuasive than a view presented as suggestion.[17] Participants in such disputes are then simply not providing an accurate description of what they are really doing. Even though, in fact, they are merely trying to influence the outcome of the dispute, they try to make their arguments objective, as arguments based on the law as it was at the time. Hence the usual statements in the parties' submissions before the International Court asking it 'to adjudge and declare',[18] or to 'recognize and declare',[19] which all suggest, at least formally, a perception that the role of the Court is declaratory rather than constitutive. The problem with this view, however, is that it presents the practice of law as a charade without explaining or justifying the existence of such a charade. If all participants in all legal disputes about what transforms a given practice into a rule of customary law are all engaged in this mutual deception, who is being deceived? Why has the charade been perpetuated? Why have States which have been unsuccessful in previous disputes continued to engage in this charade?[20] Furthermore, where a third-party decision-maker is involved, the difficulty which has to be faced is that such decision-makers, unless expressly authorised to do otherwise by the parties to the dispute, have a responsibility to apply the law as it is at the time of the dispute, not to apply extra-legal standards or to make new law.

1.3.1.3.2 Other bases must therefore be sought to explain away the problem posed by the existence of empirical and theoretical disputes. A second such reason might be the argument that the problem identified here is somewhat overstated and melodramatic. This argument would distinguish between empirical and theoretical disputes, on the basis that the latter, and not the former, are far more significant for the (international) legal order. Empirical disputes, on this view, are simply disputes about finding out what happened, whereas theoretical disputes challenge the definition of categories of legal rule in any circumstances. But, the argument runs, in most cases, the dispute is empirical because most

17. See M. Mendelson, 'Practice, Propaganda and Principle in International Law', (1989) *Current Legal Problems*, pp. 8-9: '. . . if you can present your demand as an existing right, it is the other government who would ostensibly be disturbing the status quo by denying it, and not you by making the demand.'

18. See e.g., the German Memorial and Replies in the *North Sea* cases, loc. cit. n. 12, at pp. 8-9.

19. See e.g., the Danish and Dutch Counter-Memorials, loc. cit. n. 12, at p. 10.

20. The only answer to these questions is an overly cynical one; i.e., lawyers and judges are conniving to keep the truth from their clients so as not to disillusion them, thereby perpetuating their own profession. This is hardly defensible.

participants in the international legal system agree as to when it is correct to say that a treaty or customary rule/obligation exists, so that theoretical disagreement, which questions the foundations of legal categories, is rare. In other words, there are clear cases of what rules of treaty and custom look like, even if occasionally there are hard cases which would involve debate as to what the grounds of a treaty or customary rule/obligation are. In this limited range of penumbral or borderline cases, the argument runs, it is true that it may be admitted that the dispute is about an unsettled situation in which there is no law, so that the dispute really is about what the law should be, rather than what it is. But theoretical disputes, which are more disquieting because they challenge the very existence of law and legal categories, on this view, are rare.

There are a number of problems with this argument. Firstly, there is the consideration, discussed at the beginning of this subsection, that disputes relating to facts are nevertheless legal disputes, so that empirical disputes are not to be seen as being unimportant. Secondly, theoretical disputes are not rare, as suggested by the argument under consideration. A glance at any textbook chapter on the sources of international law will confirm this point. Furthermore, it is not difficult to see that the distinction between empirical and theoretical disputes is one that is to be maintained for analytical purposes only. In practice, they are not separated, and the reason for this is not hard to see. It is simply that one's view as to whether a given set of circumstances fall within the rubric 'custom' (i.e., an empirical matter) will be influenced by what one perceives that very rubric to mean (a theoretical matter).

Thirdly, the argument is flawed because it rests on a distinction between clear cases and penumbral or borderline or hard cases, a distinction which is, in a very important way, illusory. The view that physical acts only, and not mere statements, can be evidence of State practice,[21] will be taken to illustrate this point. The clear case, in which it is agreed that a rule of customary law exists, is one in which there is universally accepted (physical) practice, where States have acted in the belief that their actions were sanctioned by the law. The hard or borderline case would arise where the practice has consisted almost exclusively of claims, declarations, assertions or the like, without corresponding physical practice. But the point is that any answer to the question whether mere statements constitute practice must be based on a conception of the purpose and nature of the concept of custom, and with it, State practice. If the answer to the question is that statements do constitute practice, then that reflects a particular conception of the nature of custom as being based on any evidence from which the views of States can be inferred. If the answer to the question is that statements do not amount

21. See e.g., D'Amato, *The Concept of Custom in International Law* (1971) p. 88.

to practice, then that also reflects a particular, narrower view of custom. Therefore, regardless of the answer, the question is about the purpose and nature of the concept of customary law. The decision to regard or not to regard mere statements as State practice is not merely a linguistic dispute about how the phrase 'State practice' is to be used. That decision is based on deeper considerations about what kinds of conduct are sanctioned by the law, through the instrumentality of the concept of custom and State practice. It is thus a trivialization of the issue to characterise the dispute between mere statements and practice as a dispute about a hard or borderline example and a clear example of something. Whatever side is taken, it is a dispute about the concept of custom including its subset of State practice, not simply an argument about where a line between two essentially distinct phenomena is to be drawn. In other words, arguments involving hard examples of something are arguments which test the limits and meaning of that thing as illustrated in the clear case.[22]

The point is that if it were true that prior State consent had provided a fixed meaning of custom and its component parts, then such disputes about borderline cases would not arise. The fact that they do arise suggests that the distinction between clear and borderline cases is unhelpful.

1.3.1.3.3 Another argument that may be put forward to explain away the problem posed by the existence of empirical and theoretical disputes would run as follows. The problem posed by the existence of these disputes is the suggestion that consent, which is the basis of treaty and customary rules, cannot provide a sensible explanation of why they do arise. If there is consent as to what 'treaty' and 'custom' mean, then such disputes should not arise. But this problem is real only if 'consent' is taken to mean consent to the substantive law governing the conditions for the creation/existence of a rule of treaty or customary law. If consent is taken to mean consent to the jurisdiction of a (third-party) decision-maker, then the problem is eradicated, because the parties to the dispute can be taken to have accepted, implicitly or explicitly, whatever methods of identifying the law that may be chosen by the decision-maker.[23]

22. The distinction between clear and borderline cases also assumes, by referring to 'clear' cases, that the meaning of words and concepts are fixed, precise or exact. But as has been demonstrated in legal and other contexts, this is not the case. See L. Wittgenstein, *Philosophical Investigations*, translated by G.E.M. Anscombe (1974) paras. 37-42, esp. paras. 39 and 40. See Lim and Elias, loc. cit. n. 10, in text accompanying nn. 28-31.

23. See e.g., V. Lowe, 17 *Journal of Law and Society* (1990) p. 386 (book review of M. Koskenniemi's *From Apology to Utopia: The Structure of International Legal Argument* (1989)) at p. 388, where this point is made.

While this argument has considerable force, it is also problematic, for a number of reasons. Firstly, it is well-known that that third-party adjudication is very much the exception rather than the norm in the international legal system. The explanation under consideration would hold true, then, only in the limited number of disputes referred to a third-party. Secondly, even in those cases, it must be remembered that the basis of that third-party's jurisdiction is the consent of the parties. As a result, just as is the case in relation to treaties and custom, consent to the decision-makers' jurisdiction in general is itself open to, and is often enough the subject of legal disputation.[24] Thirdly, and most importantly, even where the consent to the third-parties jurisdiction is not disputed, there are standards by reference to which the decision-maker must act. The difficulty lies in the fact that those standards which decision-makers must apply, *in casu* treaties and custom, are themselves the product of consent; any decision-maker applying treaties and custom is applying law based on consent, often including the consent of the actual parties to the dispute. Unless the decision-maker has been given the power to decide the case *ex aequo et bono*, or by the application of other non-legal standards, it must have regard to the law and apply the law. Consent to its jurisdiction to decide a case according to law is consent to have the substantive rules of law, including the rules on identifying the law *and their consensual basis*, applied in the case.

The situation is not the same as the situation in the case of contracts in domestic law, where, even though contracts are also consent-based, it is for the court dealing with the case to determine (i) whether the intentions of the parties is the key, and more importantly, (ii) what amounts to consent, without necessary reference to the opinions of the parties on these points. In international law, both questions (i) and (ii) are themselves to be determined by reference to practice.[25] The paradox, thus, is in consenting to the decision-makers' authority to apply rules that are themselves derived from consent. Surely the States (whether they

24. See e.g., A. Redfern and M. Hunter, *International Commercial Arbitration* (1986) pp. 209-216 (for arbitrations) and Brownlie, loc. cit. n. 9, at pp. 718-730 (on the World Court) for discussion of the problems of consent to the jurisdiction of third-party decision-makers.

25. L. Henkin ('General Course on Public International Law', 216 Hague Recueil (1989-IV) p. 54) wrote that '[t]he norm governing the making of customary law-the requirement of consistent general practice plus *opinio juris* - is based on the constitutional conceptions of the State system, but developed by custom, by general repeated practice and acceptance'. V. Lowe also wrote that '[t]he secondary rule of law creation will itself be a rule of customary international law derived from state practice' ('Do General Rules of International Law Exist?', 9 *Review of International Studies* (1983) p. 207, at p. 209).

are parties to the particular dispute or not) must know what they have consented to better than a third-party?[26]

However, it may seem reasonable to argue that it is precisely the fact that few disputes are submitted to third-party settlement that confirms the view that in such cases, States are willing to recognise in advance whatever methods of law identification that may be chosen by the adjudicator. Since there is no general obligation to do so (precisely because a third-party may use methods which at least one of them has not accepted), it would seem true that to submit a dispute to a third-party signifies a willingness to accept any solution, provided the dispute in question is resolved on the basis of 'law'. The point, however, is that a great deal is taken for granted, rather than demonstrated, by the approach that says that a decision-maker, in the international legal system, is free to apply whatever methods it chooses. For one thing, even though the parties specify what kind of decision they seek,[27] or which law is to be applied (as is normal in the case of ad hoc arbitral tribunals), they do not normally specify the methodological

26. It is no answer to these arguments to say that there are normal processes of legal reasoning which decision-makers must apply, and that this is what distinguishes the third-party's enterprise from that which the parties could do themselves. The simple point is that States, in the traditional conception of the international legal system, do serve executive, judicial (i.e., relating to interpretation and application of the law) and legislative functions. See B. Cheng, 'The Future of General State Practice in a Divided World', in MacDonald and Johnston, *The Structure and Processes of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) p. 523. He points out that what he describes as 'auto-interpretative' international law 'represents the bulk of international law'. States, through the medium of their officials, can and do interpret and apply rules of international law, so that the substantive function of a third-party decision-maker is routinely performed by the subjects of the law themselves. The normal processes of legal reasoning, the inherent discretion involved in the exercise of applying the (general) rule to the (particular) facts, and the implicit processes of defining the scope of the applicable rule and the classification of the facts do not require a third-party decision-maker. All these things can be and are undertaken by States and other subjects of the law in everyday international legal discourse.

27. In the *Minquiers and Ecrehos* case (ICJ Rep (1953) p. 47), instead of using the optional clause, the parties submitted their case by special agreement, thereby giving themselves a greater degree of control over the nature of the judgment. Both States wanted a judgment ruling that full sovereignty over the disputed islets and rocks belonged to one or the other State, rather than a declaration that these areas were *terra nullius* or a condominium. They thus formulated their submissions to guide the Court accordingly. And it worked; the Court found, on p. 52, that '[b]y the formulation of Article I the Parties have excluded the status of res nullius as well as that of condominium.' Similarly, in the *North Sea Continental Shelf* cases (loc. cit. n. 12, at p. 13, para. 2), the Court recognised that it was 'requested to . . . to decide what are the applicable "principles and rules of international law"', rather than actually delimiting the boundaries itself. See D. W. Bowett, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes', Hague Recueil (1983-II) p. 170, at p. 197, for a survey of the different kinds of requests made of third-party adjudicators by the Parties.

approach to be used by the tribunal in identifying the law, if for no other reason, because that is often itself the very subject-matter of the dispute. The only incontrovertible evidence of the parties' views on this point is to be found in their pleadings. Of course, it may well be that the fact that third-party adjudicators do apply different methods from those supported in the pleadings may be taken to imply consent to whatever the third-party chooses. But this is only speculation, and there is certainly evidence that States, both parties to the dispute and other States, can disapprove of a tribunals judgment.[28] It is not always easy to determine what the parties have in mind when they submit a case to third-party adjudication. It could be that each party could simply be so confident, individually, that its position will receive the sanction of the third-party, so that reference to the third-party is for the purpose of having a vindication of its claims against the other party; and in such a case, there is no necessary basis for assuming that such a State accepts whatever methods of law identification are used. Alternatively, it could just as easily be that the parties may really not be sure as to the legal validity of their claims, and it is in this type of case that the decision-maker may be considered, in this limited sense, to have been given a free hand as to methodology. But, again, this is speculation. One could also speculate as to what the answer would be if a State is asked in the abstract whether it does intend to give a free hand whenever it submits a dispute to a third-party.[29] The paradox lies in the fact that we do not know why States

28. A well-known example of this is the *SS Lotus* case (PCIJ Rep., Series A, no 10), the ruling in which was rejected by the International Law Commission in its draft articles on the law of the sea (see ILC Yearbook (1956-II) and by the United Convention on the Law of the Sea (1982) Art. 11(1). See also the views expressed on the *Nottebohm* judgment (ICJ Rep. (1955) p. 4) in the *Flegenheimer* case (25 ILR (1958-I) p. 91 at pp. 148-50); the General Assembly's response to the *Admissions* case (ICJ Rep. 1947-8) p. 65 (see S. Rosenne, 'On the Non-use of the Advisory Competence of the International Court of Justice', 39 BYIL (1963) p. 1 at pp. 40-43); the statement by the American Secretary of State concerning the law applied by the Permanent Court of Arbitration in the case concerning the *Norwegian Shipowners' Claims* (I RIAA (1948) pp. 344-346), stating that 'My Government finds itself compelled to say that it cannot accept certain apparent bases of the award as being declaratory of [international] law or as hereafter binding on this Government as a precedent.' The letter containing the statement proceeded to mention the particular rules against which the Government felt obliged to protest. The point of all these examples is to show that it cannot be true, certainly not always, that by referring a case to a third-party, the parties have given that third-party a free hand. For a discussion of the problems caused where third parties may be seen to have gone to far, see Bowett, loc. cit. n. 27, at p. 194-201.

29. See e.g., the *N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos* v. *Nederlandse Administratie der Belastingen* case before the European Court of Justice in 1963 (case 26/62 [1963] ECR 1), where the Court ruled that the principle of direct effect was implicit in the EEC Treaty. Strongly worded interventions were made by three of the six Member States of the Community to the effect that they had not intended, when they signed the treaty, to allow immediate

submit disputes to third-parties, but we do know that treaties and custom are based on consent, and that States do not (always) intend to give the third-party a free hand. At the very best, then, the argument that adjudicators have a free hand provides only a very limited way round the paradox. It is limited because it is confined to the relatively rare occasions where a third-party adjudicator is involved, and also because, even then, it is based on speculation in the face of (at best) ambiguous evidence.

There does not appear, therefore, to be a satisfactory answer to the problem posed by the existence of empirical and theoretical disputes in the context of treaty law and customary international law. The inability of the consensual basis of treaties and custom to account for such disputes is the paradox of consensualism in international law. The paradox is this: the major sources of international law, treaties and custom, owe their status to the fact that they are derived from the consent of States. At the same time, however, their pedigree, consent, simply does not allow for a sensible description of what legal disputes are about. To put the same point differently, concreteness of the law is very important, and this is provided by the consent of those with law-making authority, i.e., mainly States. But where there is a dispute, and conflicting claims are advanced, it is the very consent which is supposed to supply the applicable law which is itself in issue, and the consensual basis of the law becomes a stumbling block. The paradox, therefore, is that consent is both essential and doubly problematic. It provides the essential concreteness to the form and content of the law, while at the same time allowing for neither the solution of disputes nor a sensible description of the character of dispute resolution even in relation to the major consensual sources of international law.[30]

enforceability of Treaty provisions by individual applicants in national courts. Of course the Court had compulsory jurisdiction, and the judgment was binding in law. But it is surely paradoxical that a third-party can tell a signatory to a treaty, only five years after that treaty was concluded, that the party had not willed what it said it had willed?

30. See M. Koskenniemi, loc. cit. n. 23, Chapter 1, for an alternative analysis of this problem. However, while Koskenniemi's analysis of the structure of international legal argument shows that there are two dimensions to legal argumentation which reflect a tension between the need for concreteness and the need for normativity, we try to show that concreteness and normativity are intimately related. Participation leads to specificity and normativity force, and lack of participation leads to lack of specificity and lack of normative force. As such, we do not dwell on the tension that Koskenniemi alludes to. But our conclusions are the same. We find that legal decision-making, in so far as it seeks to rely upon doctrine, which itself results from consent, faces the problem of what indeed the object of consent looks like. Now, Koskenniemi portrays a straightforward tension between received doctrine and consent whereas we emphasize how doctrine is the result of consent and therefore faces the problem of what that consent consists of in a particular case where the consent of States are meant to have resolved the problem, and yet cannot. We direct our attention to the problematic notion of consent itself, without talking about any tension that there may be between

If treaties and custom, the main sources, suffer from this fundamental paradox, the attempt to differentiate between them and the non-consensual sources (i.e., 'general principles' and 'soft' law) hierarchically and logically must examine how differently the non-consensual sources fare when subjected to the same type of scrutiny. Any conclusion as to the relative advantages or as to the status of the non-consensual sources *vis-à-vis* the consensual ones must, at least in part, consider the problem from this point of view.[31] 'General principles' and 'soft' law will now be discussed in the context of this difficulty.

2. GENERAL PRINCIPLES OF LAW

Testimony to the fact that the category of general principles has caused a great deal of concern in international law is the wide variety of possible meanings of what the category contains suggested in international legal doctrine. The following discussion identifies some of these different meanings[32] (which are not necessarily mutually exclusive in the sense that a principle could fall into more than one

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consent and doctrine. It might be said that Koskenniemi describes a problem which we try to locate in the notion of consent itself. But our conclusions are, naturally, similar. Koskenniemi's explanation is contextual in the sense that it looks towards the political environment in which the law resides, but ours is formalistic and conceptual, and looks merely towards the internal coherence of our received doctrine.

The foregoing should not be taken, because it focuses on disputes, to rest on the assumption that dispute resolution is the central function that the law serves. The reason why disputes are the basis of the foregoing arguments is that they are the most illuminating setting in which the assumptions and claims of the participants in the system can be scrutinised, since they are most explicitly discussed in that setting. Hard cases, which are the subject of dispute, test the limits of legal rules and concepts explicitly, and are thus by far the most worthwhile setting for an analysis of the process of law-identification.

31. The point is that any legal philosophy which subscribes to any form of 'pedigree' test must face this problem. In other words, if any kind of law is to be derived from a particular source (be it explicit legislation through consent or otherwise, morality or social necessity), legal disputes should not arise because that source should stipulate the law.

32. Schachter, loc. cit. n. 7, provides a convenient taxonomy of the different meanings that have been attached to the phrase 'general principles', and the following discussion uses his categories as a basis. He identified five meanings, which shall be examined along with some other suggestions as to the meaning of the phrase. See also B. Vitanyi, 'Les positions doctrinales concernant le sens de la notion de 'principes généraux reconnus par les nations civilisées' 86 RGIDP (1982) p. 48. For a useful bibliography on the subject of general principles, see J.G. Lammers, 'General Principles of Law Recognised by Civilized Nations', in *Essays on the Development of the International Legal Order (Mélanges Panhuys)* (1980) p. 3, at n. 1.

of the categories) and contributes to the debate, and then, most importantly, it compares the difficulties with those raised by disputes about custom and treaty.[33]

2.1 Principles of municipal law

In addition to the two principal sources of international law treaties and custom, Article 38(1)(c) of the Statute of the World Court refers to general principles as a third source of rules which may be applied by the Court. Treaties and custom are essentially consensual methods of law-making. This paragraph has thus been described as 'revolutionary',[34] because, at least as far as the majority of the Advisory Committee of Jurists which drafted the Statute of the Permanent Court was concerned, the purpose was to allow for reference to rules not resting on the will/consent of States, rules which therefore went beyond treaty law and rules of custom.[35] However, the deliberations of the Committee make it clear that the text of paragraph (c) that we now have was meant not to be a licence for the application of 'general and vague principles of objective justice'. It was meant to cover 'only those principles which were clearly laid down in the municipal law systems of dominant States.'[36] The main question here is not so much the drafting history of the text of paragraph (c), but of the role to be played by a source of international law which is not rooted in the consent of States, at least in the senses covered by treaties and custom.

2.1.1 *A source of international law?*

There is a body of opinion which would deprive this third source of any useful function. The views usually attributed (though not exclusively)[37] to Soviet

33. The aim of this discussion of general principles is not to provide an exhaustive list of the kinds of general principles that there are, nor is it to provide exhaustive analyses of each kind of general principle identified. The purpose is to consider the problems raised in how to determine that a given principle is one which exists independent of treaties and custom, and to compare those problems with those raised in the process of identifying a treaty or customary rule.

34. Cassese, loc. cit. n. 1, at p. 171.

35. Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee (1922) pp. 286 et seq.

36. Cassese, loc. cit. n. 1, at p. 172. In Lord Phillimore's often-quoted words, 'the general principles referred to . . . were those which were accepted by all nations in foro domestico, such as certain principles of procedure, the principle of good faith, and the principle of res judicata, etc.' (Procès-verbaux, idem., n. 30, at p. 335).

37. See e.g., Tunkin, loc. cit. n. 4, at pp. 184-185; H. Kelsen, in *Principles of International Law*, A. Tucker, ed., 2nd edn., (1966) pp. 539-540; P. Guggenheim, *Traité de droit international*

scholars illustrate this approach. Their argument is basically that international law is derived from the will/consent of States to a given practice or proposition as international law, as distinct from domestic law. This is due, it is argued, largely to the fact that there are hardly any principles common to the different legal orders of different countries. Therefore, before any induction from principles of domestic legal systems can yield rules of international law, those principles must be recognised as international law. To the extent that Article 38(1)(c) is directed at the Court, this body of opinion objects that reference to domestic law allows judicial law-making; law would be created 'not by general principles, but by judges on the basis of general principles extracted from national legal systems,' which causes difficulties, since the Court 'does not create international law; it applies it.'[38] And to accept a principle as one of international law is to have *opinio juris* (which would make the principle one of customary law) or to consent to a treaty text. In sum, acceptance as international law equals custom or treaty, and acceptance as law simpliciter is not international law at all. There is thus little left for paragraph (c) to do. This is an attempt at logical differentiation, on the basis that municipal law principles are of a different form from treaties and custom.

There are, however, a number of objections to this approach. Firstly, this approach draws a distinction between the 1920 version of 'general principles'

Secondly, it may not always be possible to distinguish between evidence of domestic law and evidence of international law in the way that the views under consideration might seem to suggest. Thus Tunkin admits that, leaving aside the question of their social purposes, the rules of most legal systems are often identical, and this has a certain significance for the formation of norms of international law; '[t]he existence of externally identical norms in different systems of national law frequently leads to the emergence of corresponding principles and norms of international law.'[41] He however stops short of saying that common domestic principles can be formal sources of international law, in the sense of law-making process; common principles can only 'exert great influence' on the development of international law, but cannot be principles of international law. Such a view implies the adoption of a more or less dualistic conception of the relationship between international and domestic law,[42] or an adoption of the view that international law deals exclusively with inter-State relations. But the accuracy of such views is questionable. Today, there are many important areas regulated by international law which are not necessarily concerned with the relations between States; human rights law is but one example. Furthermore, the relationship between international law and domestic law is symbiotic, in the sense that domestic laws can be a material source of international law while international law at the same time influences domestic law.[43]

Thirdly, the argument that domestic law principles cannot be a source of international law, because of the different socio-political settings in which domestic principles are supposed to operate, is questionable. The fact is that competent tribunals, and not just the International Court of Justice, have applied general principles of municipal law as a source of international law.[44]

41. Tunkin. loc. cit. n. 4, at pp. 199-200.

42. This is particularly odd in the case of Kelsen, an avowed monist. See e.g., loc. cit. n. 37, at pp. 553-88, and his *General Theory of Law and State* (1945) at pp. 363-80.

43. In the *SS Lotus* case (loc. cit. n. 28), the search for a rule of customary law compelling States not to prosecute offenders in M. Demons' circumstances involved an examination of domestic laws of the States. One can only speculate whether States enacted these laws with international law in mind, or whether they were simply focusing on regulating their own rules of domestic criminal procedure. The point is that it is not always possible to distinguish between practice which is purely municipal and practice which is supposed to have international legal significance.

44. See e.g., H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1929) Chapters III-VIII; Brownlie, loc. cit. n. 9, pp. 17-18; Sir R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edn., Vol. 1 (1992) pp. 36-40, for detailed lists of the application of general principles of municipal law in international cases, both before the World Court and other tribunals. In particular, see p. 39 of the latter, regarding tribunals other than the World Court: '. . . a number of international tribunals, although not bound by the Statute, have treated that paragraph of Article 38 as declaratory of existing law and have relied on "general principles of law" in reaching their decision.' See further, ibid. p. 40: 'General principles of law, however, do not have just a

General principles of municipal law, then, are sources of international law, and the attempt at logical differentiation between them and the consensual sources on the basis that they operate only in the domestic sphere while the latter operate in the international field, fails.

2.1.2 *The process of identification of a principle of municipal law*

The real limitation on the identification of an applicable principle of municipal law depends, then, not on any neat distinction between international law and municipal law, but on two considerations.

The first is vertical; it is the question of the suitability of the municipal law principle to application in the international law sphere. It has been suggested that the vitality and applicability of the given general principle found in domestic systems be based on its capacity 'to guide or inspire State action'.[45] The principle in question must possess 'such a degree of reasonableness and appropriateness for application on the international plane for a State which acts in a contrary manner at least to have been conscious of a possibility that a rule of law might point in the opposite direction.'[46] It is for this reason that there have been numerous instances when international tribunals have refused to apply what might be considered to be well-known principles of domestic law.[47]

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supplementary role, but may give rise to rules of independent legal force; and it is to be noted that general principles of law are included in Article 38 of the Statute of the Court in the same manner as are treaties and custom, rather than as one of the "subsidiary means" referred to in Article 38(1)(d).'

45. H.W.A. Thirlway, 'The Law and Procedure of the International Court of Justice: Part Two', 61 BYIL (1990) p. 1, at p. 113.

46. For similar views, see Jennings and Watts, loc. cit. n. 44, at p. 37, and Judge Sir Arnold McNair's much-quoted statement in the *International Status of South-West Africa* case, ICJ Rep. (1950) p. 120, at p. 132: 'The way in which international law borrows from [municipal law] is not by means of importing private law institutions "lock, stock and barrel", ready made and fully equipped with a set of rules . . . In my opinion the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policies and principles rather than as directly importing these rules and institutions.'

47. See e.g., the *North Atlantic Fisheries* case, 1 Hague Court Reports (1910) p. 141, where the tribunal refused to apply the concept of servitude; the International Court's Advisory Opinion on the *International Status of South-West Africa*, idem., p. 120, at p. 132, esp. Judge McNair's Separate Opinion, at pp. 148-153 (on the applicability of the private law concepts of mandate, trust and agency); the *Right of Passage* case, ICJ Rep. (1960) p. 6, where the Court effectively distinguished between 'the universal practice of States' whose *municipal* laws recognised that 'the holder of enclaved land has a right, for purposes of access to it, to pass through adjoining land' (Portuguese submission, pp. 11-12) on the one hand, and intentional law rights of transit over State territory on the other (see Thirlway, loc. cit. n. 45, at p. 119). Brownlie, loc. cit. n. 9, at p. 16,

The second consideration is horizontal or lateral, and may be termed the 'census' element.[48] This refers to the requirement that the principle must be 'general', in the sense of being widely recognised. It is this point that Tunkin had in mind when he spoke of the absence of principles common to the different legal systems of the world.[49] This horizontal dimension has been an even more frequent reason why international tribunals refuse to apply municipal law principles. It has been written that,

> '. . . recourse to principles of domestic law, even if they have not yet become "internationalized" by custom or treaty, does not derogate from the principle of consent. It is a source available only as necessary for interstitial use, to fill out what international law requires but has not recognised as customary law because it has not yet been invoked often and widely enough, and is too cumbersome for the system to negotiate by multilateral treaty. General consent is properly assumed.'[50]

The reality of the requirement that the principle be 'general' is illustrated by the way in which principles of domestic law origin are selected and applied in the international context. In the *Temple of Preah Vihear* case[51] before the International Court of Justice, neither party contested the existence of the principle of estoppel, and this might explain why the Court's judgment was silent as to the method it used in transferring the principle from the domestic realm. The Separate Opinion of Judge Alfaro, in contrast, stressed the differences between the conceptions of the principle in different domestic systems, and he chose for application the least common denominator of all these different conceptions.[52] In the *South-West Africa* cases (Second Phase), the Court refused, again in a somewhat brief and laconic pronouncement, to apply the *actio*

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also mentions the differences between the international law on acquisition of territory and the effect of duress on treaties on the one hand and their domestic counterparts on the other.

48. The term is taken from Brownlie, idem., who underscores the importance of the consideration that the widespread recognition of a given principle is not sufficient; the principle must be suitable otherwise than on grounds of widespread recognition for application at the international level.

49. For analysis of the differences between Socialist and bourgeois legal systems, see R. David and J.E.C. Brierly, *Major Legal Systems in the World Today*, 3rd edn. (1985) pp. 155-306. The reluctance of Socialist countries to submit disputes to third-party settlement means that there have not been cases where the applicability of a general principle not found in the legal systems of such countries was in dispute. The *Russian Indemnity* case (*Russia* v. *Turkey*, Hague Court Reports (1912) p. 297) was decided before the Russian Revolution.

50. See Henkin, loc. cit. n. 4, at p. 40. See also Lauterpacht, loc. cit. n. 44, at pp. 69-70 (the principle must be '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.').

51. ICJ Rep. (1962) p. 4.

52. Ibid., p. 49.

popularis on the grounds that it was not 'general', being known only to certain legal systems.[53] Similarly, in *Barcelona Traction* case, the Court stated that,

> '[i]t is to rules generally accepted by municipal legal systems which recognise the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers.'[54]

Judge Gros, in his Separate Opinion, warned against the untrammelled translocation of 'definitions taken from certain municipal systems of law into a rule of international law', on the basis that in the present-day world,

> '. . . two-thirds of the population live outside the capitalist system and the legal rules to which the Parties adhere. The principle asserted must therefore be demonstrated to form a veritable rule for States with a liberal economic system, one accepted by them as a regional rule of international law.'[55]

In the *Abu Dhabi* arbitration, Lord Asquith contrasted two English law principles, namely *expressio unius est exclusio alterus*, which was applicable because it was 'rooted in the good sense and common practice of the generality of civilised nations', on the one hand, and the *verba chartarum fortius accipiuntur contra proferentem* principle, which was not applicable because it was peculiarly English; it owed its origins to incidents of English 'feudal polity and royal prerogative', and was thus not generalizable.[56] Again, in the arbitration between Texaco and Libya in 1977 the arbitrator refused to treat the French institution of administrative contracts as being a general principle of law because it was not recognised in other legal systems, including, pertinently, Libyan law.[57] In *Sea-Land Services Inc.* v. *Iran*, the Iran-United States Claims Tribunal stated that the principle of unjust enrichment 'is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of available general principles of law to be applied by international tribunals.'[58] It is for this reason that it has been suggested that '[m]uch of the difficulty of proving general principles of law could be avoided if international tribunals confined themselves to applying general

53. ICJ Rep. (1966) p. 5, at p. 47, para. 88.
54. ICJ Rep. (1970) p. 2, at p. 37, para. 50.
55. Ibid., p. 277, para. 16.
56. 1 ICLQ (1952) p. 247, at pp. 250-251.
57. *Texaco Overseas Petroleum Co. and California Asiatic Oil Co.* v. *Libya*, 53 ILR (1977) p. 389, at pp. 467-468.
58. 6 Iran-USCTR (1984) p. 149, at pp. 168-169.

principles of law which were common to the disputing parties, without inquiring whether these principles existed in the law of other States.'[59] The same should be true even if the dispute arises outside the context of third-party dispute settlement.

The upshot of the foregoing is that in identifying a general principle of international law from provisions of domestic law, the principle must be general, as required by the letter and the spirit of Article 38(1)(c). But this is also a familiar requirement for identifying a rule of customary law. Even accepting that finding a given principle of domestic law in State X is not the same thing as finding that State X has consented to that principle *qua* international law, the same kind of inquiry is needed whether one is applying custom or general principles. For domestic law principles, the inquiry involves a survey aimed at distilling such concordance as may be found between the stipulations of different domestic systems, much in the same way that general custom is to be derived from the concordance of the practice of States,[60] or in the same way that the meaning of a treaty provision may be provided by looking at the subsequent practice or the *travaux préparatoires* attending that provision.

2.1.3 *The paradox*

At the level of empirical disputes[61] (i.e., disputes about whether a given principle falls within the 'well-defined' rubric 'general principles of law'), essentially the same process is required for the identification of an applicable principle of domestic law as is required by customary law. But much more importantly, at the level of theoretical disputes, the whole debate which has been spawned regarding the status and meaning of the category of 'general principles' in general, and the status and meaning of municipal law sources in particular, is exactly the same as those which arise when there is a theoretical dispute about custom or treaty.

59. M. Akehurst, 'Equity and General Principles of Law', 25 ICLQ (1976) p. 824. See also Lammers, loc. cit. n. 32, at pp. 62-64, and 69, for the view that there is nothing to stop the application of principles recognised by States within a limited region only, in the same way as the wording of sub-paragraph (b) on customary has not prevented the application of regional and bilateral customary law. For the argument that no meaningful distinction can be drawn between general and non-general custom, see O. Elias, 'The Relationship Between General and Particular Customary International Law', 8 *African Journal of International and Comparative Law* (1996) p. 67.

60. The same applies whether one adopts a narrow consensual view of custom (i.e., that no State can be bound without its consent) or a broad one (i.e., that only widespread or general practice is required, not a universal one), or whether one is dealing with general custom or custom of more limited scope.

61. See section 1.3.1.1 above.

The point in relation to theoretical disputes, i.e., disputes about the meaning of the category itself, needs elaboration. Article 38(1)(c) is, after all, a treaty provision; it derives its existence from the consent of States to the Statute of the Court. Yet its meaning is the subject of disagreement. Consent, as reflected in the treaty text or subsequent practice, should provide the answer, but it does not. Alternatively, even if, as Lauterpacht puts it, it could be said that 'there is a rule of customary law to the effect that rules of law otherwise independent of custom and treaty are to be regarded as binding in individual cases,'[62] so that principles of municipal law are a source because customary international law says so (regardless of Article 38 or any other form of written agreement conferring jurisdiction on a third-party decision-maker), the same problem has to be faced. The consent of States as reflected in general practice should provide the answer to the disputes arising concerning the requirements of the category, but it does not. If, then, general principles of domestic law are themselves a category based on the consent of States expressed through treaty or custom, the attempt to logically differentiate municipal sources from custom and treaty cannot escape the paradox of consensualism.

In the final analysis, therefore, whatever view one takes as to the status of municipal law principles, the paradox of consensualism manifests itself. If one takes the approach (criticised in section 2.1.1 above) which does not ascribe any role to principles derived from domestic law, one has a rigidly defined list of the sources. General principles of law are then non-existent both as sources and (hence) as problems for international law. The paradox of consensualism, however, would still hold in relation to treaty and custom, the accepted sources. This means that there will still be debates about what is meant by custom and treaty, which simply shifts the issue from being a debate about general principles to being a debate concerning custom and treaty. Alternatively, if one takes the view supported here, i.e., that national law principles constitute a source of international law, then the same problems resurface in a different guise; as demonstrated, recourse to the principles of domestic systems entails the same questions of sufficient consent (even if it is consent in a different sense from consent to treaty and custom), generality, uniformity and awareness of such a principle in support of the claims put forth on the basis of that principle.

It may be argued, in response, that principles of national law are not consensual (and this is the rationale for their inclusion in Art. 38) and should therefore not suffer from the paradox. But as has been observed in the course of this subsection, and as many commentators have argued, this apparently non-consensual character of 'general principles' is the explanation of the lack of use

62. Lauterpacht, loc. cit. n. 44, at p. 63.

of the category in international law generally.[63] To guarantee their applicability, such principles must have an objective basis, namely, their recognition in legal systems of States generally. Alternatively, the implication in such arguments about the non-consensual nature of municipal law sources is that, since Article 38(1)(c), for example, is a direction to the Court, this category of principles would exist only in disputes before the Court or other third-party fora where the decision-makers are permitted to apply it, because the parties can be taken to have accepted implicitly whatever method of law-identification chosen by that decision-maker. But as has been seen in section 1.3.1.3.3 above, the distinction between focusing on consent as far as jurisdiction of the tribunal is concerned and focusing on the consent to substantive law does not take us very far; what is meant/required by reference to the category of 'municipal law sources' is to be found by an examination of international practice.

In sum, whatever side is taken as to the status of municipal law sources, the problems raised are the same as those raised by treaty and custom, if for no other reason, precisely because the category of general principles of municipal law depends on treaties (or other written agreements) and/or custom for its existence. It follows that the same problem applies not just to general principles, substantive or procedural, derived from municipal law, but also to any class of principle that may be referred to as a source of international law other than treaties and custom. The meaning of any source of international law must necessarily come from international practice, and it is that practice that should provide the meaning and requirements of the new source. The statement that 'general principles' are not consensual is quite unimportant wherever the serious business of identifying an applicable principle is faced. The paradox is inescapable. Nevertheless, other kinds of general principle will be discussed because they raise other pertinent issues.

2.2 General principles of law 'derived from the specific nature of the

It has been argued that the category 'general principles of law' covers principles derived from a system dealing with sovereign States as the major actors. Examples of such principles are stated to be the principles of '*pacta sunt servanda*, non-intervention, territorial integrity, self-defence and the legal equality of States.'[64] The implication is that these principles are both logically and

63. See e.g., Cassese, loc. cit. n. 1.

64. Schachter, loc. cit. n. 7, p. 51. See also H. Mosler, *The International Society as a Legal Community* (1980) pp. 134 et seq.. The principle of good faith may also be included in this category.

hierarchically different from customary and treaty law; logically because they are of a different species, hierarchically because they are foundational rules of the international legal system. The question that arises is whether the differentiation is meaningful, i.e., whether there is any need for this category separate from treaty and customary law.

That the answer is negative can be demonstrated by looking at the work of Henkin.[65] The principles falling within this category are principles which he identifies as being principles of a specific kind of customary (because unwritten) law,[66] namely what he calls 'constitutional law' or 'fundamental legal principles of the international system'. The main feature of these principles, as distinct from other kinds of customary law, is that while they all are supported by treaty texts (notably the United Nations Charter) and practice and *opinio juris* today, they were 'basic assumptions' of the international system, which were 'implicit, inherent in statehood in a State system'; in other words, they were not created by the texts and practice/*opinio juris*. The point is that, nevertheless, on the most traditional analysis of custom, these principles are customary law because (a) they were not deliberately laid down,[67] but at the same time (b) they are not immutable and can be, and have been developed, eroded or otherwise altered by practice.[68] Of course, the changes may be slight or gradual, and the more drastic

65. Henkin, loc. cit. n. 4.

66. Henkin's list includes 'the concepts of state and government, territory, population; the equality of states; state autonomy and its implications, notably the requirement of state consent and the effectiveness of consent to bind the state; territorial integrity and inviolability and the impermeability of the state as an entity; the principle of pacta sunt servanda; the concept of nationality; perhaps also established norms of diplomatic intercourse'; Henkin, loc. cit. n. 4, at p. 31.

67. The distinction between the mode of creation of customary law when compared with treaties is, in Henkin's terms, '[t]reaty law is made; customary law results. Treaties are made by an act of will, purposefully; custom develops. Treaties are prospective; custom is realised retrospectively' (Henkin, loc. cit. n. 4, at pp. 27-28.). This is not, in traditional terms, a controversial view, although there is compelling evidence to suggest that custom is now being made purposefully; see T. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 Harvard ILJ (1985) p. 457, at p. 463 et seq.

68. Some of these constitutional norms have been changed over the years; for example, 'the effectiveness of consent to bind the state' is now subject to the concept of jus cogens. Similarly, as to the meaning of the principle of non-intervention in the domestic affairs of States, see also the *Nationality Decrees Issued in Tunis and Morocco* (PCIJ Rep. (1923), Series B, No. 4), where the Court stated that '[t]he question whether a certain matter is or is not within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations . . . it may well happen that . . . in a matter which . . . is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless limited by obligations it may have assumed towards other States.' See also L.M. Goodrich, E. Hambro and A.P. Simon, *The Charter of the United Nations*, 3rd edn. (1969) pp. 66-67; Mosler, loc. cit. n. 64, at pp. 136 et seq.; B. Conforti, 'The Principle of Non-Intervention', in M. Bedjaoui, ed., *International Law: Achievements*

the change the more different international law, as a system, will become. This well-established conception of custom encapsulates the principles listed in this category.[69] In other words, the same kind of empirical and theoretical disputes arise whether these principles are referred to as custom, treaty, or general principles. Thus the paradox of consensualism, which applies to customary law and treaties, also applies to this category of principles. This means that the attempt at logical or hierarchical differentiation fails.

But even if it were to be accepted that because these principles did not originate in (explicit) State consent, and are therefore distinct logically (and hierarchically, because they are 'constitutional' or 'fundamental' as distinct from 'ordinary' norms) from custom or treaty, the problem of identifying the content of these principles still remains, especially since they can be changed by practice. To determine the limits of each principle in this category, the same method would have to be used, i.e., international perceptions of the meaning and limits of the given principle, as reflected in practice, must still be examined. Thus regardless of origin, there is no difference between these principles and the consensual sources in practice, at least far as the question of identification of law is concerned. The empirical and theoretical disputes arising from reference to a third source beyond treaties and custom are the same as those that arise from reference to treaties and custom, namely the problem of discovering what the law says. To this may be added the observation made earlier concerning any kind of general principle; it is either a rule of customary law or treaty law that permits reference to sources other than custom or treaty. Whether we view these 'constitutional' or 'fundamental' principles as 'custom', treaty law, or 'general principles', their character, in essential respects, is the same, and thus their susceptibility to the paradox of consensualism.

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and Prospects (1991) p. 467.

69. See for the ascription of a similar role to general principles, Lammers (loc. cit n. 32, at pp. 68-69, and 72), who draws a distinction between these 'principles resting on expressed general legal conviction or principles obtained through induction' and 'customary international law proper'. However, for reasons similar to those given here, he concedes that the conflation of the two categories 'is not incomprehensible'. See also Cassese, loc. cit. n. 1, at p. 174, and Brownlie, loc. cit. n. 9, at p. 19 for a similar characterisation. Brownlie actually treats the category 'general principles of law' separately from the category 'general principles of international law'. The latter category, he says, 'may refer to customary law, general principles of law as in Art. 38 (1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies. What is clear is the inappropriateness of a rigid categorization of the sources.'

2.3 Principles intrinsic to the idea of law and basic to all legal systems

Examples of these principles are the *nemo dat quod non habet* principle, the *lex specialis derogat generali* rule, the *lex posterior derogat priori rule* and the principle of *res judicata*. These principles encapsulate what may be termed 'legal logic'; they 'afford a reason for acceptance by those who hesitate to accept municipal law *per se* as international law but are prepared to adopt juridical notions that are seen as intrinsic to the idea of law.'[70] As Schachter points out, some of these principles are not really rules of legal logic but simple descriptive statements. For instance, the *nemo dat* rule and the principle of *pacta sunt servanda* are tautologous; one cannot give what one does not have, and anyone entering into an agreement does so because the agreement must mean something. Even outside legal contexts, the same arguments could be made, which would suggest confirmation of the 'necessity' of the applicability of these principles. Again, this is an example of hierarchical differentiation; to classify a norm as being compelled by logic is to suggest that it is of a higher order than rules based on experience, in the sense of practice, and that it is unchallengeable. There is also a logical differentiation implicit in this category, namely that principles of this kind are not to be derived by the same process used to infer rules based on experience; rules of this kind exist, and are applicable, whether they are supported by practice or not.[71]

But this needs closer examination. Since the basis of these principles is logic rather than experience, they should be applicable in any situation, whether in the context of municipal or international law. But if the *nemo dat* principle, for example, is examined even in municipal law, it is clear that this logical basis does not seem to have withstood the onslaught of experience. In English municipal commercial law, for example, the operation of the rule has been the subject of major developments. One of these is the doctrine of apparent ownership, namely that a person could sell property not belonging to her if the real owner of property by conduct holds her out as being the owner of the goods.[72] Also, until recently, where goods were sold in market overt according to the usage of the market, the buyer acquired good title to the goods provided he bought them in good faith and without notice of any defects in title on the part of the seller.[73] And it is now a statutory rule that where a seller has voidable title to goods but

70. Schachter, loc. cit. n. 7, at pp. 53-54. See also Mosler, loc. cit. n. 64, at p. 134.

71. See similarly, Brownlie, loc. cit. n. 9, at p. 16: '. . . it is impossible, or at least difficult, for state practice to evolve the rules of procedure and evidence which tribunals must employ.'

72. *Lloyds & Scottish Finance Ltd* v. *Williamson* [1965] 1 WLR p. 404.

73. Sale of Goods Act (1979), section 22(1), abolished by Sale of Goods (Amendment) Act, section 1.

the title has not been avoided at the time of the sale, the buyer acquires good title provided that she buys in good faith and without notice.[74] In all these cases, the person selling the property has the legal power to give more than she has. These developments are not peculiarly English; there have been changes to the applicability of the *nemo dat* principle over the centuries outside the English legal system.[75] The point is that this principle, like any other legal stipulation, whether 'logically' compelled or not, serves, and its applicability is contingent upon, a social purpose. That the real basis of the principle is not 'logic' was stated in the English case of *Bishopsgate Motor Finance Corp. Ltd* v. *Transport Brakes Ltd:*

> 'In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.'[76]

In other words, the vitality of this so-called principle of logic depends on whether experience and practical circumstances require it. If the values deemed worthy of protection by the international community require the applicability of the principle, then it may be called 'logical', but if not, the principle has no place. The same applies to the other principles identified above as falling within this category. It may well be that *pacta sunt servanda*, but the grounds upon which agreements remain or cease to be binding have not remained constant throughout (international) legal history;[77] the true principle thus becomes *pacta sunt servanda when the law says so*. Similarly, as far as the *lex posterior* and *lex specialis* principles are concerned, there is nothing inherently logically compelled about their status. Is it really so inconceivable that a legal system might contain a rule to the effect that in given circumstances, an earlier law of the same kind and

74. Sale of Goods Act (1979), section 23.

75. See F. Guisan, *La Protection de l'Acquéreur de Bonne Foi* (1970), esp. Chap. 1 and 2.

76. [1949] 1 KB 322, at pp. 336-337.

77. See Jennings and Watts, loc. cit. n. 44, at pp. 1284-1309, for a discussion of the practice regarding the discharge of treaty obligations. Quite distinct from the scope of the rule is the question of its basis. Jennings and Watts state that '[t]he question why international treaties have binding force has been much disputed. The correct answer is probably that treaties are legally binding because there exists a customary rule of international law that treaties are binding . . .' (at p. 1206; our emphasis); so much for the 'logical' basis of the principle.

degree of specificity can prevail over a later one, or that a less specific legal stipulation should prevail over a more specific one?[78]

A proper examination reveals, then, that these principles are principles based on good sense, and not logic. Indeed, it is not just good sense that is required, but *common* good sense, since the problem is that one person's good sense may not be the same as another's. It is not surprising, therefore, that Schachter states that in spite of this quality of 'necessity' derived from logic attending these principles, these principles are based on general acceptance. In the event of dispute regarding the general acceptance, the 'persuasive force' of the principle would be lost.[79]

The International Court's decision in the *Frontier Dispute*[80] case concerning the applicability of the *uti possidetis juris* also serves to illustrate this point about the proper place of logic in the law. This case does not concern logic as the source of a principle, but with logic as compelling the applicability of the principle in all cases. The Court stated that the principle was one 'of a general kind which is logically connected with . . . decolonization whenever it

78. The constitutional question of the ability of the United Kingdom Parliament to bind future Parliaments provides an illustration of this point. The rule chosen by the English courts is that of 'implied repeal', namely that a later Act of Parliament prevails over an earlier one because it is the implicit intention of Parliament in the later Act to repeal the earlier one (*Ellen Street Estates Ltd* v. *Minister of Health* [1934] KB 590, at p. 597), which is a reflection of the principles under consideration. But the fact that this is only a legal rule rather than a logical rule is to be seen when the applicability of the EEC Treaty has been in issue. In *Litster* v. *Forth Dry Dock Co Ltd* [1990] 1 AC 546, the House of Lords was prepared to construe the words of a contrary domestic statute to conform with EEC law, whereas in *Duke* v. *GEC Reliance Ltd* [1988] AC 618, Lord Templeman held that the words of a statute passed in 1975 before the conflicting relevant EEC Council Directive of 1976 could not be construed so as to conform with the Directive, so that the intention of Parliament cannot have been that the EEC rule prevail over the domestic Act. There is nothing which stops the English courts, however, from choosing to apply the European law on the basis that sections 2 and 3 of the European Communities Act 1972, another, earlier Act of Parliament, could be read as having expressed Parliament's will that European law should prevail over domestic Acts. That this is so is confirmed by the House of Lords decision in *Webb* v. *EMO* ([1995] 4 All ER 577), where, in circumstances identical to those in the *Duke* case, the House of Lords read the domestic Act to conform with the meaning of the European law as construed by the European Court of Justice. In sum, the reference to the 'logical' *lex posterior* and *lex specialis* rules were not a solution to this problem, as different judges in three different cases reached these different results on the same legal question. A legal rule, be it 'logical' or otherwise, applies only after the characterisation of the factual circumstances. No 'logic' can guarantee, in advance, the applicability of a legal rule.

79. Schachter, loc. cit. n. 7, p. 54. See also Tunkin, loc. cit. n. 4, at p. 200 et seq., and M. Virally, 'Le rôle des "principes" dans le développement du droit international', *Recueil en hommage á Paul Guggenheim* (1968) p. 531.

80. ICJ Rep. (1986) p. 554.

occurs.'[81] It should be, therefore, a principle which, logically, should be applicable without variation. In fact, it has been written that the *uti possidetis* principle was 'of such a nature that it must be applied universally or not at all.'[82] Nevertheless, the Court went on to state that,

> 'However, it may be wondered how the time hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law . . . *The essential requirement of stability has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples . . . Thus the principle has kept its place* despite the apparent contradiction which explained its coexistence alongside the new norms. *Indeed it was by deliberate choice that African States selected, among all the classic principles, that of uti possidetis juris.*' [our emphasis][83]

The Chamber thus seemed to base the applicability (as distinct from the existence) of the principle on the consent of the African States, as expressed generally in Article 3 of the Charter of the Organisation of African Unity (1963) and particularly in the Cairo Resolution of the Conference of African Heads of State and Government (1964).[84] It is not clear, however, that the principle would have been applicable to these States *because* logic compelled it, irrespective of such consent.[85] The operation of logic in the law is therefore not 'necessary' in a real sense. Logic serves a particular purpose, which is why there can still be disputes about 'principles of logic', both as to their existence in the abstract and, as this case shows, as to their applicability in specific cases.

81. Ibid., at p. 566, para. 23.

82. H. Thirlway, 'The Law and Procedure of the International Court of Justice: Part One', 60 BYIL (1989) p. 106. See also Judge Bedjaoui's Dissenting Opinion in the *Guinea Bissau-Senegal* case, 83 ILR (1992), p. 1.

83. See pp. 566-567 of the judgment.

84. Organisation of African Unity, AGH/ Res. 16 (I), 1964.

85. See Brownlie, loc. cit. n. 9, giving several examples, states at p. 135 that it must be emphasised that the principle 'is by no means mandatory and the states concerned are free to adopt other principles as the basis of the settlement. However, the general principle . . . is in accordance with *good policy* [i.e., not logic] and has been adopted by governments and tribunals concerned with boundaries in Asia and Africa.' See also the *North Sea Continental Shelf* cases, loc. cit. n. 12, at pp. 28-37, paras. 37-59, where the Court found that the argument that the notion of equidistance 'as being logically necessary, in the sense of being an inescapable a priori accompaniment of basic continental shelf doctrine, was incorrect', contrary to the views of the two Kingdoms and Judge Tanaka (at p. 181).

Put simply, logic (including legal logic) is not transcendental; it is borne of experience.[86] Thus the test is one of consent to the particular method or rule of 'legal logic' in practice. The attempt to both logically and hierarchically differentiate between principles which are intrinsic in the idea of law on the one hand, and customary and treaty rules on the other remains susceptible to the paradox of consensualism. Whether the differentiation is resorted to or not, whether certain principles are classed in one way or the other, the same practical problems arise as regards the substantiation of a claim put forth on the basis of these 'principles of legal logic'. In the final analysis, 'these principles, however "intrinsic" they seem to be to the idea of law, rest on an implied consensus of the relevant community.'[87]

2.4 Inchoate custom

It has been suggested that recourse could be had to general principles where a given norm has not reached the threshold required for the formation of customary law. In other words, a given norm may qualify as a general principle where it may, for example, have been emphasised repeatedly by the international community, 'and may through such repetition and sponsorship come to be generally accepted (at least in principle) by all States and thus become part of international law even before customary law has developed in the same sense.'[88] This approach does have a number of attractions. It would give a certain vitality to the category of general principles, and it would seem to have a useful role where common values are involved. The context in which this approach is sometimes suggested shows this point;[89] where human rights are in issue, the fact that they may not have the kind of support required by traditional conceptions of customary

86. See the celebrated paper by J. Dewey, 'Logical Method and Law', 10 Cornell LQ (1924) pp. 17-27.

87. Schachter, loc. cit. n. 7, p. 54. The same argument can be applied to Fitzmaurice's often-quoted statement that 'A rule answers the question "what": a principle in effect answers the question "why" ('The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 Hague Recueil (1957-II), p. 1 at p. 7; a principle, however described, and whether it is distinguishable from a rule in this manner or not, must be a well-recognised principle.

88. P. Szasz, 'General Law-Making Processes', in *United Nations Legal Order*, O. Schachter and C. Joyner, eds., Vol. 1 (1995) p. 35 at pp. 44-45. See also B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 Australian YIL (1992) p. 82; Lammers, loc. cit. n. 32, at p. 58 (discussing the views of Verdross and Simma), and p. 72 (referring to principles of international law which are not customary because they do not enjoy the support of actual State practice); Cassese, loc. cit. n. 1, at p. 174, para. 94.

89. See e.g., Szasz and Simma and Alston, loc. cit. n. 88, who argue for this approach as a way of protecting human rights.

law would not prevent the applicability of the relevant norm, since norms may have been invoked 'generally' enough or often enough to enable them to qualify as principles of law regardless of whether the strict requirements of customary law-formation have been met. The original 'gap-filling' function intended for the third source mentioned in the Statute of the World Court is also realised explicitly by this view of general principles. It should be apparent that this view of general principles involves a logical (because they are not the same as authentic custom) and hierarchical (because human rights are more important than, say, maritime delimitation) differentiation between them and authentic custom.

The difficulty with this view, however, is that the suggestion fails by the same standards it relies on for its own existence. Just as there may be no recognised basis upon which repeated declarations may be treated as State practice for customary law purposes, there is no recognised basis upon which the phrase 'general principles' is to be used in the manner under discussion. If a given norm is not a norm of customary law because it has not enjoyed the kind of support required, it would seem unlikely that it is a principle that would command acceptance under a different heading. This is precisely why the phrase '*general principles*' has been the subject of so much controversy. It is doubtful whether there is evidence of the permissibility of this process in contemporary international law.

In addition, it is not necessary to resort to 'general principles' as a separate category in order to encompass the outcome desired by those who argue for the subsumption of inchoate custom within it. Szasz wrote, for example, that '[a]lthough torture may still take place in a number of states, no accused government defends itself by asserting a right to torture, but rather by denying such activities. So, while it cannot be said that torture violates customary law, which reflects how countries actually behave, it can be said that all legal systems now condemn torture, which suggests a general principle of law.'[90] The suggestion that custom cannot cover torture in the circumstances described here seems to be based on the discredited conception of State practice as something which must be physical, that statements and declarations cannot constitute practice.[91] In the *Nicaragua* case, the Court did rely on such repeated declara-

90. Szasz, loc. cit. n. 88, at p. 43.

91. See M. Akehurst, 'Custom as a Source of International Law', 47 BYIL (1974-5) p. 1 at pp. 1-8, for devastating criticism of views which limit state practice to physical acts and not claims. The main proponents of such views are A. D'Amato, loc. cit. n 21, Judge Read in the *Anglo-Norwegian Fisheries* case, ICJ Rep. (1951) p. 116 at p. 191, and, less extremely, H.W.A. Thirlway, *International Customary Law and Codification* (1972) p. 58.

tions as evidence of *opinio juris*.[92] It is therefore quite possible to regard repeated declarations as (evidence of) customary law.[93] In addition, there is no need for repetition as a distinct requirement of customary law; '[t]he number of States taking part in a practice is much more important than the number of separate acts of which the practice is composed.'[94] In fact, this requirement of repetition (if it is a requirement), which is what makes general principles a more attractive option than custom since it is an easier substitute for 'real' practice, may turn out to be counter-productive, because custom itself does not require repetition. Repetition of practice is useful only because it amounts to better evidence of that practice. The essential question, again, is this: if the proponents of this view are prepared to take a strict view of the customary law-making process (a view which is not, it is submitted, an accurate one), why are they not prepared to take a strict view of general principles of law?

The attempt to place this category of principles in a distinct class of 'things' from what is simply the incomplete formation of custom, being a proper logical form of valid international law, fails. This attempt at logical differentiation fails because it is consent, or the lack thereof, that is at issue, and which lies at the root of the problem of oft-repeated legal claims. Whether the attempt is made to deal with the problem by differentiating such principles from ordinary custom, as a matter of logical form, or whether it is treated as a straightforward difficulty concerning consent to custom, the paradox of consensualism holds both at the empirical and theoretical levels. Along with the logical differentiation, therefore, the hierarchical differentiation between human rights and other norms fails; it is the law, and nothing else, which must ground the differentiation, but it does not.

2.5 Principles of natural law and justice

2.5.1 *The limited role of natural law and justice*

As mentioned in section 2.1 above, the debates in the drafting of the third source listed in Article 38 reveal that it was not intended to be a general licence for the application of 'vague principles of objective justice', and the Court has followed

92. ICJ Rep. (1986) p. 14, e.g. at p. 102-3 (para. 193), pp. 106-108 (para. 202-5). See also the Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. (1996) especially the Opinions of Judge Schwebel (at p. 6 thereof) and Judge Oda (at. pp. 15-42).

93. See R. Higgins, *Problems and Process: International and How We Use It* (1994) pp. 18-28, especially p. 20; her argument proceeds on the assumption that torture is prohibited under customary law.

94. Akehurst, loc. cit. n. 91, pp. 12-15, at p. 14.

this in its practice.[95] Thus, the role of 'general principles of natural law and justice' does not require elaboration. While a minority of judges on the International Court have suggested such a role for that sub-paragraph,[96] it would appear that resort to this universalist and non-consensual interpretation, to the very limited extent that it does exist, has been superseded by other developments within international law, and have thus become a part of the positive law. The main identifiable developments referred to are the development of human rights law (considered in the previous subsection) and the increasing use of equity, which 'includes such elements of "natural justice" as fairness, reciprocity, and consideration of the particular circumstances of the case.'[97] For example, the development of human rights law is seen by some as a reflection of the changing ethical foundations of international law.[98] Values are thus included within positive laws.

If positive laws, then, are to be seen as the source of legal values, the question of consent would obviously feature throughout.[99] This idea of 'value-inclusive positivism' suggests the body of positive laws, its basis in consent, and the problems pertaining thereto, as the first port of call in analysing the values of

95. See text accompanying nn. 34-36 above, and accompanying text. The International Court stated in the *South-West Africa* cases (ICJ Rep. (1966) p. 5, at p. 34, para. 49, that: 'Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason, it can do so only through and within the limits of its own discipline. Otherwise, it would not be a legal service that would be rendered.'

96. See e.g., Judge Wellington Koo's Separate Opinion in the *Right of Passage* case (ICJ Rep. (1960) pp. 66-7), where he stated that the basis upon which municipal law could be adapted for use in international law was 'the principle of justice founded on reason'; Judge Tanaka's Dissenting Opinion in the *South-West Africa* cases (idem., at p. 296 et seq.), where he refers to the *jus rationale*.

97. See Schachter, loc. cit. n. 7, at p. 55.

98. See e.g., F. Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (1988) and Henkin, loc. cit. n. 4, Part Two.

99. See W.J. Waluchow, *Inclusive Legal Positivism* (1994), and the review of this book by C. L. Lim, 'A Re-Appraisal of the Limits of Legal Positivism; The Case for Morals of Pedigree', 14 *Legal Studies* (1994) p. 446. An example of this 'value-inclusive' positivism is provided by Arts. 5 and 6 of the International Law Commission's Draft Articles on the Law of Non-Navigational Uses of International Watercourses, which set out (a non-exhaustive list of) the factors to be taken into account in ensuring the equitable utilization of watercourses (see 24 EPL (1994) p. 335 et seq.). Other examples of the positive laws requiring the application of equity abound, and are further examples; see, e.g., Article 59, 74 and 140 of the 1982 United Nations Law of the Sea Convention (UN Doc. A/CONF. 62/122; 21 ILM (1982) p. 1261); and see the *Gulf of Maine* case, ICJ Rep. (1984) p. 244, at pp. 288-295, paras. 79-96.

the international legal order. The alternative lies in the belief that certain values are so much a necessary feature of human reason, so logical as to suggest their immutability even in the face of actual reason and experience to the contrary. But the difficulties with such an approach have been underscored in the preceding sub-sections, especially section 2.3.[100] If this *a priori* approach is not sustainable, it follows that the idea that the category 'general principles of natural law and justice' must yield to the same difficulties that plague the consensual sources of international law.

2.5.2 *Equity*

Equity merits treatment separate from the previous category, precisely because it is often claimed that equity is not supposed to be of the character of 'vague principles of objective justice'. The application of equity is now a well-recognised part of international law. The present purpose, then, is to analyse the process of identifying and applying equity in international law, in order to distinguish it, if possible, from the process of identifying and applying rules of treaty and custom.

2.5.2.1 The differences between law and equity in principle

The elements of fairness, justice and considerations of the particular circumstances of the case, which are inherent in the idea of equity, would suggest that equitable reasoning permits reference to a much wider range of considerations than those which are permissible in pure legal argument. As the International Court of Justice stated, some may say too widely, in the *North Sea Continental Shelf* cases, 'there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures.'[101] Legal argumentation, on the other hand, is much more narrow in its focus. It has been written that legal argumentation 'turns a complex relationship into a one-dimensional relationship susceptible of legal analysis.'[102] Legal argument involves transforming the circumstances of the case to make them fit into the conceptual framework of the law. This would suggest that equity can produce results which reference to strict legal rights cannot, and vice-versa. That is why the areas in which equity is most frequently invoked are those where the

100. See further J.M. Finnis, *Natural Law and Natural Rights* (1980) at pp. 36-42 and 63, and N. McCormick, 'Natural Law Revisited', 1 *Oxford Journal of Legal Studies* (1981) p. 99.

101. Loc. cit. n. 12, at p. 50.

102. V. Lowe, 'The Role of Equity in International Law', 12 Australian YIL (1992) p. 54, pp. 70-73, at p. 72.

law is not sufficiently developed but which are nevertheless important because of their subject-matter, such as environmental law, shared resources, and international economic law. Equity, in our terms, can thus be differentiated from strict law both as a logical form and also in terms of its substance (i.e., hierarchical differentiation).

2.5.1.2 The differences between law and equity in practice

Regarding the question of where the content of equity is to be found, it should be pointed out that equity could fall within at least some, if not all of the categories of general principle identified in the preceding sub-sections.[103] To the extent that it does fall within any of those categories, no further discussion is necessary. The question here, then, is whether equity as a category of general principle independent of any of the above-mentioned ones, raises problems of cognition which are different from those raised by treaties or custom.

In the first place, it has been argued (most convincingly, it is submitted)[104] that, at least in the senses of equity *infra legem* (equity as a method of interpretation, and an attribute of, law)[105] and *praeter legem* (equity used to fill in logical gaps in the law, though not to remedy its social inadequacies), it is doubtful whether it is necessary to have recourse to equity, because the same results can be reached by the routine use of familiar legal techniques.

In the case of equity *infra legem*, whether explicit reference is made to equity or not, there is always a discretion involved in deciding whether a given (abstract) norm will or will not apply to a concrete case. This arises both in the process of determining the scope of the given rule as well as in the process of determining which facts and circumstances are the relevant ones. The exercise of this choice

103. See the often-cited judgment of Judge Hudson in the *Diversion of Water from the River Meuse* case (PCIJ Rep. Series A/B, No. 70, pp. 76-77 ('Article 38(1)(c) expressly directs the application of "general principles of law recognised by civilised nations," and in more than one nation, principles of equity have an established place in the legal system.' See also Judge Ammoun's Separate Opinion in the *North Sea* cases, loc. cit. n. 12, e.g., at p. 136 et seq. These suggest general principles of municipal law as the basis of equity, and these principles have been discussed in subsection 2.1. Also, the point made in the text following n. 95 above suggest that equity may have a role to play in the context of inchoate custom, for which see subsection 2.4. Also, in the *Frontier Dispute* case, loc. cit. n. 80, where the Republic of Mali urged the application of 'that form of equity which is inseparable from the application of international law' (see p. 567, para. 27 of the judgment). This may be taken to mean that equity is a necessary part of law in general or of international law specifically, in which case, see sub-sections. 2.2 and 2.3.

104. See Lowe, loc. cit. n. 102, at pp. 56-67.

105. This is the definition used by the Chamber in the *Frontier Dispute* case, loc. cit. n. 80, at. pp. 567-568.

must be based on what the person applying the rule considers to be reasonable. But if it is true, as the International Court appears to have recognised in the *Barcelona Traction* case, that (a) there is no difference between the equitable and the reasonable, and (b) that the law must be applied reasonably in all fields of international law,[106] then it must be doubted whether equity *infra legem*, being equity as 'used to adapt the law to the facts of the case,'[107] is distinguishable from law,[108] so that recourse to this kind of equity is not necessary. There is no real distinction between this kind of equity and ordinary legal reasoning.

In the case of equity *praeter legem* (i.e., as used to fill in gaps in, but nevertheless not derogating from, the law) the problem is the familiar one, which has been identified in other contexts, namely, that of the open texture of language.[109] To accept that there can be a gap in the law assumes, somewhat naively, that it is possible to define the limits of legal stipulations in a definite and precise way. But this incorrect; since 'there is a limit, inherent in the nature of language, to the guidance which general language can provide,'[110] the person applying the rule in question, whether an interested party or a third-party, has a wide choice of rules of markedly different scope which may legitimately be inferred from, for example, the practice upon which a rule of customary law is based.[111] Again, as in the case of equity *infra legem*, the process involves

106. Judge Gros, in the *Gulf of Maine* case (ICJ Rep. (1984) p. 244, at p. 384, para. 40), referring to the *Barcelona Traction* case (loc. cit. n. 70, at paras. 92-102), stated that 'the Court again took the traditional prudent approach and, following several considerations relating to the case, ruled out the application of equity, though saying that "as in other fields of international law, it is necessary that the law be applied reasonably" (para. 93), which does not go very far, and more or less amounts to the assimilation of the equitable to the reasonable . . .'

107. This is the definition used by Akehurst, loc. cit. n. 59, at p. 801.

108. See Judge Fitzmaurice's Separate Opinion in the *Barcelona Traction* case (loc. cit. n. 70, at pp. 85-86, para. 36), where he quoted the then current edition of Snell's Principles of Equity for the proposition that 'equity is not distinguishable from law "because it seeks a different end, for both aim at justice . . ."'.

109. This term is used by Hart, loc. cit. n. 10.

110. Ibid.

111. Lowe, loc. cit. n. 102, at p. 59, uses the *Corfu Channel* case (ICJ Rep. (1949) at p. 22) as an illustration. In relation to the obligation of Albania to warn British ships of mines in the Channel, the Court chose to refer, inter alia, to 'elementary considerations of humanity', which some writers (e.g., Akehurst, loc. cit. n. 59, at p. 806) have taken, rightly or wrongly, to mean a reference to equity, as a basis for the existence of such an obligation. Lowe points out that the Court could have referred to other rules of customary law in order to ground the same obligation; for example, the rules that (a) 'coastal States may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea', or that (b) 'States are responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another State if it has failed to use due diligence to prevent such injury. Even if such rules had not previously been construed to include an obligation to warn foreign ships, they could legitimately have been construed

a marked element of discretion and choice in the determination of the applicable rule.[112] The point is that since the nature of legal reasoning and legal rules allows room for the same function that equity would have performed if referred to explicitly, it is doubtful whether recourse to equity is necessary. The problem here, then, is that it becomes difficult to tell whether equity is being applied or not. To the extent that equity is being applied implicitly, then, being a part of routine legal reasoning, it is the same as law.

Beyond this, where the use of equity is explicit (i.e., independent equity), the problem which has to be faced is that of what equity demands. As is well-known, the precise content of equity is difficult to identify. By its very nature, equity applies on a case-by-case basis; it is 'fact-intensive'.[113] In relation to the application of equitable principles in the context of maritime boundary delimitation, for example, it has been suggested that there is a clear body of equitable principles,[114] and that 'a structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate.'[115] Doubts have, however, been expressed as to the possibility of producing a finite class of equitable considerations or a structured system of

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in such a manner.' He also uses another illustration of the unlimited nature of the process of inference, taken from the law of jurisdiction: '. . . if state practice contains many instances of uncontested assertions of jurisdiction over aliens in cases of cross-frontier shooting and blackmail cases, is it proper to infer a rule allowing "objective" territorial jurisdiction only in relation to such crimes? or in relation to those and similar crimes such as fraud? or in relation to all generally recognised crimes where physical acts take place in the two jurisdictions? or to any such crime under the law of the State claiming jurisdiction, no matter how idiosyncratic . . .? or to all crimes which produce an effect within the state . . .? or to all crimes injuring the interests of the state, or of its nationals? . . . There is no rational basis upon which any formulation of a rule inferred from State practice can be said to constitute an "improper" inference of a rule from that practice, although there may be considerations of principle or public policy external to the process of inference which render one interpretation preferable to another.'

112. As Sir Gerald Fitzmaurice (quoted by Lowe, loc. cit. n. 102, at p. 61, taken from his 'Judicial Innovation – Its Uses and Perils – As Exemplified in Some of the Work of the International Court of Justice During Lord McNair's Period of Office', in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965) p. 24, at pp. 24-25) has put it, in practice, 'courts hardly ever admit a non-liquet. As is well known, they adapt existing principles to meet new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept, or by invoking doctrines in the light of which an essentially innovatory process can be carried out against a background of received legal precepts.'

113. Schachter, loc. cit. n. 7, at p. 59.

114. See the *Continental Shelf* case (Libya/Malta) (ICJ Rep. (1985) p. 55, para. 76. Apparently, those principles were listed at pp. 39-40, para. 46.

115. Sir R. Jennings, 'Equity and Equitable Principles', 42 ASDI (1986) p. 27, at p. 38.

equity.[116] In response to the majority of the International Court's statement in the *Tunisia/Libya* case[117] to the effect that the goal of reaching an equitable result is superior to the equitable principles to be applied in reaching that decision, some individual judges objected to what they considered to be a disguised *ex aequo et bono* decision.[118] Their assumption was that there is a distinction to be drawn between the categories of a decision based on equity, which is 'legal', and an *ex aequo et bono* decision; but the majority considered itself to be applying equity within the law. Likewise, in the *Gulf of Maine* case, Judge Gros dissented from the decision of the Chamber for the same reasons as the dissenting judges in the *Tunisia/Libya* case.[119]

If we cannot tell in advance what independent equity demands, it would seem true, as Lowe suggests, that equity is about *who* decides, not about the (objective?) *basis* for that decision. Now it has been argued thus far that consent to the jurisdiction of a third-party decision-maker to decide the case (as distinct from consent to the rules of substantive law applied by that decision-maker) does not eradicate the problem posed by 'empirical' and 'theoretical' disputes. It would seem that in this one situation, i.e., the application of equity, that consent to jurisdiction does eradicate the problem. In other words, to permit the judge to apply equity is to permit the judge to apply what she considers to be equitable. But the problem is this: if the parties to the dispute say equity demands *x*, and the decision-maker disagrees, the problem arises again, unless the third-party is empowered to apply equity *contra legem* or to reach a decision *ex aequo et bono*. The fact that equity is used in contexts other than that of third-party adjudication confirms the difficulty;[120] if States and other international persons

116. See L.D.M. Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries', 84 AJIL (1990) p. 837, at pp. 851-853.

117. ICJ Rep. (1982), p. 18, para. 70.

118. See ibid., the Dissenting Opinions of Judge Gros at pp. 151-153, paras. 16-18; Judge Oda, at p. 157, para. 1, and p. 269, para. 180; Judge ad hoc Evensen, p. 293-296, para. 14.

119. Loc. cit. n. 117, at p. 360 et seq..

120. See Schachter, pp. 55-61, ('The Diverse Manifestations of Equity') for a discussion of the use of equity in State practice outside the context of tribunals. He concludes that equity and distributive justice 'enter into the arrangements and the negotiations because each régime [in which equity is referred] requires an understanding as to the allocation of benefits and burdens and such allocation must take into account the perceptions of the parties as to fairness and equities of the arrangement. This does not mean that all such arrangements are equitable by some objective standard or that they entirely satisfy each participant as to its fair share. What it does mean is that as a minimum, a participant State must not consider that the co-operative arrangement is so inequitable that it cannot be accepted.' This seems very close to the normal techniques of negotiation and consensus which are familiar to international law-making. Does the content of equity in everyday practice outside third-party fora, then, differ from what States consent to, just like treaties and custom?

disagree as to what equity means or demands, it must be asked where third-party adjudicators find the equity they apply. It would seem, then, that equity is not of the character of 'vague principles of objective justice', but rather of vague principles of subjective justice.[121]

Hence the paradox of consensualism even as regards equity. If equity is not an independent source, then it is a part of 'ordinary' law. If it is an independent source, there does not seem to be any sensible or pre-ordained way of identifying its content. But even in that case, it is no different from any other source of law in relation to which empirical and theoretical disputes arise, i.e., it is no different from any other source of law.

2.6 Conclusion

The foregoing discussion illustrates the various ways in which attempts have been made at differentiating between general principles of law on the one hand and treaties and custom on the other, both by those who advocate a role for these principles and those who do not. It has been argued that, regardless of the side taken, the problems encountered in identifying 'general principles of law' are the same essential problems caused by treaties and custom. There is therefore not much ground for the differentiation, and the structure of the international legal system is not threatened in any way by the inclusion of general principles among the sources of international law. The simplistic statement that some kinds of 'general principles of law' are not meant to be consensual does not even begin to deal with the problem of the identification of international law.

121. See the Dissenting Opinion of Judge Gros in the *Gulf of Maine* case, loc. cit. n. 100, at p. 386, para. 42: '. . . since equity is now a matter of each judge's opinion, I do not maintain that the Chamber's line, *or any of the lines presented during this case*, is less equitable than the presented by myself . . .'. The added emphasis is to show that States do have their own perceptions of what equity demands.

3. SOFT LAW[122]

The term 'soft' law, for present purposes, basically refers to two ideas. Firstly, it refers to questions of form, i.e., where norms are expressed in a form which is not one of the recognised forms in which international law is expressed, so that these norms are not legally binding. Secondly, it refers to questions of substance, i.e., where, even though a rule is expressed in a recognised legal form, such as a treaty, its content may be so vague that it is difficult to identify exactly the normative demand being made upon the parties to the treaty. It may be argued that from the point of view of the identification of international law, the second meaning of 'soft law' described here is not problematic, because it simply involves the problem of finding out the exact meaning of a text which is certainly legal.[123] On this view, no threat is posed to the structure of the international legal order by the second meaning. But this distinction is immaterial for present purposes. Whether the problem is one of knowing whether the form in which the rules or norms are expressed is legal, or whether the problem is one of knowing exactly what a legal rule requires, the problem is knowing what legal rights and duties flow from the rules in question. The problem in either case is to find out what legal rights and duties the parties have accepted. It is ultimately a question of consent to law being approached from different angles. After all, the reason for recourse to soft law of either kind is the inability to generate, or unwillingness to supply, consent to 'full' legal rights and obligations.

The problems posed by 'soft' law are centred around the idea that it blurs the distinction between *lex lata* and *lex ferenda*, and thereby threatens the structure and stability of the international legal order. The most striking aspect of the debates about 'soft' law is that the problem is often thought to be a relatively new one, at least when compared to the problem of 'general prin-

122. The literature on the question of 'soft' law, again, is extensive. The following is a representative selection: M. Bothe, 'Legal and Non-legal Norms – A Meaningful Distinction in International Relations?', 11 NYIL (1980) p. 91; Cassese and Weiler, loc. cit. n. 3; T. Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"', 30 McGill LJ (1984) p. 37; K. C. Wellens and G. M. Borchardt, 'Soft Law in European Community Law', 14 ELR (1989) p. 267; C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 ICLQ (1989) p. 850; G. Handl, 'Environmental Security and Global Change', 1 YIEL (1990) p. 3; M. Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol', 3 YIEL (1992) p. 123; M. A. Fitzmaurice, 'International Environmental Law as a Special Field', 25 NYIL (1994) p. 181, pp. 199-201; P. Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles', in W. Lang, ed., *Sustainable Development and International Law* (1995) p. 53.

123. See e.g., M. Virally's contribution in Cassese and Weiler, loc. cit. n. 3, pp. 72-73 at p. 73.

ciples'. There is truth in this observation. The current phenomenon of 'soft' law arose in large part as a result of the expansion of the international community after the Second World War. This resulted in a reduction of the degree of homogeneity in the identity and consequently in the values of the community, compounded by the fact that the composition of the community is also changing. The truth of this observation must, however, be put in proper context; it must be remembered that the problem of identifying the content of legal demands on the subjects of the law has always been a problem for international lawyers (as much as municipal lawyers), even in relation to the meaning of treaty texts and customary law. Nevertheless, it is clear that the social sources of the problem of 'soft' law in the past are different from the source of the problems today.

More importantly for present purposes, the debates about 'soft' law reflect the preoccupation with logical and hierarchical differentiation of 'soft' law from hard law. As regards logical differentiation, 'soft' law is 'soft' because it is not embodied in appropriate legal-logical form such as the logical form of a treaty or customary norm. As regards hierarchical differentiation, it is well-known that many of the most important principles of international law in the era of co-operation (as distinct from co-existence), and which are directed towards human (as distinct from State) values and to considerations of global social welfare tend to be couched in hortatory or preambular terms. This is equally easy to explain when it is borne in mind that international law remains largely the result of the consent of States and not individual persons or non-governmental 'welfare' organisations.[124] Thus the more important the norm in terms of its service towards the attainment of emergent global values, the less precise it often turns out to be when articulated by States. While these rules may be 'soft', they concurrently demand attention due to the important values they seek to represent.[125] Thus, the argument runs, the reason that they are (or at least should be) entertained and the conceptual problems to which they give rise require analysis because they are of a 'higher' importance when compared to laws which are more 'neutral'.

These differentiations, however, should be placed in context. The fact is that the luxury of having a ready-made reservoir of rules derived from defined sources which in turn supply definite and precise rules does not exist in any system of

124. Of course, the same applies even where the norm in question is not one which is concerned with global values, but is simply a norm concerned with State values, but where there is a lack of common ground upon which to base 'hard' obligations.

125. See G. Arangio-Ruiz' warning in Cassese and Weiler, loc. cit. n. 3, at pp. 83-84, to the effect that lawyers should be wary and critical of 'soft' law because it is often used as a political technique by States to create the impression that something useful had been done to regulate important social issues.

law, let alone international law, with the absence of centralised law-making authorities or bodies with compulsory law-determining jurisdiction. That is precisely why legal disputes arise. To take a recent (and apparently controversial) illustration, namely the *Nicaragua* case[126] before the International Court of Justice, the Court was faced with trying to find evidence of customary (and indeed treaty) rules. For this purpose, the Court relied on various declarations and resolutions (which were, and are, perceived by many to be 'soft') as material evidence of the perceptions and practice of States. The debate perceived by some to be a debate between distinct categories (i.e., law on the one hand and 'soft' law on the other) took place as a debate within a single category (i.e., customary law). The point is that the meaning of the logical form known as customary law was (and is) simply not determinate, as evidenced by this case and the responses to the Court's approach to customary law.[127] Reliance cannot be placed on logical forms alone to resolve practical disputes arising from the consensual basis of the law. So too the normative content that attends those logical forms (i.e., hierarchical differentiation). Those norms which are not considered to be legal because they are 'soft' reappear for consideration under the guise of material evidence of law. Thus viewed, the heart of the problem is that most of what is termed 'soft' law is not soft law, but is simply evidence of what the law is on a given matter, and on this analysis, the *Nicaragua* case, while not free from controversy on other grounds, is not as problematic as some perceive. The Court found what it considered to be evidence of customary law. The objection that it was not evidence of customary law could be seen as giving rise to an empirical dispute (i.e., a dispute about whether those States in fact agreed that they believed that they were bound in law by the apparently 'soft' rules in question), just as much as it gives rise to a theoretical dispute (i.e., a dispute about what is meant by the phrase 'customary international law').

In every case where 'soft' law is encountered, then, be it in the context of environmental protection, human rights, issues of international economic development or issues arising out of constitutional arrangements in the context of international organisations, the question is always about what legal regulation the parties have agreed to, and this normally involves a search for consent to law

126. Loc. cit. n. 92. For a discussion of the controversial nature of the judgment, see H. Charlesworth, 'Customary International Law in the Nicaragua Case', 11 Australian YIL (1991) p. 1.

127. See for criticism of the judgment, A. D'Amato, 'Trashing Customary International Law', 81 AJIL (1987) p. 101, and M. Mendelson, 'The Nicaragua Case and Customary International Law', 26 *Co-existence* (1989) p. 85.

as revealed in the intention of the parties.[128] It is of little consequence, for present purposes, to say that, although 'soft' law is not really law, that it nevertheless is not legally irrelevant. Analysis of (a) precisely what legal significance 'soft' law has (b) how effective 'soft' law actually is, or can be, in politics if not in law or (c) the various ways in which 'soft' law is used as a technique, would add nothing to this paper. The simple point being made here is that whatever legal significance there is in any stipulation having the character of 'soft' law will be identified in exactly the same way as any stipulation of 'hard' law would be. Whether 'soft' law is referred to or not, the question surely is the same in all cases; what law can be found, considering the facts and circumstances in any given case? And if it is about the search for international law, then the paradox of consensualism holds. There will always be legal instruments tout court which embody vague provisions or aspirations, and instruments of uncertain status which embody relatively precise rules.

4. CONCLUSION

It is hoped that it has been demonstrated that, in the face of the problem of the identification of (international) legal stipulations, attempts at logical and/or hierarchical differentiation in distinguishing 'general principles of law' and 'soft' law on the one hand from treaties and custom hardly get to grips with the crux of the matter, of which they are but one facet. The crux of the matter lies in the conundrum that laws must both be evidenced in the practice while at the same time being separate from that evidence, in the sense of being immune from arbitrary contestation. In the present secular age, the function of the higher order of natural law has simply been replaced by the modern paradox that is the idea of law which is higher than brute power-politics, but which, paradoxically, is articulated by, and in the context of, such politics. This circular notion, which seeks immunity from a long-absent papal hegemony on the one hand, and a substitute 'higher rationality' on the other, is the perennial problem for legal craftsmanship. Whilst reason (law) and habit (politics) compete for primacy, questions of substantive legal regulation are met by deferring identification of the law to a search for agreement.

The inherent circularity involved here is revealed most clearly in the case of 'general principles' and 'soft' law. These are relegated to some inferior position because they threaten the perceived certainty of the 'truly consensual', 'logically

128. See Borchardt and Wellens, loc. cit. n. 122, for analysis of the important role of the intentions of the parties in this context.

determinate', and 'empirically verifiable' categories of treaty and customary law. In the final analysis, it is clear that general principles and 'soft' law are just as unproblematic, or just as problematic, as treaties and custom. The problem common to all arises from the need to place law beyond entrenched habit and regulatory indeterminacy. Would the law suddenly become clear and certain if the categories 'general principles' and 'soft' law were to be banished from international legal thinking? Or is the world a better place because of the extant facility of reference to 'general principles' and 'soft' law? Just as idealism should not serve to blur the distinction between law and non-law, so too should cynicism be barred from clouding legal judgment in the face of important social problems. But both idealism and cynicism are simply contingent upon the genuine conceptual problems arising within the law; they are methods by which participants in legal disputes seek to make their positions (appear) more compelling than the opposing ones. The paradox of consensualism must be confronted in each case. Any differentiation between the consensual sources of the law and the non-consensual sources is itself only a manifestation of the everyday appearance of the paradox of consensualism in practice.