governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.'[88]

Such local customs therefore depend upon a particular activity by one state being accepted by the other state (or states) as an expression of a legal obligation or right. While in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule.[89] This is because local customs are an exception to the general nature of customary law, which involves a fairly flexible approach to law-making by all states, and instead constitutes a reminder of the former theory of consent whereby states are bound only by what they assent to. Exceptions may prove the rule, but they need greater proof than the rule to establish themselves.

Treaties[90]

In contrast with the process of creating law through custom, treaties (or international conventions) are a more modern and more deliberate method.[91] Article 38 refers to 'international conventions, whether general or particular, establishing rules expressly recognised by the contracting states'. Treaties will be considered in more detail in chapter 16 but in this survey of the sources of international law reference must be made to the role of international conventions.

Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants.[92] All these terms refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and

[88] ICJ Reports, 1960, p. 44. [89] See Cohen-Jonathan, 'La Coutume Locale'.

[90] See generally A. D. McNair, *The Law of Treaties*, Oxford, 1961; Pellet, 'Article 38', p. 736, and A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007. See further below, chapter 16.

[91] *Oppenheim's International Law* emphasises that 'not only is custom the original source of international law, but treaties are a source the validity and modalities of which themselves derive from custom', p. 31.

[92] See e.g. UKMIL, 70 BYIL, 1999, p. 404.

arrangements are laid out which the parties oblige themselves to carry out.[93]

The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding (*pacta sunt servanda*). Treaties may be divided into 'law-making' treaties, which are intended to have universal or general relevance, and 'treaty-contracts', which apply only as between two or a small number of states. Such a distinction is intended to reflect the general or local applicability of a particular treaty and the range of obligations imposed. It cannot be regarded as hard and fast and there are many grey areas of overlap and uncertainty.[94]

Treaties are express agreements and are a form of substitute legislation undertaken by states. They bear a close resemblance to contracts in a superficial sense in that the parties create binding obligations for themselves, but they have a nature of their own which reflects the character of the international system. The number of treaties entered into has expanded over the last century, witness the growing number of volumes of the United Nations Treaty Series or the United Kingdom Treaty Series. They fulfil a vital role in international relations.

As governmental controls increase and the technological and communications revolutions affect international life, the number of issues which require some form of inter-state regulation multiplies.

For many writers, treaties constitute the most important sources of international law as they require the express consent of the contracting parties. Treaties are thus seen as superior to custom, which is regarded in any event as a form of tacit agreement.[95] As examples of important treaties one may mention the Charter of the United Nations, the Geneva Conventions on the treatment of prisoners and the protection of civilians and the Vienna Convention on Diplomatic Relations. All kinds of agreements exist, ranging from the regulation of outer space exploration to the control of drugs and the creation of international financial and development institutions. It would be impossible to telephone abroad or post a

[93] See the Vienna Convention on the Law of Treaties, 1969. Article 2(1)a defines a treaty for the purposes of the Convention as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. See further below, p. 117 with regard to non-binding international agreements.

[94] See Virally, 'Sources', p. 126; Sørensen, Les Sources, pp. 58 ff., and Tunkin, *Theory of International Law*, pp. 93–5.

[95] Tunkin, *Theory of International Law*, pp. 91–113. See also R. Müllerson, 'Sources of International Law: New Tendencies in Soviet Thinking', 83 AJIL, 1989, pp. 494, 501–9, and Danilenko, 'Theory', p. 9.

letter overseas or take an aeroplane to other countries without the various international agreements that have laid down the necessary, recognised conditions of operation.

It follows from the essence of an international treaty that, like a contract, it sets down a series of propositions which are then regarded as binding upon the parties. How then is it possible to treat conventions as sources of international law, over and above the obligations imposed upon the contracting parties? It is in this context that one can understand the term 'law-making treaties'. They are intended to have an effect *generally*, not restrictively, and they are to be contrasted with those treaties which merely regulate limited issues between a few states. Law-making treaties are those agreements whereby states elaborate their perception of international law upon any given topic or establish new rules which are to guide them for the future in their international conduct. Such law-making treaties, of necessity, require the participation of a large number of states to emphasise this effect, and may produce rules that will bind all.[96] They constitute normative treaties, agreements that prescribe rules of conduct to be followed. Examples of such treaties may include the Antarctic Treaty and the Genocide Convention. There are also many agreements which declare the existing law or codify existing customary rules, such as the Vienna Convention on Diplomatic Relations of 1961.

Parties that do not sign and ratify the particular treaty in question are not bound by its terms. This is a general rule and was illustrated in the *North Sea Continental Shelf* cases[97] where West Germany had not ratified the relevant Convention and was therefore under no obligation to heed its terms. However, where treaties reflect customary law then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule or rules of customary international law. Similarly, non-parties may come to accept that provisions in a particular treaty can generate customary law, depending always upon the nature of the agreement, the number of participants and other relevant factors.

[96] But this may depend upon the attitude of other states. This does not constitute a form of international legislation: see e.g. *Oppenheim's International Law*, p. 32; the *Reparation* case, ICJ Reports, 1949, p. 185; 16 AD, p. 318, and the *Namibia* case, ICJ Reports, 1971, p. 56; 49 ILR, p. 2. See also Brownlie, *Principles*, pp. 12–14, and R. Baxter, 'Treaties and Custom', 129 HR, 1970, p. 27. See also O. Schachter, 'Entangled Treaty and Custom' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 717, and Y. Dinstein, 'The Interaction Between Customary International Law and Treaties', 322 HR, 2006, p. 247.

[97] ICJ Reports, 1969, pp. 3, 25; 41 ILR, pp. 29, 54.

The possibility that a provision in a treaty may constitute the basis of a rule which, when coupled with the *opinio juris*, can lead to the creation of a binding custom governing all states, not just those party to the original treaty, was considered by the International Court of Justice in the *North Sea Continental Shelf* cases[98] and regarded as one of the recognised methods of formulating new rules of customary international law. The Court, however, declared that the particular provision had to be 'of a fundamentally norm-creating character',[99] that is, capable of forming the basis of a general rule of law. What exactly this amounts to will probably vary according to the time and place, but it does confirm that treaty provisions may lead to custom providing other states, parties and non-parties to the treaty fulfil the necessary conditions of compatible behaviour and *opinio juris*. It has been argued that this possibility may be extended so that generalisable treaty provisions may of themselves, without the requirement to demonstrate the *opinio juris* and with little passage of time, generate *ipso facto* customary rules.[100] This, while recognising the importance of treaties, particularly in the human rights field, containing potential norm-creating provisions, is clearly going too far. The danger would be of a small number of states legislating for all, unless dissenting states actually entered into contrary treaties.[101] This would constitute too radical a departure for the current process of law-formation within the international community.

It is now established that even where a treaty rule comes into being covering the same ground as a customary rule, the latter will not be simply absorbed within the former but will maintain its separate existence. The Court in the *Nicaragua* case[102] did not accept the argument of the US that the norms of customary international law concerned with self-defence had been 'subsumed' and 'supervened' by article 51 of the United Nations Charter. It was emphasised that 'even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the

[98] ICJ Reports, 1969, p. 41; 41 ILR, p. 71. The Court stressed that this method of creating new customs was not to be lightly regarded as having been attained, *ibid.*

[99] But see the minority opinions, ICJ Reports, 1969, pp. 56, 156–8, 163, 169, 172–80, 197–200, 221–32 and 241–7; 41 ILR, p. 85. See also the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 295; 71 ILR, pp. 74, 122, and the *Libya/Malta Continental Shelf* case, ICJ Reports, 1985, pp. 13, 29–34; 81 ILR, pp. 239, 261–6.

[100] See D'Amato, *Concept of Custom*, p. 104, and D'Amato, 'The Concept of Human Rights in International Law', 82 *Columbia Law Review*, 1982, pp. 1110, 1129–47. See also Akehurst, 'Custom as a Source', pp. 42–52.

[101] D'Amato, 'Concept of Human Rights', p. 1146.

[102] ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as distinct from the treaty norm'.[103] The Court concluded that 'it will therefore be clear that customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content'.[104] The effect of this in the instant case was that the Court was able to examine the rule as established under customary law, whereas due to an American reservation, it was unable to analyse the treaty-based obligation.

Of course, two rules with the same content may be subject to different principles with regard to their interpretation and application; thus the approach of the Court as well as being theoretically correct is of practical value also. In many cases, such dual source of existence of a rule may well suggest that the two versions are not in fact identical, as in the case of self-defence under customary law and article 51 of the Charter, but it will always depend upon the particular circumstances.[105]

Certain treaties attempt to establish a 'regime' which will, of necessity, also extend to non-parties.[106] The United Nations Charter, for example, in its creation of a definitive framework for the preservation of international peace and security, declares in article 2(6) that 'the organisation shall ensure that states which are not members of the United Nations act in accordance with these Principles [listed in article 2] so far as may be necessary for the maintenance of international peace and security'. One can also point to the 1947 General Agreement on Tariffs and Trade (GATT) which set up a common code of conduct in international trade and has had an important effect on non-party states as well, being now transmuted into the World Trade Organisation.

On the same theme, treaties may be constitutive in that they create international institutions and act as constitutions for them, outlining their proposed powers and duties.

'Treaty-contracts' on the other hand are not law-making instruments in themselves since they are between only small numbers of states and on a limited topic, but may provide evidence of customary rules. For example, a series of bilateral treaties containing a similar rule may be evidence of the existence of that rule in customary law, although this proposition needs to

[103] ICJ Reports, 1986, pp. 94–5; 76 ILR, pp. 428–9. See also W. Czaplinski, 'Sources of International Law in the *Nicaragua* Case', 38 ICLQ, 1989, p. 151.

[104] ICJ Reports, 1986, p. 96; 76 ILR, p. 430.

[105] See further below, chapter 20, p. 1131.

[106] See further below, chapter 16, p. 928.

be approached with some caution in view of the fact that bilateral treaties by their very nature often reflect discrete circumstances.[107]

General principles of law[108]

In any system of law, a situation may very well arise where the court in considering a case before it realises that there is no law covering exactly that point, neither parliamentary statute nor judicial precedent. In such instances the judge will proceed to deduce a rule that will be relevant, by analogy from already existing rules or directly from the general principles that guide the legal system, whether they be referred to as emanating from justice, equity or considerations of public policy. Such a situation is perhaps even more likely to arise in international law because of the relative underdevelopment of the system in relation to the needs with which it is faced.

There are fewer decided cases in international law than in a municipal system and no method of legislating to provide rules to govern new situations.[109] It is for such a reason that the provision of 'the general principles of law recognised by civilised nations'[110] was inserted into article 38 as a source of law, to close the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*.[111] The

[107] See further below, p. 686, with regard to extradition treaties and below, p. 837, with regard to bilateral investment treaties.

[108] See e.g. B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, 1953; A. D. McNair, 'The General Principles of Law Recognised by Civilised Nations', 33 BYIL, 1957, p. 1; H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927; G. Herczegh, *General Principles of Law and the International Legal Order*, Budapest, 1969; O. Schachter, *International Law in Theory and Practice*, Dordrecht, 1991, pp. 50–5; O. Corten, *L'Utilisation du 'Raisonnable' par le Juge International*, Brussels, 1997; B. Vitanyi, 'Les Positions Doctrinales Concernant le Sens de la Notion de "Principes Généraux de Droit Reconnus par les Nations Civilisées"', 86 *Revue Générale de Droit International Public*, 1982, p. 48; H. Waldock, 'General Course on Public International Law', 106 HR, 1962, p. 54; Pellet, 'Article 38', p. 764; Thirlway, 'Supplement', p. 108; M. Sørensen, 'Principes de Droit International', 101 HR, 1960, p. 16, and V. Degan, 'General Principles of Law', 3 Finnish YIL, 1992, p. 1.

[109] Note that the International Court has regarded the terms 'principles' and 'rules' as essentially the same within international law: the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 288–90. Introducing the adjective 'general', however, shifts the meaning to a broader concept.

[110] The additional clause relating to recognition by 'civilised nations' is regarded today as redundant: see e.g. Pellet, 'Article 38', p. 769.

[111] See e.g. J. Stone, *Of Law and Nations*, London, 1974, chapter 3; H. Lauterpacht, 'Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Legal Order',