CHAPTER 4

OTHER SOURCES OF LAW

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SECTION 1. GENERAL PRINCIPLES OF LAW AND EQUITY

A. GENERAL PRINCIPLES OF LAW

PROSECUTOR v. TADIĆ

International Criminal Tribunal for the Former Yugoslavia,
Decision on Interlocutory Appeal on Jurisdiction, 1995
Appeals Chamber, Case No. IT–94–1–AR72, 35 I.L.M. 32 (1996) (footnotes omitted)

[The first individual to be tried by the International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) was Dusko Tadić. The trial was noteworthy as the first war crimes trial before an international tribunal since the Nuremberg and Tokyo trials after World War II. Tadić was accused of committing atrocities at the Serb-run Omarska concentration camp in northwestern Bosnia–Herzegovina in 1992. The initial contention of Tadić's defense was that the I.C.T.Y. was without jurisdiction to try him because the Tribunal had been unlawfully established. Tadić objected to the fact that the Tribunal had been created subsequent to the acts of which he was accused, by a 1993 decision of the U.N. Security Council (a body consisting of just fifteen states, without participation or consent by any of the states of the former Yugoslavia). A portion of Appeals Chamber's decision on the jurisdictional issues is set forth below; for other excerpts, see Chapter 16.]

Before: JUDGE CASSESE, PRESIDING; JUDGES LI, DESCHENES, ABI-SAAB, and SIDHWA.

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4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14,

paragraph 1, of the International Covenant on Civil and Political Rights. It provides:

> "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights * * * and in Article 8(1) of the American Convention on Human Rights. * * *

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations," one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the

expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. * * *

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (see United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. * * * [W]e are of the view that the Security Council was endowed with the power to create this

International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. * * *

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

* * *

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

NOTES

1. *General Principles in International Criminal Tribunals.* The Appeals Chamber in *Tadić* made reference to several human rights treaties but was not applying them directly as treaty law. The I.C.T.Y. itself is a subsidiary organ of the U.N. Security Council and not a party to any of these treaties; thus, if the norms embodied in the treaties were to be applied by the I.C.T.Y, it would have to be as a matter of general principles.

In their subsequent rulings, the International Criminal Tribunals for the Former Yugoslavia and for Rwanda have carried out intensive examinations

of national criminal laws and procedures, to try to discern "general principles of law" that might guide the tribunals in resolving disputed points, in the absence of treaty-based sources. In a later phase of the *Tadić* case, after the defendant had been convicted, he again appealed to "general principles" as part of his arguments concerning the substantive standards required to convict him of a crime under international law, in particular as regards the conditions under which an individual could be held criminally responsible for acts of others. The Appeals Chamber consulted national legislation and case law relevant to participants in a common purpose, but did not find any controlling general principle because of a divergence in approaches among countries and major legal systems. Case No. IT–94–1–AR72, Judgment on Appeal from Conviction, paras. 224–25 (July 15 1999).

The Rome Statute of the International Criminal Court (see Documents Supplement) provides in its Article 21(1) that the Court shall apply (a) its own Statute (and related instruments adopted in connection with it); (b) applicable treaties and the principles and rules of international law, including the law of armed conflict; and "(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards." For discussion of the relationship between the I.C.C. and national legal systems, see Chapter 16.

2. *Generality across Common–Law and Civil–Law Traditions.* In the *Erdemović* case, Case No. IT–96–22–A, Judgment on Appeal (Oct. 7, 1997), the tribunal looked in detail at national legislation from common-law and civil-law jurisdictions and at national judicial precedents, both with respect to the substantive question of whether duress can be a complete defense to a homicide and with respect to procedural points, viz., whether the defendant could withdraw a plea of guilty made with inadequate knowledge of its consequences. On the specific questions before the tribunal in *Erdemović,* common-law and civil-law traditions seemed to differ markedly, so that no truly "general" principles could emerge. Yet, as some of the judges separately explained, "general principles of law recognized by civilized nations" might well serve as a residuum of authoritative guidance in appropriate cases. Compare the Joint Separate Opinion of Judges McDonald & Vohrah, paras. 56ff, with the Separate and Dissenting Opinion of Judge Cassese, para. 1ff. (national concepts cannot be automatically transposed to the international level).

3. *Transposing Practices Found Across Many Legal Systems.* In the *Blaskić* case, the Appeals Chamber considered whether national practice as to subpoenas, contempt of court, and other procedures claimed to be "inherent powers" of a judicial organ could be transposed to the international level, in order to fill a gap in authority that had not been explicitly conferred in the Tribunal's Statute. The Chamber observed that "domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal procedures. * * * [T]he transposition onto the international community of legal institutions, constructs or approaches pre-

vailing in national law may be a source of great confusion and misapprehension." Case No. IT–95–14–AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of Decision on the Issuance of *Subpoenae Duces Tecum*, paras. 23–24, 40 (Oct. 29, 1997).

SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE

50–55 (1991)

We can distinguish five categories of general principles that have been invoked and applied in international law discourse and cases. Each has a different basis for its authority and validity as law. They are

(1) The principles of municipal law "recognized by civilized nations".

(2) General principles of law "derived from the specific nature of the international community".

(3) Principles "intrinsic to the idea of law and basic to all legal systems".

(4) Principles "valid through all kinds of societies in relationships of hierarchy and co-ordination".

(5) Principles of justice founded on "the very nature of man as a rational and social being".

Although these five categories are analytically distinct, it is not unusual for a particular general principle to fall into more than one of the categories. For example, the principle that no one shall be a judge in his own cause or that a victim of a legal wrong is entitled to reparation are considered part of most, if not all, systems of municipal law and as intrinsic to the basic idea of law.

Our first category, general principles of municipal law, has given rise to a considerable body of writing and much controversy. Article 38(1)(c) of the Statute of the Court does not expressly refer to principles of national law but rather general principles "recognized by civilized nations". The travaux préparatoires reveal an interesting variety of views about this subparagraph during the drafting stage. Some of the participants had in mind equity and principles recognized "by the legal conscience of civilized nations". (The notion of "legal conscience" was a familiar concept to European international lawyers in the nineteenth and early part of the twentieth century.) Elihu Root, the American member of the drafting committee, prepared the text finally adopted and it seemed clear that his amendment was intended to refer to principles "actually recognized and applied in national legal systems". The fact that the subparagraph was distinct from those on treaty and custom indicated an intent to treat general principles as an independent source of law, and not as a subsidiary source. As an independent source, it did not appear to require any separate proof that such principles of national law had been "received" into international law.

However, a significant minority of jurists holds that national law principles, even if generally found in most legal systems, cannot *ipso facto* be international law. One view is that they must receive the *imprimatur* of State consent through custom or treaty in order to become international law. The strict positivist school adheres to that view. A somewhat modified version is adopted by others to the effect that rules of municipal law cannot be considered as recognized by civilized nations unless there is evidence of the concurrence of States on their status as international law. Such concurrence may occur through treaty, custom or other evidence of recognition. This would allow for some principles, such as *res judicata*, which are not customary law but are generally accepted in international law. * * *

Several influential international legal scholars have considered municipal law an important means for developing international law and extending it into new areas of international concern. For example, Wilfred Jenks and Wolfgang Friedmann have looked to a "common law of mankind" to meet problems raised by humanitarian concerns, environmental threats and economic relations. In this respect they followed the lead of Hersch Lauterpacht suggested in his classic work, *Private Law Sources and Analogies of International Law*. The growth of transnational commercial and financial transactions has also been perceived as a fruitful area for the application of national law rules to create a "commercial law of nations", referred to as a "vast *terra incognita*".

Despite the eloquent arguments made for using national law principles as an independent source of international law, it cannot be said that either courts or the political organs of States have significantly drawn on municipal law principles as an autonomous and distinct ground for binding rules of conduct. It is true that the International Court and its predecessor the Permanent Court of International Justice have made reference on a number of occasions to "generally accepted practice" or "all systems of law" as a basis for its approval of a legal rule. (But curiously the Court has done so without explicit reference to its own statutory authority in Article 38(1)(c).) Those references to national law have most often been to highly general ideas of legal liability or precepts of judicial administration. In the former category, we find the much-quoted principles of the *Chorzów Factory* case that "every violation of an engagement involves an obligation to make reparation" and that "a party cannot take advantage of his own wrong". These maxims and certain maxims of legal interpretation, as for example, *lex specialis derogat generalis*, and "no one may transfer more than he has", are also regarded as notions intrinsic to the idea of law and legal reasoning. As such they can be (and have been) accepted not as municipal law, but as general postulates of international law, even if not customary law in the specific sense of that concept.

The use of municipal law rules for international judicial and arbitral procedure has been more common and more specific than any other type of application. For example, the International Court has accepted *res*

judicata as applicable to international litigation; it has allowed recourse to indirect evidence (i.e., inferences of fact and circumstantial evidence) and it has approved the principle that legal remedies against a judgment are equally open to either party. Arbitral tribunals have applied the principle of prescription (or laches) to international litigation relying on analogies from municipal law. Lauterpacht's *Private Law Sources and Analogies of International Law,* written in 1927, still remains a valuable repository of examples, as does Bin Cheng's later work on *General Principles as Applied by International Courts and Tribunals.*

But considerable caution is still required in inferring international law from municipal law, even where the principles of national law are found in many "representative" legal systems. The international cases show such use in a limited degree, nearly always as a supplement to fill in gaps left by the primary sources of treaty and custom. * * * The most important limitation on the use of municipal law principles arises from the requirement that the principle be appropriate for application on the international level. Thus, the universally accepted common crimes—murder, theft, assault, incest—that apply to individuals are not crimes under international law by virtue of their ubiquity. In the *Right of Passage over Indian Territory* case (India v. Portugal), the Court rejected arguments that the municipal law of easements found in most legal systems were appropriate principles for determining rights of transit over State territory. Similarly, a contention that the law of trusts could be used to interpret the mandate of South Africa over South West Africa (Namibia) did not win approval as international law but it may possibly have had an indirect influence on the Court's reasoning in its advisory opinions. Lord McNair, in an individual opinion, in the 1950 Advisory Opinion on the *International Status of South West Africa,* expressed a balanced conclusion on the subject of analogies from private law that merits quotation here.

> "International law has recruited and continues to recruit many of its rules and institutions from private systems of law * * * The way in which international law borrows from the source 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 policy and principles rather than as directly importing these rules and institutions".

I would subscribe to this general formulation and stress the requirement that the use of municipal law must be appropriate for international relations.

At the same time, I would suggest a somewhat more positive approach for the emergent international law concerned with the individual, business companies, environmental dangers and shared resources. Inasmuch as these areas have become the concern of international law, national law principles will often be suitable for international application. This does not

mean importing municipal rules "lock, stock and barrel", but it suggests that domestic law rules applicable to such matters as individual rights, contractual remedies, liability for extra-hazardous activities, or restraints on use of common property, have now become pertinent for recruitment into international law. In these areas, we may look to representative legal systems not only for the highly abstract principles of the kind referred to earlier but to more specific rules that are sufficiently widespread as to be considered "recognized by civilized nations". It is likely that such rules will enter into international law largely through international treaties or particular arrangements accepted by the parties. But such treaties and arrangements still require supplementing their general provisions and such filling-in can often be achieved by recourse to commonly accepted national law rules. The case-law under the European Convention on Human Rights exemplifies this process. The fact that treaties and customary law now pervade most of the fields mentioned above means that the use of municipal law for specific application will normally fall within an existing frame of established international law. It would be rare that an international tribunal or organ or States themselves would be faced with the necessity of finding a specific rule in an area unregulated by international law. But there still may be such areas where injury and claims of redress by States occur in fields hitherto untouched by international regulation. Weather modification, acid rain, resource-satellites are possible examples. In these cases, municipal law analogies may provide acceptable solutions for the States concerned or for a tribunal empowered to settle a dispute.

The second category of general principles included in our list comprises principles derived from the specific character of the international community. The most obvious candidates for this category of principles are * * * the necessary principles of coexistence. They include the principles of *pacta sunt servanda,* non-intervention, territorial integrity, self-defence and the legal equality of States. Some of these principles are in the United Nations Charter and therefore part of treaty law, but others might appropriately be treated as principles required by the specific character of a society of sovereign independent members.

Our third category is even more abstract but not infrequently cited: principles "intrinsic to the idea of law and basic to all legal systems". As stated it includes an empirical element—namely, the ascertainment of principles found in "all" legal systems. It also includes a conceptual criterion—"intrinsic to the idea of law". Most of the principles cited in World Court and arbitral decisions as common in municipal law are also referred to as "basic" to all law. In this way, the tribunals move from a purely empirical municipal law basis to "necessary" principles based on the logic of the law. They thus 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. Some of the examples that fall under this heading would seem to be analytical (or tautologous) propositions. *Pacta sunt servanda,* and *nemo*

plus iuris transfere potest quam ipse habet (no one can transfer more rights than he possesses) are good examples. (Expressing tautologies in Latin apparently adds to their weight in judicial reasoning.) Several other maxims (also commonly expressed in Latin phrases), considered as intrinsic to all representative legal systems, are sometimes described as juridical "postulates", or as essential elements of legal reasoning. Some principles of interpretation fall in this category: for example, the *lex specialis* rule and the maxim *lex posterior derogat priori* (the later supersedes the earlier law, if both have the same source). These are not tautologies, but can be considered as "legal logic". A similar sense of lawyers' logic supports certain postulates of judicial proceedings: for example, *res judicata* and the equality of parties before a tribunal. The latter suggests that reciprocity on a more general basis may be considered as an intrinsic element of legal relations among members of a community considered equal under the law.

These various examples lend support to the theory that the general principles of law form a kind of substratum of legal postulates. In Bin Cheng's words, "They belong to no particular system of law but are common to them all * * * Their existence bears witness to the fundamental unity of law". In actual practice those postulates are established by "logic" or a process of reasoning, with illustrative examples added. The underlying and sometimes unstated premise is that they are generally accepted. They may be used "against" a State in a case because they are established law. However, if a particular principle or postulate becomes a subject of dispute regarding its general acceptance, it is likely to lose its persuasive force as an intrinsic principle. Hence, in the last analysis, these principles, however "intrinsic" they seem to be to the idea of law, rest on an implied consensus of the relevant community.

The foregoing comments are also pertinent to the next two categories of general principles. The idea of principles *"jus rationale"* "valid through all kinds of human societies" (in Judge Tanaka's words) is associated with traditional natural law doctrine. At the present time its theological links are mainly historical as far as international law is concerned, but its principal justification does not depart too far from the classic natural law emphasis on the nature of "man", that is, on the human person as a rational and social creature.

The universalist implication of this theory—the idea of the unity of the human species—has had a powerful impetus in the present era. This is evidenced in at least three significant political and legal developments. The first is the global movements against discrimination on grounds of race, colour and sex. The second is the move toward general acceptance of human rights. The third is the increased fear of nuclear annihilation. These three developments strongly reinforce the universalistic values inherent in natural law doctrine. They have found expression in numerous international and constitutional law instruments as well as in popular movements throughout the world directed to humanitarian ends. Clearly, they are a "material source" of much of the new international law manifested in treaties and customary rules.

In so far as they are recognized as general principles of law, many tend to fall within our fifth category—the principles of natural justice. This concept is well known in many municipal law systems (although identified in diverse ways). "Natural justice" in its international legal manifestation has two aspects. One refers to the minimal standards of decency and respect for the individual human being that are largely spelled out in the human rights instruments. We can say that in this aspect, "natural justice" has been largely subsumed as a source of general principles by the human rights instruments. The second aspect of "natural justice" tends to be absorbed into the related concept of equity which includes such elements of "natural justice" as fairness, reciprocity, and consideration of the particular circumstances of a case. The fact that equity and human rights have come to the forefront in contemporary international law has tended to minimize reference to "natural justice" as an operative concept, but much of its substantive content continues to influence international decisions under those other headings. Judge Sir Gerald Fitzmaurice was not far from the mark when he concluded in 1973 that there was a "strong current of opinion holding that international law must give effect to principles of natural justice" and "that this is a requirement that natural law in the international field imposes *a priori* upon States, irrespective of their individual wills or consents".

NOTES

1. *What Kinds of Principles Qualify?* The use of analogies drawn from municipal legal systems to develop or supplement international law is as old as international law itself. International tribunals have frequently employed such analogies in deciding disputes between states. Substantive principles applied as "general" principles by such tribunals have included clean hands, acquiescence, estoppel, elementary principles of humanity, duty to make reparations, equity, equality, protection of legitimate expectations, and proportionality. For references to recent decisions by a variety of international tribunals resorting to general principles as a sources of international law, see Charney, Is International Law Threatened by Multiple International Tribunals?, 271 Rec. des Cours 115, 190, 196, 200–10 (1998) (citing decisions of I.C.J., Iran–U.S. Claims Tribunal and European Court of Justice, among others).

Is it necessary to show that many states have recognized a principle of municipal law as appropriate to interstate relations in order to apply it in international law? Tunkin, a leading Soviet authority, argued that this was a requirement that could only be met by showing that the rule in question had been accepted by custom or treaty. Tunkin, op. cit. 200–01. Consider Schachter's comment that the rule must be appropriate for interstate relations and Judge McNair's even more cautious view that private law rules may be regarded as "indications of policy and principles rather than directly importing them into international law." 1950 I.C.J. 148.

2. *Necessity and Other Claims.* A provocative illustration of potential uses in international jurisprudence of claims of general principles is the

Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7, a dispute over the viability of a treaty dating from the socialist era to construct certain works on the Danube River. (For background and excerpts, see p. 225.) Hungary contended that the environmental risks of the project had become so grave as to create a state of "ecological necessity," such that its refusal to carry out its part of the treaty should not be viewed as wrongful. The Court's opinion takes note of a range of concepts which one or both parties had invoked as being found in legal systems in general: these included contentions that "the notion of state of necessity is ... deeply rooted in general legal thinking" (para. 50); that a party cannot be permitted to profit from its own wrongful act (*ex injuria jus non oritur*) (paras. 57, 110, 113); that an aggrieved party has a duty to mitigate damage from another's unlawful action (paras. 68, 80–81); that if an instrument cannot be applied literally, it should be applied to approximate its primary object (paras. 75–76, citing Judge Sir Hersch Lauterpacht); and that a countermeasure to a wrongful act must be proportional to the injury suffered (paras. 83–87). The Court paraphrased the parties' reliance on general principles of law but did not specifically endorse these lines of argument, typically finding that it was unnecessary to resolve the points (e.g., para. 76) or resting its own reasoning on another source of law, such as custom (e.g., para. 52).

3. *Principles Intrinsic to Law: Res Judicata? Burdens of Proof? Duties to Produce Evidence?* As Schachter observes, the I.C.J. has applied concepts such as *res judicata* and has addressed various questions of judicial practice along lines comparable to the approaches of municipal legal systems. A recent illustration is the Bosnian *Genocide* case (excerpted in Chapter 3), 2007 I.C.J. No. 91. There the Court had to consider the import of the principle of *res judicata,* in relation to a complex sequence of developments at the Court and in the United Nations which respondent Serbia claimed had cast doubt on the correctness of the Court's previous dismissal of respondent's jurisdictional objections. After reviewing this history and probing into the purposes underlying the doctrine of *res judicata* "internationally as well as nationally" (para. 116), the Court accepted Bosnia-Herzegovina's view that the jurisdictional holding was *res judicata* and could not be reopened at a later phase of the case. Id. at paras. 80–140. In the same case—the first genocide case ever brought against a state in an international tribunal—the Court dealt with questions of first impression concerning burdens of proof, standards of proof, and methods of proof (paras. 202–30). Applicant urged the Court to draw negative inferences from respondent's withholding of certain documents that were said to contain national security information. In its treatment of this matter (paras. 204–06), would it have been appropriate for the Court to resort to "general principles," in supplementation of its power under Article 49 of its Statute to take "formal note" of any refusal to produce evidence?

4. *General Principles and Human Rights.* Some writers consider custom a relatively weak ground for human rights, in view of violations and lack of uniform practice; they thus contend that "general principles" can be a more appropriate source, based on the support of human rights in international declarations and national constitutions. Simma & Alston, The Sources of Human Rights Law: Custom, Jus Cogens and General Principles, 12 Australian Y.B.I.L. 82 (1992). How would such principles be discerned? How much "generality" should be required?

MANN, REFLECTIONS ON A COMMERCIAL LAW OF NATIONS

33 Brit. Y.B.I.L. 20, 34–39 (1957) (footnotes omitted)

The general principles as a whole and the commercial law of nations in particular are determined and defined by comparative law, i.e., by the process of comparing municipal systems of law. Although publicists rarely refer in terms to comparative law as a "source" of international law, the great majority is likely to agree. This is so for the obvious reason that since the elimination of the direct influence of Roman law there does not exist any system or branch of law, other than comparative law, which could develop general principles. * * *

* * * In a sense it is quite true that all law and all legal systems incorporate and are based upon some such maxims as find expression in the maxims of English equity, in Article 1134 of the French or in s. 242 of the German Civil Code or in similar provisions of codified law. Many, if not most, of the specific rules and provisions accepted in the systems of municipal law can be said to be manifestations or applications of such maxims. Yet "general clauses," as they have been called, have been proved to be an unsatisfactory guide and dangerous to legal development. While no legal system has found it possible to do without them none has found it possible to work with them alone. They leave much room for a subjective approach by the court. They leave the result unpredictable. They lack that minimum degree of precision without which every legal decision would be wholly uncertain. They may, on occasions, be useful to fill a gap but in essence they are too elementary, too obvious and even too platitudinous to permit detached evaluation of conflicting interests, the specifically legal appreciation of the implications of a given situation. In short they are frequently apt to let discretion prevail over justice. For these reasons they cannot be the sole source of a sound and workable commercial law of nations. * * *

A principle of law is a general one if it is being applied by the most representative systems of municipal law.

That universality of application is not a prerequisite of a general principle of law is emphasized by almost all authors. It should be equally clear that a single system of municipal law cannot provide a general principle within the meaning of Article 38. What is usually required is that the principle pervades the municipal law of nations in general. * * *

A principle of law is a general one even though the constituent rules of the representative systems of law are similar rather than identical. * * *

NOTES

1. *Principles Common to National Legal Systems: Investment Agreements.* Disputes between states and foreign companies involving concession agreements or development contracts have involved references to principles of law common to the national legal systems of the countries involved or in a more general way to principles of law. In a well known arbitration, involving nationalization of an oil company, the sole arbitrator considered that a provision of that kind in a concession agreement brought that agreement within the domain of international law and required reference to the rules of international law, more particularly the international law of contracts. *Arbitration between Libya and Texaco Overseas Petroleum Company et al. (TOPCO)*, Award of January 19, 1977, 17 I.L.M. 1 (1978), especially paragraphs 46–51. On nationalization disputes, see Chapter 14.

2. *Principles Common to National and International Law.* In another arbitration involving the nationalization and termination of an oil concession, the relevant agreements indicated that the applicable law included both the law common to the territorial state and the home state of the company and principles of law prevailing in the modern world. The arbitral tribunal noted that the law of the territorial state (Kuwait) also incorporated international law. However, instead of declaring that the applicable law was international law, the tribunal concluded that three sources of law—municipal law of the state concerned, general principles, and international public law—should be considered as a common body of law. See *Kuwait and American Independent Oil Company (Aminoil)*, Award of Sept. 26, 1977, 21 I.L.M. 976, paras. 6–10 (1982).

3. *Generality of Concepts.* The tribunals that have applied "general principles" have not considered it necessary to carry out a detailed examination of the main (or "representative") systems of national law to determine whether the principles pervade "the municipal law of nations in general" (Mann, *supra*). They have at most referred to highly general concepts such as *pacta sunt servanda*, good faith, legitimate expectations of the parties, the equilibrium of the contract. See Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations, 51 A.J.I.L. 734 (1957); Friedmann, The Uses of "General Principles" in the Development of International Law, 57 A.J.I.L. 279 (1963). The Iran–U.S. Claims Tribunal has applied a large number of general principles of law, including unjust enrichment, force majeure, changed circumstances, and other doctrines. See Crook, Applicable Law in International Arbitration: The Iran–U.S. Claims Tribunal Experience, 83 A.J.I.L. 278, 292–99 (1989).

4. *Administrative Tribunals.* General principles of municipal law have also been relied on by the administrative tribunals established by the United Nations and other international organizations to adjudicate disputes between the organization and members of its staff. In some cases such general principles of law have been held to limit the power of the governing bodies of the international organization to alter the conditions of employment of staff members. See *de Merede et al. v. The World Bank*, Decision No. 1, World Bank Admin. Trib. Rep (1981). For commentary see Amerasinghe, The Law of the International Civil Service 151–58 (2d ed. 1994); Meron, The United Nations Secretariat, The Rules and Practice (1977). But compare the views of one eminent international law scholar, Suzanne Bastid (for many years the President of the U.N. Administrative Tribunal), who has written:

> These rules are undoubtedly inspired by the internal law of certain states, but it does not appear that they are being applied as general principles of law. "Here again one may consider that a custom is being established, which has not been contested, notably by the organs which could have recourse to the International Court of Justice against the judgments which apply the custom."

Bastid, Have the U.N. Administrative Tribunals Contributed to the Development of International Law, in Transnational Law in a Changing Society 298, 311 (Friedmann, Henkin, & Lissitzyn eds. 1972).

B. CONSIDERATIONS OF EQUITY, PROPORTIONALITY, AND HUMANITY

As the foregoing materials indicate, substantive principles applied as "general principles of law" by international tribunals have included equity, proportionality, and humanity. As you read further below about those principles, consider whether you think their use provides a useful and inevitable means for tribunals and states to fill in the gaps of the international legal system—or might they afford too much discretion for imposing norms on states to which they did not affirmatively consent?

1. Equity and Good Faith

The concept of equity is used in a variety of ways by tribunals and governments. Consider, for example, the following five uses of equity distinguished by Schachter:

> (1) Equity as a basis for "individualized" justice tempering the rigours of strict law.
>
> (2) Equity as consideration of fairness, reasonableness and good faith.
>
> (3) Equity as a basis for certain specific principles of legal reasoning associated with fairness and reasonableness: to wit, estoppel, unjust enrichment, and abuse of rights.
>
> (4) Equitable standards for the allocation and sharing of resources and benefits (notably, in boundary delimitation).
>
> (5) Equity as a broad synonym for distributive justice used to justify demands for economic and social arrangements and redistribution of wealth.

Schachter, International Law in Theory and Practice 55–56 (1991). The following materials illustrate some of its diverse applications.

FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW

197 (1964) (footnotes omitted)

Probably the most widely used and cited "principle" of international law is the principle of general equity in the interpretation of legal documents and relations. There has been considerable discussion on the question of whether equity is part of the law to be applied, or whether it is an antithesis to law, in the sense in which *"ex aequo et bono"* is used in Article 38, paragraph 2, of the Statute of the International Court of Justice. A strict distinction must of course be made between, on the one hand, the Roman *aequitas* and the English equity, both separate systems of judicial administration designed to correct the insufficiencies and rigidities of the existing civil or common law, and, on the other hand, the function of equity as a principle of interpretation. In the latter sense, it is beyond doubt an essential and all-pervading principle of interpretation in all modern civil codifications, and it is equally important in the modern common law systems, under a variety of terminologies such as "reasonable," "fair" or occasionally even in the guise of "natural justice." There is thus overwhelming justification for the view developed by Lauterpacht, Manley Hudson, De Visscher, and Dahm, that equity is part and parcel of any modern system of administration of justice. * * *

THE DIVERSION OF WATER FROM THE MEUSE (NETHERLANDS v. BELGIUM)

Permanent Court of International Justice, 1937
P.C.I.J. (ser. A/B) No. 70, 76–78

[The case concerned a complaint by the Netherlands that construction of certain canals by Belgium was in violation of an agreement of 1863 in that the construction would alter the water level and rate of flow of the Meuse River. The Court rejected the Netherlands claim and a Belgian counter-claim based on the construction of a lock by the Netherlands at an earlier time. Judge Hudson, in an individual concurring opinion said:]

The Court has not been expressly authorized by its Statute to apply equity as distinguished from law. Nor, indeed, does the Statute expressly direct its application of international law, though as has been said on several occasions the Court is "a tribunal of international law". Series A, No. 7, p. 19; Series A, Nos. 20/21, p. 124. Article 38 of the Statute expressly directs the application of "general principles of law recognized by civilized nations", and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it "to decide a case *ex aequo et bono,* if the parties agree thereto". [Citations omitted.] It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo–American law. Some of these maxims are, "Equality is equity"; "He who seeks equity must do equity". It is in line with such maxims that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper". 13 Halsbury's Laws of England (2nd ed., 1934), p. 87. A very similar principle was received into Roman Law. The obligations of a vendor and a vendee being concurrent, "neither could compel the other to perform unless he had done, or tendered, his own part".

NOTES

1. *Equity as Contextual Justice.* The use of equity to "individualize" decisions and to escape the rigors of rules is akin (as Schachter notes) to the practice of tribunals to distinguish prior cases in terms of the particular facts. In doing this they attribute weight to individual circumstances and thereby allow for exceptions to general rules. Treaty clauses that refer to equitable principles similarly permit exceptions on grounds of the particular facts. As Judge Jiménez de Aréchaga remarked in the 1982 Tunisia–Libya *Continental Shelf* case in the International Court:

> [T]he judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant "factual matrix" of that case.

1982 I.C.J. 18, para. 24. In that case, the International Court emphasized "equitable solutions" and the "particular circumstances," declaring (1982 I.C.J. at para. 132):

> Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore no attempt should be made to overconceptualize the application of the principles and rules.

Similar emphasis on the specific circumstances can be found in the judgment of a Chamber of the Court in the *Gulf of Maine* case between Canada and the United States. 1984 I.C.J. 246, 300.

Criticism of such "individualization" by dissenting judges and by commentators may have influenced the International Court to adopt a more "legal" view of equity. In 1985, it declared "[E]ven though [equity] looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application * * * having a more general validity and hence expressible in general terms." *Continental Shelf* (Libya/Malta), 1985 I.C.J. 13, para. 45.

2. *Equity Inside, Outside, or Against the Law.* In discussing exceptions to rules on equitable grounds, international lawyers (especially in Europe)

often refer to decisions *infra legem* (within the law), *praeter legem* (outside the law) and *contra legem* (against the law). A decision on equitable grounds that is *infra legem* typically occurs when a rule leaves a margin of discretion to a state or law-applying organ. Exercising such discretion on equitable grounds is clearly within the law. A decision that is *contra legem* would not normally be justifiable on grounds of equity, unless the tribunal had been authorized to act *ex aequo et bono*. See *Continental Shelf* (Tunisia/Libya), 1982 I.C.J. 18, 60, para. 71. In exceptional circumstances, a tribunal may feel it necessary to disregard a rule of law on grounds that it is unreasonable or unfair in the circumstances.

The question of whether equity may be used to support a decision *praeter legem* arises when an issue is not covered by a relevant rule and the law appears to have a lacuna in that situation. In one view, a tribunal should hold, in that event, that it cannot decide the issue in accordance with law and therefore refrain from judgment. This distinction is designated as *non liquet* (the law is not clear enough for a decision). See discussion of the 1996 Nuclear Weapons Advisory Opinion, p. 89 note 6. A contrary view maintains that no court may refrain from judgment because the law is silent or obscure. Lauterpacht has argued that the principle prohibiting *non liquet* is itself a general principle of law recognized by civilized nations. Lauterpacht, The Function of Law in the International Community 67 (1933). If that position is adopted, a tribunal may be allowed to use equitable principles as a basis for decisions *praeter legem.*

3. *Substantive Equity.* Substantive concepts of equity such as estoppel, unjust enrichment and abuse of rights have been treated as general principles of law. On estoppel, see *The Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 6, 31, 32, 39–51, 61–65; *Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua) 1960 I.C.J. 192. On unjust enrichment, see Friedmann, The Changing Structure of International Law 206–10 (1964). On abuse of rights, see Bin Cheng, General Principles of Law Applied by International Courts 121–36 (1953). See also Schwarzenberger, "Equity in International Law" 26 Y.B. World Aff. 362 (1972). Litigants before international tribunals frequent assert a "clean hands" doctrine in reliance on *Diversion of Water From the Meuse* and other cases, but are not always able to persuade the tribunal that the facts warrant application of the doctrine. For a recent example, see *Oil Platforms* (Iran v. United States), 2003 I.C.J. 161, paras. 27–30 (U.S. request for dismissal of Iran's claim because of wrongful Iranian conduct in the 1987–1988 naval war in Persian Gulf did not dissuade the Court from considering the claim on the merits).

4. *Equity in Contract and Property Claims.* Equity and "equitable doctrine" are also invoked in cases of international claims for breach of contract or taking of property by a government. The Iran–U.S. Claims Tribunal has had occasion to refer to equity as a basis for a general principle of law and also in some cases as a ground for departing from law. It declared, for example, that the concept of "unjust enrichment" has been recognized in the great majority of municipal legal systems and "assimilated into the catalogue of general principles available to be applied by international tribunals * * * Its equitable foundation makes it necessary to take into account all the

circumstances of each specific situation." *Sea-land Services v. Iran*, 6 Iran–U.S. Cl. Trib. Rep. 149, 168 (1984).

In another case, the Claims Tribunal was faced with a claim of a U.S. company that shares in an Iranian company belonged to the claimant although they were registered in the name of a third party. Iran, the respondent, argued that under Iranian law the nominal registration was conclusive as to ownership. However, the tribunal majority did not accept the Iranian argument, noting that the nominal owner had acted on the basis that the shares belonged to the claimant. The tribunal concluded that a contrary result would "be both illogical and inequitable." *Foremost Tehran v. Iran*, 10 Iran–U.S. Cl. Trib. Rep. 228, 240 (1986). Was this a use of equity *contra legem?* Would the tribunal have been able to rely on a generally accepted principle such as beneficial ownership or estoppel to reach the same result?

5. *Equity and Avoidance of Environmental Harm.* Are there situations in which equity would be appropriate to allow a tribunal (or the governments concerned) to take account of circumstances that would not be germane in a purely legal adjudication? It has been suggested that this might be the case where new international law is emerging as, for example, in regard to transborder environmental damage or access to common resources. See Lowe, The Role of Equity in International Law, 12 Australian Y.B.I.L. 54, 69 (1992). As an alternative, would it be more acceptable to rely on concepts that have been accepted as general principles of law as, for example, the obligation of a state "not to allow knowingly its territory to be used for acts contrary to the rights of other states"? (*Corfu Channel Case*, United Kingdom v. Albania, 1949 I.C.J. 4, 22.) The Latin version of this principle, *"sic utere tuo ut alienum non laedas"* (i.e., use your own so as not to injure another) is often mentioned in international legal writing and judicial decisions. See Chapter 18 on Environmental Law.

6. *Equity in Boundary Delimitations.* Equitable principles and equitable solutions have become key concepts in the law governing the delimitation of maritime boundaries between states. The International Court of Justice and *ad hoc* arbitral tribunals have adjudicated a number of delimitation disputes based on the principle enunciated by the Court in the *North Sea Continental Shelf Cases* (p. 90) that "it is precisely a rule of law that calls for an application of equitable principles." The opinion added, "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 and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of others." 1969 I.C.J. 3, 50.

Equitable principles have also been considered as part of the law applicable to land frontier disputes. The tribunal in the *Rann of Kutch* arbitration between India and Pakistan held that the parties were free to rely on principles of equity in their arguments. 50 I.L.R. 2 (1968). However, some arbitral tribunals have considered that they could not apply equity where the *compromis* (the special agreement setting up the arbitration) required a decision based on law. See Carlston, The Process of International Arbitration 158 (1946); Feller, The Mexican Claims Commissions 223 ff. (1935). For general discussion, see de Visscher, De L'Equité dans le Règlement Arbitral

ou Judiciaire des Litiges de Droit International Public (1972); Lapidoth, Equity in International Law, 81 A.S.I.L. Proc. 138–47 (1987).

7. *Reasonableness.* For discussion of "reasonableness" in the jurisprudence of international courts, see Corten, L'Utilisation du "Raisonnable" par le Juge international (1997).

2. Proportionality

The idea of "proportionality" has often been referred to as an equitable criterion. It has also been called a general principle of law. See, e.g., Cannizzaro, Il Principio della Proporzionalita Nell'Ordinamento Internationale 481 (2000) (English summary).

Proportionality has been applied in various contexts by international tribunals. A recent study by Thomas Franck surveys the application of the principle across many fields of international law—evaluation of lawfulness of resort to military force and conduct of warfare; international criminal responsibility in war crimes cases; nonmilitary countermeasures; trade; human rights—and shows that tribunals provide "second opinions" on whether states have acted disproportionately in their responses to the actions of other states or in relation to the assertion of state interests against claims of individual right. Franck, On Proportionality of Countermeasures in International Law, 102 A.J.I.L. 715 (2008).

As an example, in *Oil Platforms* (Iran v. United States), 2003 I.C.J. 161, Iran complained that the United States had violated Iran's rights under a treaty providing for freedom of navigation when it attacked several oil platforms in the Persian Gulf during the Iran–Iraq war. The United States maintained that it had acted in justifiable self-defense in response to previous attacks by Iran against U.S.-flagged vessels engaged in neutral shipping. The Court found that the conditions for self-defense were not met, because the United States had failed to respect the principle of proportionality:

> [T]he Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither [the operation as a whole, nor the destruction of the platforms] can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

Id. at paras. 76–77.

In the *Gabčíkovo–Nagymaros Project* (Hungary/Slovakia), 1997 I.C.J. 7, 56 paras. 85–87, the I.C.J. ruled that proportionality was a condition of the legality of countermeasures taken against a wrongful act, and that Slovakia's countermeasures against Hungary were unlawful because they had failed to respect proportionality. The dispute settlement organs of the

General Agreement on Tariffs and Trade/World Trade Organization have applied a similar principle of proportionality, as well as other general principles of law (such as the equitable principle of estoppel). See Palmeter & Mavroidis, The WTO Legal System: Sources of Law, 92 A.J.I.L. 398, 408 (1998); Mavroidis, No Outsourcing of Law? WTO Law as Practiced by WTO Courts, 102 A.J.I.L. 421 (2007).

In maritime boundary delimitation cases, proportionality has been generally construed to refer to the ratio between the lengths of the coasts of each state that border the marine area to be delimited. The state with the longer coastline would get the proportionally larger share of the area delimited. The case-law has distinguished between proportionality as an "operative" criterion and its application as a test (or corrective) of a solution reached by other criteria. The latter position was adopted by the International Court in the Libya–Malta *Continental Shelf* case of 1985. It was followed in the *Gulf of Maine* case between Canada and the United States and in the 1992 decision of the Court of Arbitration established by Canada and France to delimit the marine areas between the French islands of St. Pierre and Miquelon and the opposite and adjacent coasts of Canada (31 I.L.M. 1145–1219 (1992)). It was also recently followed in the September 2007 maritime boundary delimitation between Suriname and Guyana by an arbitration tribunal convened under the U.N. Convention on the Law of the Sea (47 I.L.M. 164, para. 392 (2008)).

3. Humanitarian Principles

CORFU CHANNEL CASE (UNITED KINGDOM v. ALBANIA)

International Court of Justice, 1949
1949 I.C.J. 4, 22

[The case involved the explosion of mines in Albanian waters which damaged British warships and caused loss of life of British naval personnel on those vessels. The United Kingdom claimed Albania was internationally responsible and under a duty to pay damages. In regard to the obligations of Albania, the Court stated:]

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefields exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

NOTES

1. *Treaties Expressing Principles of Humanity.* "Elementary considerations of humanity" may also be based today on the provisions of the U.N. Charter on human rights, the Universal Declaration of Human Rights, and the various human rights conventions. See the advisory opinion of the International Court in the *Namibia* case, 1971 I.C.J. 16, 57, p. 212, also discussed in note 2 on p. 270 and in note 4 on p. 272. In its earlier decision in the 1966 *South West Africa* case (2d Phase), the majority of the court declared that humanitarian considerations were not decisive and that moral principles could be considered only insofar as they are given "a sufficient expression in legal form." 1966 I.C.J. at 34.

2. *Humanitarian and Moral Dimension of International Law.* Contemporary jurists who have placed high value on the role of humanitarian and moral factors in international law include such representative scholars as Hersch Lauterpacht, Myres McDougal, Hermann Mosler, and Georg Schwarzenberger. For a recent treatment, see Meron, The Humanization of International Law (2006).

3. *Community Values.* The I.C.J.'s invocation of "elementary considerations of humanity" in the *Corfu Channel* case has been followed in, e.g., the *Nicaragua* case, 1986 I.C.J. 14 at 113–14, 129. Professor Meron in his treatment of the *Nicaragua* judgment has written that "[e]lementary considerations of humanity reflect basic community values whether already crystallized as binding norms of international law or not." Meron, Human Rights and Humanitarian Norms as Customary Law 35 (1989). In its *Nuclear Weapons* advisory opinion, 1996 I.C.J. at para. 79, the I.C.J. wrote:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949,* p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

Does the use of terms such as "fundamental" and "intransgressible" place "elementary considerations of humanity" in the category of hierarchically superior law?

SECTION 2. JUDICIAL DECISIONS AND PUBLICISTS

A. JUDICIAL DECISIONS

1. International Court of Justice

Article 38 of the I.C.J. Statute in its paragraph 1(d) directs the Court to apply judicial decisions as "subsidiary means for the determination of rules of law." It is expressly made subject to Article 59 which states that