capable of judicial application'.[83] It is possible that only part of an EC law can have direct effect.

This jurisprudence on direct effect of EC measures is important because there has been substantial legislative implementation of international agreements within Community law by means of Regulations and Directives. If a provision in such a measure has direct effect there may be no need to consider as a separate issue whether the international agreement concerned can have direct effect in its own right. This issue is particularly important, however, if no internal implementation measures have been taken.

Does the general test for direct effect apply to international agreements?

Formally, the answer appears to be yes.[84] According to the ECJ's well-established jurisprudence:

> A provision in an international agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[85]

The decisions of an Association Council must satisfy the same conditions as those applicable to the provisions of the agreement itself.[86] However, the result of the practical application of this test has been that direct effect of international agreements has been the exception rather than the norm. This is the reverse of the situation with internal EC measures. We need to consider closely the ECJ's approach to the interpretation of international agreements.

How does the ECJ approach the interpretation of international agreements?

The ECJ has rarely referred expressly to the generally accepted rules of interpretation in international law in the Vienna Convention on the Law of Treaties (1969).[87] According to the ECJ, to determine the effect in the community legal system of the provisions of an international agreement, its 'international origin' has to be taken into account.[88] Parties to an agreement can '[i]n conformity with principles of public international law' expressly specify the

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83 See P Pescatore, 'The Doctrine of Direct Effect – An Infant Disease of Community Law' (1983) *ELRev* 155–77.

84 *Ibid*, pp 171–74.

85 *Demirel*, pr 14; Case C-18/90, *Office National de l'Emploi v Kziber* [1991] ECR I-199, pr 15. N Neuwahl suggests that it is 'not clear whether these criteria are sufficient in the case of an international agreement', 'Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law', in N Emiliou and D O'Keeffe (eds), *The European Union and World Trade Law – After the GATT Uruguay Round*, 1996, Chichester: Wiley at p 319.

86 *Sevince*, prs 14–15.

87 Examples are Opinion 1/91 (First EEA Opinion), pr 14, and C-432/92, *R v Ministry of Agriculture, Fisheries and Food, ex p Anastasiou*, [1994] ECR I-3087, both referring to Article 31 VCLT. The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) contains broadly analogous rules. The EC is not a party. See P Manin, 'The European Communities and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations' (1987) 24 *CMLR* 457–81.

88 *Kupferberg*, pr 17.

effect of the provisions of an agreement in their respective legal orders.[89] In practice they rarely do this and, in default, the question can come before the ECJ.[90] It is then a question of interpretation of the agreement concerned.

The general approach of the ECJ to the interpretation of international agreements is to examine its provisions in the light of the general structure of the agreement and any amending or additional Protocols to it.[91] Simultaneously, 'The spirit, the general scheme and the general terms of the ... agreement must be considered'.[92] In *Haegeman* the ECJ clearly read the international agreement concerned in the light of the EC provisions concerned. There was no reference to GATT or to the international backgrounds.

The aims and context of the agreement must also be considered, and its provisions analysed in the light of its object and purpose.[93] The considerations which lead to a certain interpretation in a Community context do not necessarily apply in the context of an international agreement. The ECJ has stressed on many occasions that the EC Treaty creates a new and unique legal order notwithstanding that it was concluded in the form of an international legal agreement.[94] The Treaty constitutes the constitutional charter of a Community based on the rule of law.[95] Member states have limited their sovereign rights. Community law has primacy over the law of the member state and many of its provisions have direct effect.[96] The Treaty pursues certain aims and objectives, and in particular, 'by establishing a common market and progressively approximating the economic policies of the member states, seeks to unite national markets into a single market having the characteristics of a domestic market'.[97] The provisions of the Treaty are not an end in themselves. They are only means to attaining the objectives of the EC and 'making concrete progress towards European unity'.[98] The interpretation and application of the Treaty, even against the same provisions in an international agreement, uses 'different approaches, methods and concepts in order to take account of the nature of each Treaty and its particular objectives'.[99] Stress is also often placed on the institutional structure of the Treaty system and that the Community has at its disposal instruments to achieve the uniform application of EC law and the progressive abolition of legislative disparities.[100]

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89 *Ibid*. Presumably the parties could not all specify that an agreement does or does not have direct effect.

90 *Kupferberg*, pr 17.

91 *Haegeman*, pr 10. AG Warner at 469 stated that the expressions in question must be interpreted in the context of the association agreement read as a whole and against the background of the provisions of the EEC Treaty. This suggests a broader framework than just the EC. In Opinion 1/91 (First EEA Opinion) the ECJ's interpretation of some of the Protocols to the EEA Agreement were very significant for its opinion.

92 IFC Case pr 20; Case C-280/93, *Germany v Council* [1994] ECR I-4973, pr 105; Case 87/75, *Conceria Daniele Bresciani v Amministrazione delle Finanze Stato* [1976] ECR 129 pr 16 (hereinafter *Bresciani*).

93 *Kupferberg*, pr 23.

94 Opinion 1/91 (First EEA Opinion) pr 21.

95 *Ibid*.

96 *Ibid*.

97 *Polydor*, pr 16.

98 Opinion 1/91 (First EEA Opinion), pr 17.

99 Opinion 1/91 (First EEA Opinion), pr 51.

100 *Polydor*, pr 20; Opinion 1/91 (First EEA Opinion), pr 21.

By contrast, the various classes of international agreements to which the EC is a party pursue different and more limited objectives than the EC.[101] In contrast to the EC Treaty, such an international agreement 'merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up'.[102] This is the case with free trade and co-operation agreements. Similarly with association agreements[103] but, to the extent that they seek to prepare the associating state for membership, they are closer on the spectrum to the EC Treaty than mere free trade and co-operation agreements.[104] In *Bresciani* it was important that the international agreement concerned was intended to promote the development of the associated states.[105] The function of the provisions concerned is important and whether it is the same as that performed by similarly worded provisions of the EC Treaty.[106] In any event the result is the same in that the interpretation given to the provisions of the EC Treaty cannot be applied by way of simple analogy to the provisions of other kinds of international agreements even if the wording is similar or even identical.[107] 'Such similarity of terms is not a sufficient reason for transposing to the provisions of the Agreement', the case law of the Community.[108] This is important because many of the EC's international agreements reproduce the language of the EC Treaty. For example, the provisions of the EEA Agreement are textually identical to the corresponding provisions of EC law.[109] Similarly, each of the different classes of EC agreements, for example, free trade, partnership and co-operation, Europe agreements tend to use identical provisions. Thus, the interpretation of any one agreement has significance for others in the same class, and sometimes for agreements in other classes.[110]

In a small number of cases the ECJ held that provisions of association agreements can have direct effect.[111] So too can the Decisions of an Association Council which are directly connected with the agreement to which they give effect. In

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101 Reference is often made to the Preamble or the first article of those agreements to determine their objectives and purpose: see, for example, *Polydor*, pr 10; Case C-280/93, *Germany v Council* [1994] ECR I-4973 pr 106.

102 Opinion 1/91 (First EEA Opinion), pr 20.

103 See Opinion 1/91 (First EEA Opinion), pr 15; *Polydor*, pr 18–20.

104 In *Demirel* the Commission analysed the Association agreement concerned as 'a combination of an association for the purposes of development and an association prior to accession', p 3730. Also, 'The concept of association has a very wide scope and covers various forms of relationship', p 3730.

105 *Bresciani*, pr 22.

106 See Case 17/81, *Pabst & Richarz KZ v Hauptzollamt Oldenburg* [1982] ECR 1331, pr 26. For an important decision on the interpretation of 'changes having equivalent effect' in bilateral or multilateral agreements concluded by the Community see Case C-125/94, *Aprile Srl en liquidation v Amministrazione delle Finanze dello Stato* [1995] ECR I-2919.

107 *Kupferberg*, pr 30; *Polydor*, pr 14; Opinion 1/91 (First EEA Opinion), pr 22; Case C-312/91, *Metalsa Srl v Italy* [1993] ECR I-3751.

108 *Polydor*, pr 15.

109 Opinion 1/91 (First EEA Opinion), pr 22.

110 In the *Polydor* case the UK submission noted that the provision in issue appeared in seven free trade agreements with EFTA countries, all of the Community's agreements with Mediterranean countries, and in the GATT, p 340. See also Case C-103/94, *Zoulika Krid v Caisse Nationale d'Assurances Vieillesse des Travailleurs Salaries* [1995] ECR I-719.

111 For example, *Haegeman*, *Bresciani*.

Kupferberg (1982) the same reasoning was extended, in principle, to free trade agreements.[112] The ECJ proceeded from one of the general rules of international law that there must be *bona fide* performance of every agreement.[113]It observed that in the absence of specific provisions on implementation in the agreement itself, international law did not specify the legal means appropriate for the full execution of a party's commitments under an agreement. It was a matter of discretion for the party concerned.[114] Accordingly, that the legal system of one party accorded direct effect to the provisions of an agreement, while the other party's legal system did not, was simply a reflection of how the parties exercised their discretion as to methods of implementation. Such a situation did not in itself constitute a lack of reciprocity in the implementation of the agreement. In the context of an agreement on development, an imbalance in the obligations of the parties may be inherent in the special nature of the agreement itself.[115] Similarly, that the parties have established a special institutional framework for consultations and negotiations on implementation is not in itself a justification for excluding the possibility of direct effect in principle.[116] Provisions in an international agreement which set out a programme to be achieved would not normally satisfy the standard conditions for direct effect. However, this 'does not prevent the decisions of Council of Association which give effect in specific respects to the programmes envisaged in the Agreement from having direct effect'.[117] The non-publication of a decisions of an Association Council will also not serve to deprive a private individual of the rights which that decision confer on him.[118] Finally, the existence of 'safeguard clauses' which enable parties to derogate from certain provisions of the agreement is also not itself sufficient to exclude the possibility of direct effect in principle.[119] In principle then, neither the nature nor structure of a Free Trade Agreement prevented it from having direct effect in the community legal system.[120]

The direct effect of the decisions of an Association Council cannot be affected by the fact that under those decisions the rights concerned are to be established any national rules. Such provisions 'merely clarify the obligation of the member states to take such administrative measures as may be necessary for the implementation of those provisions, without empowering the member states to make correctional or restrict the application of the precise and unconditional right which the decisions of the Council of Association grant ...'[121]

. . .

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112 *Kupferberg*, pr 22. See Bebr, 'Agreements Concluded by the Community and their Possible Direct Effect'.

113 *Ibid*, pr 18. Article 26 of the VCLT provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

114 This is clearly correct. For example, the UK has not incorporated the European Convention on Human Rights.

115 *Bresciani*, pr 23.

116 *Kupferberg*, prs 19–20. Similarly in *Fediol*, pr 21.

117 *Sevince*, pr 21.

118 *Ibid*, pr 24. Non-publication would prevent the decision being applied adversely to an individual, *ibid*.

119 *Kupferberg*, pr 21; *Sevince*, prs 19–20 in the context of an Association Agreement.

120 Interestingly, AG Rozes has taken a different view, stressing the lack of reciprocity, the flexibility of the provisions, the limited objectives of the agreement, and the difference in the wording of the provisions concerned.

121 *Sevince*, pr 22.

Vertical and horizontal direct effect

Another preliminary question concerns the nature of direct effect in terms of vertical and horizontal direct effect. Vertical effect concerns the relationship between an individual or other private legal person and the state.[122] For example, in cases concerning the direct effect of international agreements, the disagreement is often between the state (customs authorities, tax authorities) and an individual or a company. However, the 'state' has a particular community law meaning in this context (*Foster v British Gas plc*)[123] and therefore covers 'emanations of the state' which for other purposes would be considered as private bodies.[124] Horizontal effect concerns the relationship between one individual or private legal person and another individual or private legal person. Again, given the wide community interpretation of the state, this would be more accurately expressed as one 'non-state emanation' and another 'non-state emanation'. For our purposes, the important question is whether the direct effect of international agreements is limited to vertical direct effect. Provisions of the Community Treaties can have both horizontal and vertical effect.[125] Many provisions of the EC Treaties have been held to be directly effective both vertically and horizontally. The fact of their being addressed to states has been no bar to their horizontal effects. The same argument can be applied to international agreements. In all of the cases considered by the ECJ to date the argument has been one of the vertical direct effect of an international agreement, for example, against a customs authority. However, the *Polydor* case (1982) represented an example of an attempt to rely on the direct effect of a Treaty against a private party.

Finally, [as] Regulations and Directives are often used to implement international agreements it is important to note the possibility of them have direct effect. Regulations can have both vertical and horizontal direct effect, Directives, however, can have vertical direct effect, but not horizontal direct effect.[126] Secondary legislation implementing an international agreement must, as far as possible, be interpreted in a manner that is consistent with it.[127, 128]

2.3.5 *The relationship between regional international law and universal international law*

Since 1945, particularly in the areas of human rights and environmental protection, there has been a growth in the number of treaties setting down rules applicable to particular regions of the world. Specific treaties are discussed in subsequent chapters but it is worth highlighting here the potential problems which have yet to be fully resolved. In the event of a conflict between the

122 In a general sense, this regulation of the indiviudal-state relationship is one familiar to constitutional lawyers.

123 Case C-188/89, *Foster v British Gas* [1990] ECR I-3133. It does not matter in which capacity the state is acting.

124 For example, in the context of international personality or state immunity.

125 Case 43/75, *Defrenne v SABENA* [1976] ECR 455.

126 Case 152/84. *Marshall v Southampton & SWHAHA (Teaching)* [1986] ECR 723; Case C-91/92, *Paulo Faccini Dori, Recreb Sri* [1994] ECR I-3325.

127 See Case C-64/94, *Commission v FRG* [1996] ECR.

128 D McGoldrick, *International Relations Law of the European Union*, 1997, London: Longman at pp 117–33.

regional rule and the rule of universal application, which rule is to prevail? As will be seen in Chapter 3, the problem may be resolved by use of one of the principles: *lex posterior derogat priori* (a later law repeals an earlier law), *lex posterior generalis non derogat priori speciali* (a later law, general in character, does not derogate from an earlier law which is special in character), or the principle *lex specialis derogat generali* (a special law prevails over a general law). However, such principles are not always easily applicable to specific circumstances and it is not always clear which is the special law and which is the general law. It will only be as state practice builds up that it will be possible to state with any degree of certainty the relationship between rules of international law of limited regional application and those rules which have universal, global application.

CHAPTER 3

SOURCES OF INTERNATIONAL LAW

3.1 Introduction

The term 'sources of law' has generated considerable debate among writers and is capable of conveying more than one meaning.

> In English jurisprudence at least, the classic scheme of the sources of law is that of Salmond, who divided them first into those which are 'formal' and those which are 'material' – those imparting to a given rule the force of law and those from which its substance is drawn. He further subdivided 'material sources' into 'legal' and 'historical' sources – those which the law itself acknowledges, such as statute and judicial precedent in England, and those which, though possibly no less influential, are not so acknowledged, as, for instance, the Roman legal system from which, via judicial precedent, many English rules are derived. Finally, in a footnote, Salmond distinguished a category of 'literary' sources, consisting in 'the sources of our knowledge of the law, or rather the original authoritative sources of our knowledge, as opposed to later commentary and literature'.[1]
>
> Though its primary distinction between 'formal' and 'material' sources, however difficult of application in practice, still commands some general acceptance, Salmond's scheme has been much criticised. The alternatives to it which have been proffered have not, however, fared much better. Indeed Sir Carleton Allen, Salmond's chief critic, is regarded by Professor Paton as advocating the abandonment of the search for the sources of law in favour of an enquiry, into first, its validity and, second, the origins of the materials from which it is fashioned, on the ground that the multiplicity of theories has utterly confused the term 'source'.[2]
>
> *The traditional notion of sources in international law: terminology*
>
> International lawyers appear to have persisted longer in the search for 'sources'. Whether this is because they have displayed a greater capacity for the clear definition of terms is perhaps questionable. But their terminology is, in any case, slightly different from Salmond's.
>
> In an endeavour to introduce some order into the words used, Professor Corbett essayed 40 years ago to distinguish different elements relevant to the discussion. He laid it down thus:
>
> 1 The *cause* of international law is the desire of states to have the mutual relations which their social nature renders indispensable regulated with the greatest possible rationality and uniformity.
>
> 2 The *basis* of the rules of international law as a system and of the rules of which it is composed is the consent of states.
>
> 3 The origins of the rules of international law, which may also be called '*the sources*' of that law – though the word 'source' has such a history of confusion behind it that it might well be abandoned – are the opinions, decisions or acts constituting the starting point from which their more or less gradual establishment can be traced.

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1 Salmond, *Jurisprudence*, 10th edn, 1947, London: Sweet & Maxwell at pp 151–56.

2 Paton, *Jurisprudence*, 3rd edn, 1964, Oxford: Clarendon Press at pp 159–60.

4 The records or *evidence* of international law are the documents or acts proving the consent of states to its rules. Among such records or *evidence*, treaties and practice play an essential part, though recourse must be had to unilateral declarations, instructions to diplomatic agents, laws and ordinances, and, in a lesser degree, to the writings of authoritative jurists. Custom is merely that general practice which affords conclusive proof of a rule.[3]

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

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

> Being desirous to deal with the substance of things, and, by avoiding as far as possible wars of epithets, to save a great cause from needless injury and attrition, I have placed the words 'source' and 'evidence' [in the title to a section on the influence of arbitral decisions on the law] in the alternative, thus leaving it to their partisans, who may often agree except in terminology, the unchallenged enjoyment of the title they prefer.[4]

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

> ... has to be defined as the rising from the ground of a spring of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water ...[5]
>
> ...
>
> If we apply the conception of source in this meaning to the term 'source of law' the confusion of source with cause cannot arise. Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to the beginning; where we find that such rules do not rise from a spot on the ground as water does; they rise from facts in the historical development of a community. Thus in Great Britain a good many rules rise each year from Acts of Parliament. 'Source of law' is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force.[6]

Romantic and evocative though I find this image, I must avow that it is unhelpful to me for at least two reasons. First, I feel that the assertion that an Act of Parliament is, or is simply, 'an historical fact' would stand, and would not

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3 Corbett, 'The Consent of States and the Sources of the Law of Nations' (1925) *BYIL* VI at pp 20, 29–30.

4 *International Adjudications*, Modern Series (1929), Vol I, p xii.

5 Oppenheim, *International Law*, Vol I, 8th edn, 1955, London: Longman at p 24.

6 Oppenheim, *International Law*, Vol I, 8th edn, 1955, *ibid* at p 25.

withstand, closer examination. And secondly, though I can see that an Act of Parliament would be both a 'literary source' in Salmond's sense and an item of 'evidence' in Professor Corbett's, and that this circumstance would not exclude its inclusion in other categories established by those authors (since these categories are not necessarily on the same plane or not mutually exclusive), I am troubled by the possible effect of Professor Corbett's cursory assignment of custom to the category of *evidence*.

To say this is perhaps to be obscure unless it is first explained that Oppenheim goes on almost immediately to say that 'Custom is the oldest and original source of international law', to define it as 'a clear and continuous habit of doing certain actions [which] has grown up under the aegis of a conviction that these actions are, according to international law, obligatory or right', and to distinguish it from mere usage, a habit which has grown up without any such conviction.[7] Professor Corbett is no doubt more logical here: he says, in effect, custom merely proves or illustrates – or indeed merely provides evidence – that the conduct it reflects is obligatory. Therefore, in his system it cannot be a 'source' – an origin. Oppenheim says or implies in somewhat circular fashion that a custom is already considered as binding before it becomes such, but it is for him a source. But perhaps I misunderstand Professor Corbett here. Perhaps what he terms *practice* is Oppenheim's custom, and presumably he would concede *practice* to be both source and evidence in his sense. The alternative, which is not to be excluded, is that Professor Corbett has in fact carried out his threat and excised 'source' in all but name from his system: certainly it is difficult to regard *practice*, however, defined, as involving no more than 'the opinions, decisions or acts constituting the starting-point'.

However, this may be, it is well – a point sometimes overlooked by students of international law – to see briefly how writers in other languages and other countries regard the matter of terminology. A fair and accurate summary seems, if one may say so, to be provided by Professor Sorensen, who says that in usual legal language the sources of international law are those things which indicate the actual or concrete content of that system. Admittedly, certain authors prefer to avoid the term altogether or substitute alternative lines of enquiry for an enquiry after sources. Among these he includes Professor Corbett, thus confirming in some measure the suspicion we have already aired. But there is no harm in retaining the word if one makes sure how it is intended to be used. And it should not be used in relation to the question why international law is in general binding: that is the problem of 'basis', upon which designation Professor Corbett and many others agree,[8] or of 'source' in the singular. Nor should it be used in connection with the question what are the 'material sources' of international law in the sense of the elements and influences determining its content, be they the practical interests and needs of states or the idealistic urgings of the social conscience or the ideologies prevailing at any particular time.[9] [10]

Clive Parry makes reference to Oppenheim's *International Law* and cites passages from the eighth edition which was published in 1955. The view

7 Oppenheim, *International Law*, Vol I, 8th edn, 1955, *ibid* at pp 25–26.

8 *Cf* Brierly, *The Basis of Obligation in International Law*, 1958, Oxford: Clarendon Press.

9 Sorensen, *Les Sources du Droit International*, 1946, Copenhagen: E Munksgaard.

10 Clive Parry, *The Sources and Evidences of International Law*, 1965, Manchester: Manchester University Press at pp 1–5.

taken by the editors of the ninth edition (published in 1992) is slightly different:

> There is much discussion of the meaning to be attributed to such terms as 'source', 'cause', 'basis' and 'evidence' of international law.[11] There is, however, an unavoidable degree of flexibility and overlap in the use of such terms, and little practical purpose is served in attempting to define them too precisely or to differentiate them too rigidly. Nevertheless, the concept of a 'source' of a rule of law is important, since it enables rules of law to be identified and distinguished from other rules (in particular rules *de lege ferenda*) and concerns the way in which the legal force of new rules of conduct is established and in which existing rules are changed.
>
> The causes of a rule of law are generally to be found in particular social and historical circumstances in the development of a community, which suggest the need for a rule of conduct in a particular sense. The source of a rule of law is, by contrast, to be found in the process by which it first becomes identifiable as a rule of conduct with legal force and from which it derives its legal validity.
>
> The sources of international law must not be confused with the basis of international law; this, as we have seen, is to be found in the common consent of the international community. The sources of law, on the other hand, concern the particular rules which constitute the system, and the processes by which the rules become identifiable as rules of law. The sources of the rules of law, while therefore distinct from the basis of the law, are nevertheless necessarily related to the basis of the legal system as a whole.
>
> We should at this point also note the distinction between the formal and the material sources of international law. The former – with which we are more concerned here – is the source from which the legal rule derives its legal validity, while the latter denotes the provenance of the substantive content of that rule. Thus, for example, the formal source of a particular rule may be custom, although its material source may be found in a bilateral treaty concluded many years previously, or in some state's unilateral declaration.[12]
>
> The attempt is often made to distinguish between the basis, the causes, the sources, the formal and material sources, and the evidence of sources of international law. These and similar distinctions may be useful, within limits, so long as their importance is not exaggerated and so long as they are not permitted to conceal the essential identity of the subject matter which they are intended to elucidate. The basis – the primary cause – of international law is the fact of the existence of an international society composed of human beings organised as sovereign states. Its more immediate cause (or, as it is occasionally referred to, its objective source) is the interdependence, in its manifold manifestations, of these sovereign states; the need to safeguard their interests and their independent existence by means of binding rules of law; and the necessity to protect the individual human being who is the ultimate unit of all law, in so far as such protection, both of nationals and aliens, is rendered relevant by reference to the existence of separate sovereign states ...

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11 On the different meanings of these terms see Corbett (1925) *BYIL* 6 at pp 20–30; Fitzmaurice in *Symbolae Verzijl*, 1958, p 153; Parry, *The Sources and Evidences of International Law*, 1965, Manchester: Manchester University Press .

12 Jennings and Watts (eds), *Oppenheim's International Law*, 9th edn, 1992, London: Longman at p 23.

> The more direct sources of international law are the agencies, human or other, by means of which it is expressed and rendered binding.[13]

Some writers have gone further to argue that the whole idea of 'sources' of international law is flawed. For example, O'Connell has written:

> Sometimes the word 'source' is used to indicate the basis of international law; sometimes it is confused with the social origin and other 'causes' of the law; at others it is indicative of the formal law-making agency and at others again it is used instead of the term evidence of the law... As a figurative association the word 'source' is misleading and should be discarded.[14]

3.2 Article 38 of the Statute of the International Court of Justice

1 The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

   (b) international custom, as evidence of a general practice accepted as law;

   (c) the general principles of law recognised by civilised nations;

   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2 This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.[15]

The traditional starting point for any discussion of the sources of international law has been Article 38 of the Statute of the International Court of Justice. Apart from a few formal changes the Statute is similar to the Statute of the Permanent Court of International Justice. The Permanent Court of International Justice (PCIJ) was created in 1920 under the auspices of the League of Nations and the Statute was drafted by an 'Advisory Committee of Jurists' appointed by the Council of the League of Nations. The role and procedures of the International Court are discussed in Chapter 12.

> The search for the thing which, by the highest compulsive force as it were, gives to the content of the rules of international law their character as law, whither should it be directed? The traditional approach leads one to turn to Article 38(1) of the Statute of the International Court of Justice – formerly the same article in the Statute of the Permanent Court of International Justice. Quite why this should be the approach is not wholly clear. That article, says Brierly, is 'a text of the highest authority',[16] which is to state the proposition to be proved. The article does not even say that it purports to be a list of sources otherwise than by implication. For it simply states that the Court 'whose function it is to decide in accordance with international law such disputes as are submitted to it, shall

13 E Lauterpacht (ed), *International Law – Collected Papers of Hersch Lauterpacht*, Vol 1, 1970, Cambridge: Cambridge University Press at p 51.

14 O'Connell, *International Law*, Vol 1, 1970, London: Stevens.

15 Article 38 of the Statute of the International Court of Justice.

16 Brierly, *Law of Nations*, 6th edn, 1963, Oxford: Clarendon Press at p 56.