

# 1 Juridification of Custom

## Introduction

This chapter examines the theoretical construct of the idea of custom and its application in the formation of rules of customary law in the international legal system. This enterprise has a dual purpose. The first is to confirm the legitimacy deficit in customary international law. The second is to inform attempts to reformulate custom of the issues. This chapter will show first, that both treaty and usage origins of custom premise the emergence of a norm of customary international law on the consummation of State practice (SP) and a belief that that particular practice was obligatory - also known as *opinio juris sive necessitatis* (*OJ*). More importantly, it will show that far from making certain the distinction between legal customs and mere usage this definition of custom does not fully account for the process by which norms of customary international law are created. This situation is unacceptable for a process credited with creating the majority of rules that regulate the behaviour of nearly two hundred States one with another.

## Etymology of Custom

The word custom is part of everyday vocabulary in all languages, meaning the habitual behaviour of people in a particular community.<sup>1</sup> Once adopted by lawyers this word, like many others assumes ambiguities that must be attended.<sup>2</sup> Because customs exist everywhere,<sup>3</sup> it is necessary to distinguish between legal customs and non-legal customs. This distinction is useful not least because it fastens onto legitimacy endearing tenets of transparency, coherency, consistency, determinacy and predictability.

Therefore, it is proposed first, to establish the etymological and perceptual origins of the idea of customary international law, and second, to examine international jurisprudence and discourse on the idea. Of

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particular interest to this study in the archive of discourse on this matter is the current work of the International Law Association Committee on the Formation of Customary International Law whose mandate is to try and explain away custom's paradox.<sup>4</sup> The impact on custom of developments in specific areas of international law such as human rights, law of the sea and environmental law will also be analysed. Finally, the source of obligation of rules of customary international law will be considered in order to inform any effort to address the legitimacy deficit in custom. The hypothesis is that a high correlation between the International Court of Justice's (ICJ) jurisprudence on custom, the writings of publicists and other international institutions points to a high degree of custom's transparency, consistency, coherency, determinacy and predictability while a low correlation points to a legitimacy deficit in the doctrine. The null-hypothesis is that any correlation of views on custom is due to chance alone.

### **Custom as a Law-creating Mechanism**

Earliest evidence of recognition of custom as a tool for the creation of law in the international legal system appears in the works of Suarez,<sup>5</sup> though it is probably of greater antiquity. In his *De legibus ac cleo legislatore*, which first appeared in 1612, Suarez proposed two requirements for ascertaining the existence of a rule of customary international law, namely, consensus and compliance with reason.<sup>6</sup> The first requirement referred only to the sovereign's and not the nation's consent to particular practice. The second requirement referred to God's will as revealed to man - the ratio.<sup>7</sup> Suarez premised custom on both positivist and naturalist philosophy.<sup>8</sup> This view of custom is shared by Grotius who described custom as an embodiment of a practice that a community tacitly accepted as binding upon it.<sup>9</sup> The distinguished German legal scholars Von Savigny and Puchta,<sup>10</sup> who are widely regarded as the major protagonists of Grotius' ideas, anchored the doctrine of custom on what modern writers now routinely call the two limbs of custom, namely, State practice (SP) and *opinio juris sive necessitatis* (OJ).

In his treatise on the contribution to development of international law of the Hague Conferences, Hull<sup>11</sup> identifies what appears to be the first formal treaty recognition of custom as a source of international law. The Conference of Brussels on the Laws and Customs of War (1874) provides

in article 9 that the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- 1) That they be commanded by a person responsible for his subordinates;
- 2) That they have a fixed distinctive emblem recognisable at a distance;
- 3) That they carry arms openly; and
- 4) That they conduct their operations in accordance with the laws and *customs* of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination “army”.

It adds in article 10 that:

The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with article 9, shall be regarded as belligerents if they respect the laws and *customs* of war.

It is curious that this treaty, which was never ratified, appeared to distinguish between laws of war and customs of war, and appeared to privilege adherence first to laws, and second to customs if no laws existed. Such a distinction compels discovery of the reason why States would willingly submit their conduct to regulation of customs that are themselves not law. Did “laws of war” refer to treaty-based rules of international law only, and customs to uncodified rules of international law? This distinctive reference to laws of war and customs of war is common in humanitarian law treaties concluded at this time. As an example, the preamble to Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (1889) reads:

... Thinking it important, with this object, to revise the laws and general customs of war, either with the view of defining them more precisely or of laying down certain limits for the purpose of modifying their severity as far as possible.<sup>12</sup>

Nonetheless, differentiating between treaty and custom as sources of international law in this manner has fanned the general debate on whether or not article 38(1) of the Statute of the International Court of Justice classified the sources of international law in successive order. The Committee of Jurists that drafted this Statute for the League of Nations

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regarded article 38(1)(a) - (d) as constituting a hierarchical ordering of sources and that they were to be applied successively.<sup>13</sup> Hudson<sup>14</sup> writes that the deletion from this article of the Committee's recommendation that these sources should be applied successively does not appear to have had any effect on the meaning of the direction. If the parties to a convention have laid down an applicable rule, it will be controlling and tribunals may not need to look further. If that is not the case, a sufficient guide may be found in the customary law. If resort to general principles of law is necessary, however, the court will naturally want to know at the same time how courts have applied these principles, and how they have been evaluated in juristic writings. But article 38(1) does not establish such a rigid hierarchy. In applying a provision in a convention, a court may have to take into account the customary law prevalent when the convention was entered into, or general principles of law, as well as judicial precedents.

To come back to the etymology of legal custom, twenty-five years after it had first been mentioned as a source of binding obligations between States an international convention ruled that situations not regulated by the treaty itself would fall under the jurisdiction of principles of the law of nations resulting from: "... usage existing among civilised nations, from the laws of humanity and the postulates of public conscience".<sup>15</sup> This seems to have followed directly from de Marten's appeal for the adoption of rules defining belligerents, made in response to Beernaert of Belgium who advocated for non-recognition of belligerents. Beernaert argued that while the humane function of such rules was quite obvious, such rules would target matters that should not be made the subject of international agreement. These matters, he suggested, should be left: "... under the dominion of that *tacit and common law* which arises from the principles of the law of nations".<sup>16</sup> de Marten' argued, and it was accepted, that nations and belligerents should remain under the protection and sovereignty of the principles of law which flowed from *established custom* between civilised nations, the laws of humanity, and from the demands of the public conscience.<sup>17</sup> Article 1 of the Convention includes in its criteria of determining circumstances that international law recognises as giving rise to the status of belligerents: "... the conduct of warfare in accordance with its laws and *customs*". Customs remained distinguished from laws that States readily could identify.

It was the Advisory Committee of Jurists, commissioned by the Council of the League of Nations, that first suggested the entrenchment of custom as a process for the creation of rules of international law in the treaty that formally established the Permanent Court of International

Justice (PCIJ). It proposed as sources of law to be applied by the new court the following:

- 1) Conventional international law, whether general or special, being rules expressly adopted by states;
- 2) International custom, being practice between nations accepted by them as law;
- 3) The rules of international law as recognised by the legal conscience of civilised nations; and
- 4) International jurisprudence as a means for the application and development of law.<sup>18</sup>

It has to be remembered that the longest debate of the committee was on the type of jurisdiction that the court<sup>19</sup> should have. Once it was settled that the court would have a compulsory jurisdiction,<sup>20</sup> the Committee, anxious to quiet apprehensions that judges might make an undue use of their power by interpreting their jurisdiction as if they had legislative authority,<sup>21</sup> inserted article 35. Article 35 appears unchanged as article 38 of the Statute of the ICJ, the successor court to the PCIJ.

The Committee made no secret of the fact that the previous 1899 and 1907 Hague Conferences had influenced its decision to include custom on its list of sources of international law,<sup>22</sup> describing it as:

*... a very natural and extremely reliable method of development since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual inter-course. Not to recognise international custom as a principle, which the judge must follow in the absence of expressed conventional law, would be to misconstrue the true character and whole history of the law of nations.*<sup>23</sup>

This brief historical outline of the evolution of custom as a law-creating mechanism in international law plainly exposes the difficulty of juridifying the idea, i.e. giving it its distinguishing legal persona. Such a distinction is imperative not least because any legal system that is worth that name makes its subjects accountable for their conduct only by rules existent at the time of the material conduct. Descamps emphasised that customary international law should be precipitated by a constant expression of the legal conviction and the needs of nations.<sup>24</sup> It is not clear how this legal conviction was to be identified by all nations concerned, and also who among them would determine what those needs of the community that

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merited regulation through customary international law were. What is clear though is that this committee regarded State consent and practice as the lynchpins of customary international law. Descamps thought that the only thing that mattered was "... whether after having recorded as law conventions and custom, objective justice should be added ... It would be a great mistake to imagine that nations can be bound only by engagements which they have entered into by mutual consent".<sup>25</sup>

The final draft of the sources of the laws to be applied by the new court did not differ from the Descamps Committee Report. Even though the League of Nations Council had recommended some changes to paragraph 2 of the English translation, no such changes were made.<sup>26</sup> Nor did State parties make any changes to the Statute of the PCIJ<sup>27</sup> when they had occasion to revise it in 1929.<sup>28</sup>

The question whether the PCIJ would be re-established after the war, or whether a new court would be created, had exercised the minds of the leading allies as early as 1942. The proposals discussed at the Dumbarton Oaks Conference in October 1944 provided for a court as a "principal judicial organ" of the new world organization - the United Nations. After it had been decided at the Yalta Conference in February 1945 to convene the United Nations Conference on International Organization at San Francisco, a legal committee composed of forty-four States was instructed to elaborate a Draft Statute. Simma writes that: "... The draft proposed by the committee followed to a large extent, mostly textually, the Statute of the PCIJ".<sup>29</sup> The *rapporteur* for that committee reports that while article 38 of the Statute of the court was not itself well drafted, it was not possible to come up with a better draft in the short time that his Committee had been given.<sup>30</sup> In consequence the doctrine of custom that has developed until now is informed as much by the more remote 1920 perspectives as by the more immediate 1945 *zeitgeist* which prompted the emergence of the United Nations. A charitable view is that, the ICJ has consistently teleologically interpreted article 38(1)(b) consistently to maintain its relevance to more modern perspectives of international law. The implications of this argument are discussed generally in Chapter Three and extensively in Part II.

In the Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine,<sup>31</sup> the ICJ stressed that in any deliberations on any question presented before it, the court: "... must obviously begin with referring to article 38 of the Statute of the court".<sup>32</sup> Article 38 directs that the ICJ must apply the following:

- 1) international treaties;
- 2) international custom;
- 3) general principles of law; and
- 4) judicial decisions and the teachings of publicists.

Although this provision should not be regarded as a necessarily exhaustive statement of the sources of international law for all time<sup>33</sup> any conceptual analysis of custom must commence with an analysis of the content of article 38(1)(b). Wolfke regards article 38(1)(b) as the embryo of all law governing international relations.<sup>34</sup> The content of this provision has been the subject of intense debate and comment.<sup>35</sup> The general view is that while it is custom that is the source to be applied, it is practice that evidences custom. Higgins writes that article 38(1)(b) should read: "... international custom as evidenced by a general practice accepted as law".<sup>36</sup> Regardless of this general understanding, customary international law does not appear to have shaken off what Higgins calls: "... the continuing controversy on practice, custom, and *opinio juris*".<sup>37</sup> This study addresses the controversies that appear to impair custom's transparency, consistency, coherency, determinacy and predictability.

### **Unpacking Custom's Content**

In assessing the content of customary international law, or what is regarded as evidence of customary international law, the use of *evidence of custom* is deliberately preferred to "*source of custom*", which also appears in the literature.<sup>38</sup> The common view<sup>39</sup> is that the latter phrase is both metaphorical and ambiguous, and therefore a source of confusion. This confusion is exacerbated in that jurists use this phrase when referring to different things in the discourse on custom. Corbett writes that:

Source is used by different writers, sometimes even the same writer at different times, to express the concepts of cause, origin, basis and evidence. ... Taking two publicists so widely apart as Pradier-Fodere, the first volume of whose monumental treatise appeared in 1885, and de Lonter in his Carnegie edition of 1920, we find that there has been little advance towards fixity or clearness.<sup>40</sup>

Still some jurists talk of *source* when what they mean is: "... the formal source - the customary *sine qua non* of every rule in the system,

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(demanding) a distinct title which will remove all possibility of confusion with less vital matters. (And others understand it to mean) ... the material source, - the historical origins of a rule".<sup>41</sup> The International Law Association Committee on Formation of Customary International law writes that:

If we were to mark a few molecules of water percolating through the ground with a dye or a radioactive isotope, we could, ... identify the spot - and thus, we may presume, a moment - at which those molecules emerge from the ground to form part of the stream. With some stretching, this notion could be extended to municipal legislation or to treaties, which in a sense become law at a particular point in time. However, that is not really the case with custom: we cannot identify a particular moment at which it emerges as binding law. A tribunal or other decision maker may be able to say that it has already ripened or crystallised; but it would not only be necessary, but also inherently impossible, to identify a precise moment at which that had occurred. Furthermore, the customary process is a continuing one, in the sense that established customary rules are constantly being either reinforced or undermined. Here, in particular the "moving picture" is to be preferred to the "photograph".<sup>42</sup>

Difficulty with the use of the phrase *source of custom* in any discussion on the subject is clear. Corbett recommends that if this phrase is to be used at all, its application should be limited to: "... the origin of the material content of a rule, sometimes styled historical source".<sup>43</sup> As a matter of caution this phrase will rarely be used in this study. Instead, reference will be made in this connection to *elements that generate rules of customary international law*. Norm-generating processes are governed by what Hart<sup>44</sup> calls secondary rules of recognition. These declare how rules that regulate conduct of subjects of the legal system are created. Custom's secondary rules of regulation declare how rules of customary international law are created. The Vienna convention on the law of treaties declares how treaty rules are created.<sup>45</sup> Rules of customary international law must show compliance with the requirements of custom, that is, that States have demonstrated practice in the sphere of regulation of the norm, accompanied by a sense of obligation. Kelsen<sup>46</sup> writes that secondary rules of recognition not only confer validity to primary norms created by their authority, but also themselves depend for their own validity on a more superior rule of recognition, ultimately connected to the basic norm. Secondary rules of recognition also give primary rules their identity within the legal system in that they point to their formal and material elements.<sup>47</sup>



The International Law Association Committee on Customary International law has described secondary rules of recognition as: "... Those processes, compliance with which endows a rule with legal force; they are identified by the criteria of validity of the system".<sup>48</sup> The committee has described primary rules of recognition as the content that has contributed to the rule though it alone cannot bestow formal validity on the rule. "They are, so to speak, the quarry from which the content of the rule has been hewn".<sup>49</sup> Therefore, it is possible to speak of formal and material elements of custom. State practice and *opinio juris* constitute the formal elements of custom. Kopelmanus<sup>50</sup> writes that: "... There are two factors in the formation of custom: (1) a material fact - the repetition of similar acts by states, and (2) a psychological element usually called the '*opinio juris sive necessitatis*'". Hudson writes that:

... it is *not possible* for the court to apply *a custom*; instead, it can observe the *general practice of States*, and if it finds that such practice is due to a *conception that the law requires it*, it may declare that a rule of law exists and proceed to apply it. The elements necessary are *the concordant and recurring action of numerous States* in the domain of international relations, *the conception in each case that such action was enjoined by law*, and the failure of other States to challenge that conception at that time.<sup>51</sup>

But how in practice does the practitioner, diplomat or judge distinguish between State practice that connotes the emergence of a nascent primary rule of customary international law, and practice that does not? This is the question that must be answered unambiguously in the ICJ's jurisprudence and publicists' discourse if custom is to become transparent, consistent, coherent, determinate and predictable.

One view is that only physical acts by a State in, for example, imposing an embargo or expelling nationals from a State considered hostile, constitute practice - the restrictive view. D'Amato argues that a statement by a State can only be considered as evidence of *opinio juris*, but not as evidence of the material component of custom.<sup>52</sup> Fitzmaurice<sup>53</sup> is of the view that in the main: "... it is only the actions of States that build up practice, just as it is only practice that constitutes a usage or custom, and builds up eventually a rule of customary international law". Akehurst does not distinguish between States' physical acts, and their pronouncements. In his view either of them can be adduced as evidence of State practice<sup>54</sup> - the open-ended approach. While the restrictive view has the potential to make

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the law rigid, inflexible and sterile, the open-ended approach offers the potential to infuse imprecision into the practice of international tribunals, an effect that would detract and not enhance the transparency, determinacy, consistency, coherence and predictability of custom. Case law indicates<sup>55</sup> that when asked to determine whether a new norm of customary international law has emerged or not, international tribunals tend to apply the restrictive approach, and often resort to the open-ended in what appear to be situations of *non-liquet*. In his dissenting opinion in the Anglo Norwegian Fisheries Case, Judge Reid, had this to say regarding evidence of State practice:

This cannot be established by citing cases where coastal states have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing ships. ... *The only convincing evidence of State practice is to be found in seizures, where the coastal state asserts its sovereignty over the water in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.*<sup>56</sup>

In the Nicaragua Case,<sup>57</sup> the ICJ curiously invoked General Assembly resolution 2625<sup>58</sup> to ascertain State practice with regard to the use of force.<sup>59</sup> The court then defined this process as restrictive custom, and examined State practice only to see whether a permissive modification of the rule allowing intervention in support of rebel forces had been established.<sup>60</sup> According to the court:

This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves ... The principle of non-use of force, for example, may thus be regarded as a principle of customary law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such a rule ..., to be thenceforth treated separately from the provisions, especially those of an

institutional kind, to which it is subject on treaty-law plane of the Charter.<sup>61</sup>

Mendelson<sup>62</sup> argues that the court's suggestion that a United Nations General Assembly resolution can be adduced as evidence of both State practice and *opinio juris* for the purposes of determining the emergence of a rule of customary international law is highly controversial. This "double-dealing" of the ICJ seems to negate the accepted view that a primary rule of customary international law emerges only when it can be demonstrated that the practice of States in question is accompanied by a mental attitude of obligation. Even more, it appears to elevate General Assembly resolutions to a status previously not contemplated when the United Nations created that institution, nor is evidence available that the United Nations has now deliberately bestowed such a purpose to that institution. Further, instead of making clear the function of voting practices of State representatives in international organizations, it appears to throw the value of those voting tendencies into further controversy.<sup>63</sup> It is common knowledge that the United Nations Charter conspicuously denied legislative authority to the General Assembly. Its resolutions were initially intended only as recommendations, with no binding authority.<sup>64</sup> However, the Committee on the Progressive Development of international law set by the General Assembly to research methods of implementing the objectives of article 13(1)(a) of the United Nations Charter states that declarations of the General Assembly which restate existing law should be admitted as evidence of State practice.<sup>65</sup> Notwithstanding that development, the position of General Assembly resolutions with regard to customary international law remains controversial. A comparison of the direction of certain United Nations Charter provisions<sup>66</sup> with the views of international bodies,<sup>67</sup> and those of international tribunals<sup>68</sup> appears to complicate the controversy on the value of General Assembly resolutions to the process of customary international law. In the Case Concerning East Timor,<sup>69</sup> Portugal argued that its claim to exclusive territorial jurisdiction over the Timor Gap was legally "given" by successive General Assembly resolutions that continued to recognise that territory as a non self-governing territory under Portugal's trust.<sup>70</sup> Even if it was not in effective control of that territory, Portugal advanced the view that General Assembly resolutions on the matter were conclusive.

The view that the definition of State practice should include the voting practices of States' representatives in the General Assembly and

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other agencies has attracted some support. Among its proponents is Asamoah who writes that:

Our contention is that “practice” should be understood in a wider sense to include verbal forms. Furthermore, consensus should be used as the basis for the development of general international law. One must concede that law can be developed not only from a series of responses to events but also from consensus embodied in a resolution or some other similar document.<sup>71</sup>

In 1963 Higgins wrote:

The United Nations is a very appropriate body to look for indications of developments in international law, for international custom is to be deduced from the practice of States, as manifested in their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of States have come to have legal significance as evidence of customary laws. Moreover, the practice of States comprises their collective acts as well as the total of their individual acts ... collective acts of States, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law. The existence of the United Nations - and especially in its accelerated trend towards universality of membership since 1955 - now provides a very clear, very concentrated, focal point of State practice.<sup>72</sup>

Mehr<sup>73</sup> writes that some resolutions are passed to reaffirm the sanctity of established rules of customary international law. Therefore, such resolutions should have legal significance in the process of custom. Opposition of Western States to the widening of interpretation of “State practice” stems from the fact that developing countries boast a numerical strength in the General Assembly. Churchill and Lowe<sup>74</sup> observe that by virtue of their numerical strength in the General Assembly, developing States were able to secure in 1969 the passing of Resolution 2574, which declared a moratorium on seabed mining.

Some, especially the Islamic States, have asserted that this resolution is binding upon all States in international law. Western States vigorously deny this, and voted against the resolution, which was passed by sixty-two votes to twenty-eight, with twenty-eight abstentions. ... The Group of 77 developing States ... has consistently regarded this resolution as a binding statement of law rendering unilateral deep seabed mining unlawful. *Western States in accordance with their sound, and equally consistent, opinion that voting for United Nations resolutions does not of itself create*

*legal obligations, regard the resolution as merely a statement of political principle and intent.*<sup>75</sup>

The main argument against accepting States' voting decisions in the General Assembly as evidence of State practice is that what States say does not always correspond with what they do. But whatever its merits, this argument cannot be reconciled with the accepted view in international law that unilateral declarations by concerned States even in the absence of previous State practice and *opinio juris* can result in the creation of "instant custom".<sup>76</sup> It is also argued that individual statements made by a State are more likely with time to clash, than is their actual practice over time.<sup>77</sup> Schwebel insists that those who deny that the General Assembly's resolutions affect the content of customary law also observe that States members often vote for much with which they do not agree.

They may go along with a "consensus" to which they consent only in form and not in substance. Their delegates may vote uninstructed or loosely instructed; they may vote in accordance with group dictates rather than as an expression of what their government believes that the law requires. The members of the General Assembly generally vote in response to political, not legal, considerations. The intention is not to affect the law but to make the point which the resolution makes. ... The United Nations General Assembly is a forum in which States can express their views, but what they do is more important than what they say, and especially more important than what they say in the in the General Assembly.<sup>78</sup>

Such arguments have done little or nothing at all to persuade those on the other end of the continuum. Gunning insists that if only physical acts of States were recognised, then nations' disputes would always have to be addressed through physical, largely military action rather than through more peaceful negotiations, a very unattractive course for world public order. She writes that:

If only physical acts are recognised, less powerful or less technologically and economically advanced nations will have little voice in the development of custom. If for example, the only way to participate in the development of a new custom on coastal fishing rights is to have the technological and monetary capability to seize or destroy trespassing ships, only those nations with sufficient resources will have a voice. Such a view undermines and perpetuates the inequality between industrialised nations and less developed countries.<sup>79</sup>

It is presumed in article 38(1)(b) of the Statute of the International Court of Justice that States are the only actors whose conduct counts in the creation of rules of customary international law. Therefore it is necessary to ascertain how States manifest the belief that their behaviour is motivated only by a sense of legal obligation. This can be achieved by identifying in the recognised sequence of custom a conspicuous mechanism for determining the presence or lack of *opinio juris* to complement State practice. It is held that those organs of the State whose business it is to represent the State are an authoritative source for establishing the motivations underlying State conduct in the international arena.<sup>80</sup> Brownlie writes that:

The material sources of custom are very numerous and include the following diplomatic correspondence, policy statements, press releases, the opinions of legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts presented by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.<sup>81</sup>

Very often, diplomatic conflicts present a fertile exchange of arguments between States. The position taken by a State in such circumstances, and the arguments it uses to support its position in public, or before a tribunal, can be used as evidence of its belief of what is legally expected of it.<sup>82</sup> It becomes necessary to ask which of these evidences of customary international law reflect State practice and which *opinio juris* – the two limbs of custom. If accepted, the view that when State practice on a matter becomes very general, that generality can be adduced as evidence of *opinio juris* confuses the distinction initially made between the two limbs of custom, inclining the theory of custom towards obscurity and not clarity. It is born out of a convenience that compromises the transparency, coherency, consistency, determinacy and predictability of custom. It supports the negative view that international tribunals insist on unequivocal evidence of *opinio juris* in a negative fashion, to deny the emergence of a new rule of customary international law if it appears expedient to do so in the circumstances, and less so when it suits them.<sup>83</sup> Wolfke calls this: "... the problem of hierarchy and compensation of

evidence in custom”.<sup>84</sup> The practice of international tribunals shows that quite often, they determine the question of *opinio juris* without the remotest reference to the mental opinions of disputants. In the Lotus Case,<sup>85</sup> the PCIJ showed that it was concerned more with examining the legal effect of the facts, than with some elusive mental state of the parties. It examined the principles of objective and territorial jurisdiction, and the limitations placed on States by international law on this matter. It then used the facts before it to declare that previous failure by States to prosecute foreign nationals committing felonies aboard vessels flying their flags in high seas had not established the customary duty not to prosecute criminals in similar circumstances in the future. It is important to note that in this case France had requested the court to nullify Turkey’s trial and sentencing of French nationals in charge of a ship that had been involved in an accident with a Turkish ship, killing eight Turkish nationals on the high seas. France argued among other things that, Turkey lacked the criminal jurisdiction requisite to hold such a trial; and that for Turkey to exercise such jurisdiction, she must refer to some title to jurisdiction recognised by international law. Assuming that the court had followed France’s line of argument, and gone on to inaugurate a customary rule allowing for countries in Turkey’s position to prosecute foreign nationals, could France perhaps have argued that it did not recognise that customary rule because it did not consent to it? - a typical *opinio juris* argument. The court reasoned that:

The first and foremost restriction imposed by international law upon a State is that - failing a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. However, this is certainly not the case under international law as it stands at present.<sup>86</sup>

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In the Right of Passage Case,<sup>87</sup> the ICJ appeared to place emphasis on evidence of mutual rights and obligations between disputants, stating that:

This practice having continued over a period extending beyond a century and a quarter unaffected by the change in regime in respect of the intervening territory which occurred when India became independent, the court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to *a right and a correlative obligation*.<sup>88</sup>

The exercise by a State of a right which affected States perceive as giving rise to a corollary duty is acceptable as sufficient evidence of *opinio juris*. Thus, in the Asylum Case<sup>89</sup> where Columbia claimed that Peru had breached a rule of regional customary international law on the granting of asylum to fugitives, the court held that in order to sustain its claim, Columbia had to prove that this custom had been established in such a manner that it had become binding on Peru also. According to the court:

The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, *and that this usage is an expression of a right appertaining to the State granting asylum and a duty incumbent upon the territorial State*. This follows from article 38(1)(b) of the statute of the court, which refers to international custom “as evidence of a general practice accepted as law”.<sup>90</sup>

In the Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America),<sup>91</sup> and in response to United States’ claims that its consular jurisdiction and other capitulatory rights in Morocco were founded upon “custom and usage”, the PCIJ ruled that:

In the present case there has not been sufficient evidence to enable the court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco.<sup>92</sup>

The proposition that if an assertion of a right by a State is regarded by affected States as capable of giving rise to a corollary duty, then *opinio juris* which is required to consummate State practice into a rule of customary international law will have been proved appears problematic.



While this may suffice in cases where the creation of particular or regional customary law is the issue, it may prove illusory where the formation of general or universal customary law is concerned, especially where only some and not all the affected States actually actively participate in the creation of a rule. Nonetheless, it is necessary to ask what in a State's conduct accounts for "assertion of right" and what for recognition of a "corollary duty" in this proposition? These references ought to be transparent themselves to enhance custom's transparency, coherency, consistency and determinacy and predictability.

### **On the Material Elements of Custom**

Hudson's<sup>93</sup> requirements for the determination that a new norm of custom has emerged have become the backbone of academic comment on customary international law. They provide a useful launch pad for an informed analysis of the material elements of customary international law. They are:

- 1) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations,
- 2) continuation or repetition of the practice over a considerable period of time,
- 3) conception that the practice is required by, or consistent with, prevailing international law,
- 4) general acquiescence in the practice by other States, and
- 5) the establishment of the presence of each of these elements by a competent international authority.

Formulations of this tenor are not uncommon in the standard texts.<sup>94</sup> What is uncommon, though, is agreement by jurists on whether the presence of all these elements is a prerequisite to the emergence of rules of customary international law. The first requirement is that practice with the quality of creating a rule of customary international law must be concordant, that is to say it must be maintained uniformly and consistently by a number of States with reference to a type of situation falling within the domain of international relations. International tribunals have had occasion to indicate the extent of uniformity and consistency required in State conduct for this purpose. In the *Asylum Case*, the ICJ ruled that:

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The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a *uniform and constant usage practised by the States in question*, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from article 38 of the Statute of the court, which refers to international custom “as evidence of a general practice accepted as law”.<sup>95</sup>

Nonetheless, the court does not identify the threshold of “uniformity” and/or “consistency” that must be attained before a declaration can be made that a new rule of customary international law has emerged. The court’s reference to the relative idea of “substantial” State practice certainly does not sharply define the parameters of custom. Instead, it spreads them so thinly that what is meant by “substantial” State practice has to be elaborated on later. Simple cases that present little or no difficulty regarding what is meant by “substantial” State practice do not cause problems. Difficult cases require greater specificity than that suggested above. Agreement on what suffices as “substantial” State practice will be difficult to reach. The result is that predictability of custom suffers, and with it, its legitimacy. To enhance the legitimacy of the doctrine of customary international law it is necessary to ascertain the threshold at which uniformity and consistency of practice combine with the requisite *opinio juris* to result in the creation of a rule of customary international law. Predictability needs to be manifested also in Hudson’s second element of custom, the requirement that the practice relied upon as evidence of the emergence of a primary rule of recognition of customary international law must be general. How general should it be for regional rules and how general for general rules? Equally?

In determining this question, international tribunals appear to place emphasis on the quality of protest and abstention manifested in the wake of State practice indicative of claims of the emergence of a nascent norm of customary international law. While abstention may be regarded as indifference, active and substantial protest may undermine the uniformity required, and must be examined to see if: 1) it defeats any effort to create a rule; or 2) it merely defeats its application to the protesting State. The question whether at any time abstention means acquiescence or results from economic hardship does not appear to be a relevant consideration in the jurisprudence of international tribunals.<sup>96</sup> In the Corfu Channel Case<sup>97</sup>

the ICJ imposed on coastal States a duty effectively to watch over their territorial waters for any threats to the safety of the Maritime Community. This enabled the court to declare the emergence of the customary rule that obliges States to warn the Maritime Community in general, and those in immediate danger, of the risk they placed themselves in sailing in those of their territorial waters they knew to be unsafe. This appears to ignore the crucial reality that the world easily divides into affluent and poor States to such an extent that what one State may regard as a basic enjoyment, may be another's luxury.<sup>98</sup> This division is also reflected in the disproportionate distribution and enjoyment of technological benefits reaped from the unprecedented technological revolution this century. Dictionaries are being rewritten, to take account of phrases like "information superhighways", "micro chip", "internet", "the web", etc. This reflects the present and ever advancing possibilities for human interaction in both private and public life, particularly in the developed world. In the developing world communication continues to occur at a snail's pace. The implication is that, where determination that a new norm of customary international law has emerged is premised also on absence of protest of developing nations, there is real danger that custom may become the preserve of the developed countries. Were this to happen, developing countries' experience of international law would once again be not so pleasant. Previously, international law was used by empire nations to facilitate colonization, oppression and expropriation of wealth of many present day developing countries. It is only recently that by their numerical strength in organs like the United Nations General Assembly that these countries have started to contribute to international law as legal equals with their former colonial masters. Many developed States publish regularly national digests of international law or some such similar bulletin to which reference may be made for evidence of their practice on international matters.<sup>99</sup> The American Digest of International Law<sup>100</sup> is one example. Publications of regional organisations, such as The European Union's Common Foreign and Security Policy Department, are other examples. Notwithstanding disputes about the sufficiency of State practice and *opinio juris* in the determination whether or not a new norm of customary international law has been formed, "unlinked States" may be left out of the process of custom in cases where the "linked States" appear to conduct themselves primarily via modern technologies. No clear evidence of this problem has been detected as yet. However, if economic power continues to distribute the gains of technological benefits to human interdependence as it has always done, the day may not be far off when unlinked States and linked

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States experience a practical misunderstanding over custom. Such a misunderstanding would give the impression that custom had become the preserve of the wealthy. This would diminish further the legitimacy of customary international law because the principle of legal equality of Member States of the United Nations should apply also to their opportunity to contribute to the process of custom in matters that affect them. Wolfke's<sup>101</sup> argument that, recent technological advances will serve to speed up the process of custom papers over the imbalance in the distribution of communication technologies between the affluent States and their poorer companions. In the last fifty years the United Nations has grown from a mere handful of States to a community of nearly two hundred countries from all continents, with very different habits, cultures and ideologies, and with rather dissimilar understandings and expectations of international law. This appears to have added complicated nuances to custom's traditional requirement that States ought to exhibit the material elements of custom so that a general, consistent, and uniform State practice over a considerably long period of time is established before the emergence of a rule can be certified.<sup>102</sup> Differentiation between acquiescence that aids the emergence of a rule of customary international law and acquiescence that certifies typical cultural practice common only to a handful States, and which is therefore not intended by them as acquiescence to the emergence of rule of customary international law creates further problems. Of course this problem is less likely to occur in the creation of regional norms because of the geographical and often cultural, and developmental similarities amongst the concerned States. The ICJ's judgment in the *Asylum Case* supports this. The court stated that:

Even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.<sup>103</sup>

In the *Anglo-Norwegian Fisheries Case*, the ICJ observed that:

Although the 10-mile rule has been *adopted by certain States* both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, *other States have adopted a different limit*. Consequently, the 10-mile rule has not acquired the authority of a *general rule* of international law. In any event,

the 10-mile rule would appear to be inapplicable as against *Norway* inasmuch as she *has always opposed* any attempt to apply it to the Norwegian coast.<sup>104</sup>

International tribunals' practice on the requirement of sufficiency of general State practice does not appear to have ascertained a recognised threshold at which a nascent norm matures into a fully-fledged rule of customary international law. New technologies that are capable of revolutionising interaction between States are consistently emerging. The form a message takes does not necessarily change its content. Consequently, two facts combine to impair the legitimacy of custom. One is that international tribunals appear to pass on every opportunity to make clear the levels of sufficiency required for each of the elements of custom in order that a nascent norm of custom may be declared to have matured into a fully fledged norm of customary international law. Another is that the creation of rules of customary law, and technologies which States may soon be relying on to demonstrate their views on developments in international life continue to be unevenly distributed among the members of the United Nations. Increasingly the danger grows that the threshold of sufficiency required in the formation of a norm of customary international law is confined to speculation and not to clarity. Perhaps there is need for both the linked and the unlinked States to make sure that they agree a common platform for exhibiting that practice and *opinio juris* related to custom. This will have the effect of rejecting any other platform of creating customary international law except where regional custom is concerned because all the countries in a particular region that may be affected by an emerging norm of custom may have the same means as the instigators to demonstrate their opinions on the particular issue.

Closely linked to Hudson's requirement of generality of practice is the requirement that the uniform and consistent general practice relied upon as evidence of the emergence of a new norm of customary international law manifests these attributes over time. In the *North Sea Continental Shelf Cases*, the ICJ stated that:

The passage of only a short period of time is not necessarily, or of itself a bar to the formation of a new rule of customary international law. An indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform, and

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should moreover have occurred in such a way as to show a general recognition that a rule of law or a legal obligation is involved.<sup>105</sup>

Recent advances in technology have enabled, and sometimes even demanded, the creation of “instant rules” of customary international law. The legal principle prohibiting the orbiting of nuclear weapons in space vehicles was promulgated by way of joint declarations in 1963 by the two nations that had that capability.<sup>106</sup> Although this principle was eventually incorporated into the provisions of the Space Treaty (1967), it became binding from the moment the declarations were made.<sup>107</sup> Of course, this was facilitated by the fact that the two States shared mutual interests on the matter. If all parties concerned with an issue recognise and accept the need for immediate regulation through customary international law it seems extravagant to want to speculate about whether or not those States have maintained that common position for a long time before the proposed norm takes effect. Nonetheless, it is manifestation of consistency, transparency, determinacy, predictability and coherency in all cases that a norm of customary international law is inaugurated that compels this analysis so that if necessary, varieties in the process of custom are not only acknowledged, but also verified and their patterns tested for consistency, coherency, determinacy, predictability and transparency. In this instance the requirement of sufficiency was satisfied by the agreement of the two States that had capacity to orbit nuclear weapons in space vehicles, Russia and the US. Therefore generality meant all. What is not clear yet is whether the requirement of sufficiency of State practice means all in every case. Does generality mean all in each case?

### **Publicists on Custom**

For convenience, publicists’ writings on custom can be categorised into descriptive<sup>108</sup> and prescriptive<sup>109</sup> approaches. The focus in the former category is justification of custom in the international legal system. The latter category is not content with merely acknowledging custom as one of the recognised sources of international law. It is keen to demystify custom’s lens in order to make the procedure of custom transparent, predictable and determinable. Kirgis’<sup>110</sup> theory of custom on a sliding scale, and D’Amato’s<sup>111</sup> theory of manifest intent are examples of the latter approach. Nonetheless, both approaches emphasise and privilege different but equally important aspects of custom. Both approaches are united on

what constitutes the formal elements of custom. They are not always united on what counts as material elements of custom, and what the threshold of sufficiency is or should be for these elements. This problem is perhaps best rehearsed by Allot who observes that:

Custom is a, or the major source of law in customary laws. But what do we mean when we make this self evident remark, and what sort of source is custom? [Custom] = practice, is what people do; law = norm, is what people ought to do. By what mysterious process does the normal become the normative? Not every practice engenders a norm; not all custom "is" law.<sup>112</sup>

There is an abundance of literature that reflects jurists' untiring efforts to extricate custom from its definitional problems.<sup>113</sup> Jennings and Watts apparently consider that of the two formal elements of custom, namely State practice and *opinio juris*, it is the former rather than the latter that really matters. They write that:

However, the formulation in the statute serves to emphasise that the substance of this source of international law is to be found in the practice of States. The practice of States in this context embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic dispatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.<sup>114</sup>

This writer calls this the *discounting approach to custom* because eventually, it inevitably opposes the former position that it is State practice and *opinio juris* that constitute custom. Further, it threatens the legitimacy of customary international law by undermining the one distinction that serves to separate legal custom from common usage.<sup>115</sup> If only State practice mattered in the process of custom, how then could legal custom be differentiated from courtesy for example? It is precisely for this reason that Jennings and Watts append to the earlier comment that:

A custom is a clear and continuous habit of doing certain actions which has grown up *under the aegis of the conviction that these actions are, according to international law, obligatory or right*. On the other hand, a usage is a habit of doing certain actions which has grown up without there being the conviction that these actions are, according to international law, obligatory or right. Some conduct of states concerning their international

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relations may therefore be usual without being the outcome of customary international law.<sup>116</sup>

The implication here is that usage is inferior to legal custom, though usage may convert to custom upon the establishment of the psychological disposition among States that the repetition of such conduct was not due only to chance, but to a recognition that it was obligatory. In the North Sea Continental Shelf Cases, the ICJ ruled that:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the subjective element, is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not itself enough.<sup>117</sup>

The court's proposition poses the question whether the transformation from mere usage to legal custom is retrospective. First States promoting a nascent norm of custom act as if the idea were already binding. Other States join them to make practice on the nascent norm more and more general. When their practice has reached the required threshold of sufficiency (still elusive), the nascent norm matures into a rule of customary international law and from this time on, the same States adhere to the same idea as law. But by what is their initial conduct governed, if it is finally, as previous to its crystallisation, still governed by the belief that it is obligatory? Kelsen calls this custom's "unanswerable paradox". Kunz<sup>118</sup> regards this as "acting in legal error". Parry<sup>119</sup> finds this baffling. He writes: "We find that what we have done binds us. We also find that that which we have done in the conviction that it is already binding so binds us". Allot's<sup>120</sup> conclusion is that if this is how rules of customary international law are created, then custom is itself a mystery. In his dissenting opinion in the North Sea Continental Shelf Cases, Judge Lachs expressed the following view:

To postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to fiction - and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated.<sup>121</sup>



This then is the problem that appears to have steadily corroded the legitimacy of customary international law. This is not a new problem. The solutions which have been suggested over the years have served more to illustrate the problem than to solve it. For instance, Verdross<sup>122</sup> proposed a three-stage process which can be summarised as follows:

- 1) *Stage one* - in the absence of fraud, duress, or mistake, one or more States consciously manifest particular practice, or make particular claims indicative of self-interest, gain, courtesy, comity, etc.
- 2) *Stage two* - in response other States make claims or counter claims, in the hope that those other States that are yet to take a stance on the matter may be persuaded to reciprocate. At this point, States manifest estoppel-like expectations where one or more States' reliance upon the conduct of other States and the States whose conduct is relied upon by those acting in a particular way are regarded as bound by the expectations that their behaviour has induced in others.
- 3) *Stage three* - the pattern of reliance, expectation, and inducement matures and yields a rule of law.

The conviction on the part of States that they are adhering to an emerging customary rule may then gradually begin to accompany the practice in question. ... as the practice or claims become more widespread, or are acquiesced in by more States, so too the conviction that the type of conduct in question is obligatory (ought to be done) or permissible (may be done) in the scheme of inter-State relations.<sup>123</sup>

Verdross thought that his proposal would explain custom forwards rather than backwards<sup>124</sup> and therefore indicate the precise point at which a rule of customary international law is created. Verdross is elaborate with the question of custom's material elements. However, he does not tackle the mysterious<sup>125</sup> transfiguration of usage into custom. In the end, his contribution appears to address the legality rather than the legitimacy of the doctrine of customary international law, invoking in the process the doctrine of estoppel.

In *The Concept of Custom in International Law*, D'Amato rejects Hudson's formulation of customary international law,<sup>126</sup> and suggests a two-stage process of custom instead.<sup>127</sup> Clearly, D'Amato's strategy sets him on course to address custom's imponderable paradox.<sup>128</sup> It is not just the formal aspects of custom that he is concerned with, but also the content

of the idea. In place of “*usus*” he proposes “commitment”; and in place of “*opinio juris*”, he suggests “articulation”.<sup>129</sup> His main criticism of Hudson’s list is that it: “... cannot explain how existing laws could change, for a change in the law would again by definition be based on practice that was *not consistent with prevailing law*”.<sup>130</sup>

Stage one of D’Amato’s proposal involves identifying a claim that particular State conduct is motivated by a sense of legal obligation. Stage two involves ascertaining whether the determinative force of such a claim has been enhanced by successful repetition, consent, estoppel, or reasonableness. It is stage two of D’Amato’s proposal that is key to his strategy. D’Amato argues that because a State is an artificial entity, it is incapable of experiencing consciousness or unconsciousness. Therefore, “... Even if we were to substitute for the term ‘States’ the national decision-makers within those States, the task of proving consciousness of a duty would be impossible”.<sup>131</sup> Consequently, the second limb of custom - *opinio juris* - can only be a fiction which hinders legal conception of the idea of custom. For that reason, custom should be reformulated so that this fiction can be left out, and customary international law’s legitimacy enhanced. He writes that:

There is no need for the acting State itself, through its officials, to have articulated the legal rule. States often do not give official explanations of their conduct, nor should we expect them to do so. A writer on international law, a court, or an international organization may very well provide the qualitative component of custom. But it must be promulgated in a place which nation State officials or their counsel would have reason to consult. The leading journals in international law, the leading textbooks, reports of legal decisions affecting international law, resolutions of international organisations - all these are likely sources for the articulation of rules. Diplomatic correspondence is similarly a good source.<sup>132</sup>

However, if States submitted themselves to rules whose discovery depended solely on what publicists regarded as good law, which publicists should be relied upon? Second, the sceptre of States depending on their own active research for their determination of what was acceptable and unacceptable behaviour in the international community appears onerous. What of the poor countries - the majority of which might not afford the cost of running, let alone maintaining, such research? The same poor States could not afford the services of the good counsel implied in this approach. These practical difficulties add onto rather than diminish custom’s

problems with legitimacy. States would be loathe to have publicists, whatever their qualification, tell them what the law is or ought to be. In practice, even the most respected writers themselves are not always in agreement on many aspects of the law. Each country would refer only to those writers that suited its cause. It appears that this would add onto custom's legitimacy deficiencies rather than lessen them. For instance, Tunkin's view of custom<sup>133</sup> is not exactly the same as that of Meijer.<sup>134</sup> However, both writers inspire enthusiasm on the subject. Such disagreements are not limited to the process of custom itself. For instance, there is also no agreement among writers on which rules of international law are norms of *jus cogens*.

Meijers' thesis on custom is predicated on the extent to which behaviour indicative of the process of custom is ascertainable.<sup>135</sup> To achieve that certainty custom's secondary rules of recognition unambiguously ought to identify that behaviour. Meijers observes three stages in the formation of rules of customary international law. At the first stage, the nascent rule takes shape, though it does not take on its legal character. The emphasis here is on repetition of similar conduct in similar situations. He likens the vitality of repetition to custom to the vitality of expressiveness to the process of treaty making. Without repetition of similar conduct in similar situations there can be no custom and without custom there can be no customary law.<sup>136</sup> This view is consistent with the jurisprudence of the ICJ. In the *Asylum Case*,<sup>137</sup> the ICJ rejected Colombia's claim that a regional rule of customary international law on the granting of asylum to fugitives had emerged. It insisted that for such a determination to be made it was necessary to show evidence of "... a constant and uniform usage". In the *North Sea Continental Shelf Cases*,<sup>138</sup> which is probably the ICJ's most eloquent pronouncement on custom, the court referred to this requirement as "... conduct amounting to a settled practice".

While this regularity of practice which points to the emergence of a new norm of custom taking shape, occurrences contrary to the nascent rule cannot be ruled out. However, this does not mean that practice supportive of the nascent norm loses its significance. For the nascent norm to mature into a fully-fledged norm of customary international law States supporting it will just have to persevere. This phase is akin to parliamentary debates where members of the house opposed to the nascent rule on the one hand and those in support of it on the other rehearse their positions. The difference between the two lies in that whereas members of a national assembly conclude their debate with casting votes for or against

the proposed idea, and the actual votes that determine whether or not the bill becomes law or not concretely can be quantified, such legitimacy enhancing certainties are not clear in this proposition. In treaty law, for instance, the rule is that all States taking part in the negotiations must accept the text, though current practice appears to favour consensus<sup>139</sup> unless an international conference is involved. In the latter case, two-thirds of the negotiators can finalise the text, unless of course, the conference participants expressly decide otherwise. Meijers acknowledges this deficit of specificity in requiring mere generality of practice, repetition and regularity. He wonders whether it is universality or majority practice that is required:

As two States, then the requirement of generality naturally means that both States take part in the practice. If three States are involved then general can also be taken to mean universal. If the rule in making is aimed at six States, then it begins to be less clear ... But all nine?<sup>140</sup>

In the North Sea Continental Shelf Cases the ICJ stated that the requirement of general practice accepted as law was an indispensable requirement in the process of custom. It refers to: "... State practice, including that of States whose interests are specifically affected (which) should have been both extensive and virtually uniform in the sense of the provision invoked".<sup>141</sup> The requirement that practice relied upon as evidence of the emergence of a norm of customary international law ought to be general excludes notions of universal practice. However, instead of helping to clarify what is meant by "general practice", reference to "specially affected States" further complicates the problem. Even if it were accepted that it is only some and not all States that would be bound by the new rule that by their conduct ought consistently and enduringly to support the nascent norm until it matured into a fully fledged rule,<sup>142</sup> it remains unclear how many such States ought to be involved before the threshold of sufficiency is met. International tribunals, including the ICJ, have not shown sufficient courage conclusively to determine this point. Villiger<sup>143</sup> doubts that the "specially affected States" test could do sufficient justice to every type of convention (*qua* customary law). He cites, as examples, the rules on humanitarian warfare of the 1949 Geneva Conventions<sup>144</sup> and the 1977 Protocols,<sup>145</sup> and the 1961 and 1963 Vienna Conventions on diplomatic relations,<sup>146</sup> which are surely of concern to every State. He asks the question whether it is possible in all cases to assess the practice of "affected" States. He writes:

The 1969 Vienna Convention on the Law of Treaties is of import to all States, since all States possess the capacity to conclude treaties (article 6 of the Vienna Convention) and virtually all have done so, thereby applying the law of treaties. The very fact that a large number of States participate, take the floor, and vote (or establish a consensus) at a conference implies a general interest in the matters implied.<sup>147</sup>

The Third United Nations Conference on the Law of the Sea's quasi universal participation,<sup>148</sup> shows difficulties with the ICJ's requirement of "specially affected" States in the process of custom because that conference illustrated that the law of the sea is no longer the preserve of maritime powers alone.<sup>149</sup>

Stage two of Meijers' formulation refers to the question whether it is possible to determine the actual point at which a new rule of customary international law could be said to have been formed. Meijer' appears apologetic and irresolute. He writes that:

The preciseness which is usually achieved in treaty law as to the moment at which the text becomes definitive ... will hardly ever occur in customary law. This in no way means that when the required period of time has elapsed, one will still be uncertain as to whether a rule has emerged.<sup>150</sup>

But if this same preciseness is central to the transparency, determinacy and predictability of law creation through treaty process, its establishment in custom appears logical and practical especially as custom is under so much criticism.

Walden<sup>151</sup> approaches the problem of customary international law's legitimacy deficit robustly. He rejects outright both the view of customary international law that privileges the importance of *opinio juris* over any other aspect of that process, and the tacit consent theory of custom. He argues that neither of these views adequately explains the process of custom though each of them stresses an important aspect it. According to Walden: "The tacit consent theory (stresses) that custom is a law making process, and the *opinio juris* theory (stresses) that there must be some difference between customary law and practices that do not express, or do not give rise to law".<sup>152</sup> Walden appears to say that the answer to the "unanswerable paradox" lies in reformulating it so that both the consent and the *opinio juris* theories are reconciled.<sup>153</sup> He argues that the formulation of custom in most legal systems, including the international legal system, involves two different sets of rules, and that custom's

legitimacy may be revamped only by altering one of these sets, but not necessarily both. The first, the secondary rules of recognition, specify the conditions under which customary laws can be created. These can themselves be customary, or have a different origin. The second, the primary rules are those rules created under the operation of the first set of rules. To modify custom the primary rules created by the exercise of the powers mentioned in the secondary rules of recognition can be abrogated altogether, or varied by the further exercise of the same powers, or the SR themselves may be changed. While Hart<sup>154</sup> focused on the need to ascertain secondary rules that governed how legal rules of a society were formed, and therefore misled himself into concluding that international law was not law, Walden correctly focuses on the question how legal custom is created in a society whose legal system lists custom as one of law's creating agents. In primitive societies, determination of the existence or absence of a rule of customary international law is not necessary.<sup>155</sup> However, once secondary rules of recognition are introduced, a court not only has to decide whether a rule of custom has been breached in each case, but also whether, following the secondary rules of recognition, the rule claimed to have been breached actually exists. According to Walden:

To answer this, it will have to apply rules specifying what kind of conduct, carried out by whom, and over what period, can give rise to such a rule. Secondly, it will have to decide to what individuals the rule applies. (This) immediately involves the introduction of secondary rules regulating the recognition and scope of application of the customary rules.<sup>156</sup>

Following on from this observation Walden tackles custom's "imponderable paradox", that is, by what mystery does common usage transform into legal custom? Perhaps because of his seemingly excessive reliance on criticism of Hart to make his own point, he sets off by referring to Hart's argument that custom is a tool of primitive societies where in the absence of positive law people rely on shared behavioural expectations.<sup>157</sup> He concludes that therefore, customary law is created: "... on the performance by a specified person or body of a specialised act which stipulates a certain course of conduct, (and) most people generally behave in the manner so stipulated".<sup>158</sup> But, technically speaking, the international legal system is not primitive in the Hart sense, because only a primitive society operates on customary rules that do not point or belong to a legal system characterised by secondary rules of recognition. Nothing holds the primary rules together in a primitive society particularly because there are

no secondary rules to identify and claim as belonging to their body of rules, any of the primitive society's "rules" if they may be called so. Grounding his formulation of custom on a premise that is so inconsistent with the reality about the international legal system is problematic because he concedes that the international legal system is itself based on both the secondary rules of recognition, and the primary rules of recognition.<sup>159</sup> Even if this technical error were to be disregarded, this approach appears problematic also in that it regards the creation of custom as a privilege of a "Council of Elders" who wield customary legislative authority.

As an illustration, one may imagine a primitive society in which customary legislative powers are conferred on a Council of Elders. ... on issuing of prescriptions in the recognised manner by the council of elders most people generally comply with such prescriptions. Here, the issuing of prescriptions in the recognised manner is the "performance of a specified act which stipulates a certain course of conduct". The Council of Elders is the "specified person or body"; and the fact that there is general compliance with such prescriptions is an instance of most people generally behaving in the manner so indicated.<sup>160</sup>

This is confusing because custom and legislation are separate processes of law creation. Because the international legal system does not have a legislative assembly, reference to a person or body of persons with capacity to make rules contradicts the notion of custom as previously framed.<sup>161</sup> For this reason, this approach leaves unattended custom's paradox. Both Byers<sup>162</sup> and the International Law Association (ILA) Committee on the Formation of Custom perceive the adoption of a multi-disciplinary approach to custom as a possible way to resolving the legitimacy deficit in custom.

### **The ILA Committee on Formation of General International Law**

Although its work does not have an immediate legal significance for States, the International Law Association's contribution to research on international law is immense and has a unique usefulness in that it provides a "think-tank" for international law practice. Established at the Association's Sixty-second conference held in Seoul in 1986, the Committee on The Formation of Rules of General International Law was tasked with studying custom - the process by which rules of international

law are created.<sup>163</sup> In its first report Mendelson, the *rapporteur* of the Committee, lists the topics that shall be followed by the Committee in discharging its task.<sup>164</sup> It seems to the Committee that there is not one, but several modes of customary international law. In the paradigm case, one State makes a new claim, for example the Truman Proclamation on rights to the continental shelf. Publicly, justifications for such a claim are made. These consist in assessing the reasonableness of the claim in the light of general principles of international law. Other States, particularly those whose interests are affected acquiesce to the claim. Immediately, sets of bilateral relations premised on doctrines of recognition, estoppel and acquiescence emerge. These “other States” make similar claims. The State that first made the claim, together with a host of other “new respondent States” publicly accept that claim as valid. The content of the claim becomes so widely practised that an *opinio juris* can be inferred, and later claims and acquiescence by other States are regarded as being consistent with the new primary rule of customary international law.

The Committee writes that there are several variations to the paradigm case. In what we shall for convenience’s sake refer to as the first variable, the Committee observes that norms of customary international law can be created through treaty. Multilateral treaties affect custom in two ways. The first is by codifying existing primary rules of customary international law. Secondly, they can give rise to the creation of new rules of customary international law in situations where for instance a treaty provision was intended, to grow into a norm of customary international law affecting also those States not parties to the relevant treaty. The North Sea Continental Shelf Cases<sup>165</sup> are instructive. In the Committee’s second variable to the paradigm case, a series of bilateral treaties on the same or similar subject appear to be capable of creating primary rules of recognition of customary international law. The Committee’s third variable looks at the possibility that United Nations General Assembly resolutions can give rise to the emergence of norms of customary international law. Although the Committee qualifies its views by stating that: “... Variants 1-3 are to a greater or lesser extent controversial ...”, the fact that it commits Committee time to them, even if it is only to clear the air so to speak, demonstrates the depth of legitimacy deficiencies in the doctrine of custom. In its first working session members took turns to emphasise the extent of these deficiencies perhaps as a means of squaring themselves up for the task ahead. According to the Chairman, Zemanek (Austria): “Until recently, however, international bodies have avoided tackling the creation of customary law because of the complexity of the process and because of



the dissonance of the theories explaining its formation and validity”. The *rapporteur*, Mendelson (UK) observed that: “The formation of general customary international law is a highly controversial topic on which virtually every international lawyer has a theory. Quite a number of theories exist, and have been in the field for some time. These differences are not only the result of political and ideological disagreements; scholars with the same general views and background sometimes differ strongly on the present topic”. Mrazek (Czechoslovakia) stated that: “The creation of customary law is a most complicated problem. ... it can be hardly imagined without the manifestation of the wills of States, without the expression of their attitudes, without their consensus”. Murase (Japan) regretted that: “At present, there is a serious confusion about the formation, existence, and non-existence of customary norms and the function of a customary rule, and so on. In discussing these problems, people have different images of customary law, with different conceptions, and they are not really communicating anything to each other, even when they are using the same language”. Wolfke, (Poland) thought that:

The topicality of the subject of international custom-formation consists not so much in the importance of this international law-making instrument but rather in the necessity to clarify the growing confusion in the theory on conditions of the formation of rules of customary international law.<sup>166</sup>

There is no record of the Committee’s work in the Association’s report of the Sixty-fourth Conference held at Broadbeach, in 1990.<sup>167</sup> The report of the Association’s Sixty-fifth Conference held at Cairo merely notes that the Committee on Customary International law has requested national branches of the Association to supply the Committee with available material on the national practice relating to matters under consideration by it.<sup>168</sup> There is no record of the Committee’s work in the Association’s report of the Sixty-sixth Conference held at Buenos Aires in 1994.<sup>169</sup> The Committee on the Formation of Customary (General) International Law, as it is formally called, reported on its work at the Association’s Sixty-seventh Conference held at Helsinki in 1996.<sup>170</sup> The Committee’s report focused on *opinio juris*, the second limb of custom. Most members in the Committee agreed with the *rapporteur* that:

Whether or not customary rules emerged in the past in a haphazard or spontaneous way, much customary law today emerges as a result of

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careful calculation on the part of its instigators and is thus far from spontaneous.<sup>171</sup>

This was opposed, and correctly so, by Wolfke who argued that: "...calculated custom-making, if not excluded, is rare and difficult to prove". Both of these ideas are fascinating not least because they revert to the question: who makes the law that governs international relations? Both points shall be considered initially in Chapter Two, which examines the presumptions underlying article 38(1)(b), and more intensely in all Chapters of Part II. The Committee agreed that while some cases required evidence of *opinio juris* to be shown, others did not. But article 38(1)(b) evidently requires evidence of both *opinio juris* and State practice before a declaration can be made that a new norm of customary international law has been formed.

Beyond the ILA Committee on Formation of Customary International Law's paradigm and its three variables lurk two other possibilities. The first reflects what conveniently may be described as "new thinking" in customary international law, also evidenced in the "package deal approach" to concluding international conferences seen at the Third United Nations Conference on the Law of the Sea (1973). Package dealing appears to countenance the emergence of rules of customary international law without looking for evidence of general, continuous State practice and *opinio juris*.<sup>172</sup> Mahmoudi writes that:

The two procedural innovations of package deal and consensus may render it necessary to put any new customary law generated from the negotiations at the Conference in a different category. These new methods of lawmaking have certainly made it more difficult to ascertain when and how the law is laid down.<sup>173</sup>

At that Conference, consensus on the legal limit of the width of territorial seas was evidenced by unequivocal State practice in the Conference by reference to already enacted national laws. The concept of transit passage was designed and presented by the great maritime powers in order to guarantee the continuation of free navigation through straits - the package. Mahmoudi writes that although it lacked evidence of general State practice, and was even contested by the strait States as a clear violation of the fundamental principle of the sovereignty of the coastal State over its territorial sea and although that attitude did not genuinely change in the

course of the negotiations: "... it was finally overruled by the compromise resulting from the package deal mechanism".<sup>174</sup>

The second appears to stem from the ICJ's judgment in the Nicaragua Case (Jurisdiction and Admissibility).<sup>175</sup> The question whether the court had jurisdiction to determine this case arose because in accepting the court's compulsory jurisdiction under the Optional Clause,<sup>176</sup> the US entered a reservation excluding from that acceptance, among other things, disputes arising under multilateral treaties unless, (1) all parties to the treaty affected by the decision were also parties to the case before the ICJ, or (2) the US accepted by special agreement the ICJ's jurisdiction.<sup>177</sup> In one of its rulings in this issue, the court held that: "... Although the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law", the rules of the Charter of the United Nations, and those of customary international law were not completely coterminous.<sup>178</sup> The ICJ deployed the argument that:

A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what the State regards as desirable institutions or mechanisms to ensure implementation of the rules.<sup>179</sup>

Therefore, similar primary rules of recognition of customary international law and treaty could exist alongside each other. Full discussion of the problems resulting from the court's reasoning in this case occurs in Chapter Eight. Nonetheless, it must be noted that the court concluded by suggesting that it could apply United Nations Charter provisions as customary international law because:

... the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter to such an extent that a number of rules contained in the Charter have acquired a status independent of it.<sup>180</sup>

The foregoing discussion points to a lack of textual determinacy on what passes for customary international law and what does not. The fact that there are several, even rival ways of accounting for the emergence of a rule of customary international law appears to be the reason why custom's lens appears opaque. Other factors that directly or indirectly might be impairing custom's legitimacy are the ideas of obligation and jurisdiction. These

factors must also be examined for clues on what needs to be done to cure custom of its legitimacy deficit.

### **Customary International Law and Obligation**

Questions of obligation arise not only in matters theoretical, but also in matters practical such as whether a rule of law has emerged or has been terminated; or whether an event is a violation or a precedent; or whether practice under a treaty is accepted as law or not. Schachter identifies a baker's dozen of theories that attempt to explain the basis of obligation in the international legal system.<sup>181</sup> However, these theories represent what Brierly regards as the two traditional and rival explanations of the basis of obligation in international law, namely, the doctrine of natural or fundamental rights of States, and the doctrine of State consent.<sup>182</sup>

The doctrine of consent's influence on international law has very much to do with the central place allowed to the notions of *sovereignty* and *non-interference in the domestic affairs of States* in the international legal system. Nonetheless, in its own right, the doctrine of consent has become so well entrenched in international life and is actively operative that one does not need to prove its existence. In the creation of rules of customary international law, States appear to invoke it selectively depending on their self-interest, leading some to talk about a tacit consent theory of custom and stretching the idea itself. However, to say that tacit consent explains the process of custom is to violate customary law's power to obligate its addressees.

### *Positivism and Obligation*

Austin<sup>183</sup> argues that a legal system properly so called, depends for its validity on an *all powerful sovereign* capable of imposing his/her will over all of his/her subjects, and owes no such obedience to anyone else. This perspective of a legal system raises the question much hated by tacit consent theorists, that is that, if *the all powerful sovereign* is a legal despot that cannot be stopped by anyone else, by what power is the despot obligated in international law which regulates sovereign independent States? It has been suggested that a superior will exists in international society, and it is from this will that the rules of public international law result.<sup>184</sup> This "will" originates from a *Vereinbarung (traite-loi)* and a *Vertrag (traite-contract)*. A *Vereinbarung* exists when States enter into an agreement imposing parallel or identical obligations on themselves. A *Vertrag*, exists on the other hand, when the agreement imposes different

reciprocal obligations on the Parties. It is contended that only a *Vereinbarung* can be a source of law (*objectives recht*). A *vertrag* can only be a source of rights (*subjectives recht*).<sup>185</sup> But why should a *vereinbarung* give rise to a common will that is superior to, and different from the wills of the individual States composing it? An inherent weakness in this argument is that it creates the illusion that a treaty (a *vereinbarung*), gives a new will, separate and superior to the one that brought the contracting parties to the negotiating table - the myth of the juridical person capable of capping the absolute sovereignty of the State. If this were the case, then one would have in every case to affirm the existence of many international juridical persons, one for each *vereinbarung*, and whose task though limited but extremely important is to be some kind of international legal person summoned to create international law as a *volkerrechtssetzungssubjekt* properly so called.<sup>186</sup> It must be emphasised that a theory of customary international law that depends on a proliferation of imaginary, abstract legal entities has little to commend it. Its obligatory authority will be scattered and perhaps difficult to establish each time the existence or origin of a norm is questioned.

The argument that tacit consent is the basis of obligation in customary international law is premised on the view that agreement is the only possible source of international law. Proponents of this idea argue that: "... if States are equal, and if there exists no superior dictating his laws to them, nor any majority power, then one can only reach the conclusion that there can be no international law without concordant wills, without a treaty".<sup>187</sup> Such arguments risk substituting express contracts for rules of customary international law. They reflect what Lauterpacht calls a desperate effort by some positivist writers to deny the private character of the institution of contract.

It belongs, they say, to the domain of general jurisprudence. The conception of general jurisprudence is here frequently used for the purpose of explaining an otherwise insurmountable difficulty, namely, how it can be that the consensus of the parties is not essential in international treaties.<sup>188</sup>

This attempt is made hollow by its failure to account for the source of the agreement's binding authority. Its proponents are happy to conclude that because consent is the only conceivable source of international law, it follows that custom must be understood as tacit agreement, regardless of the fact that that conclusion is incongruent with the substantive definition

of custom.<sup>189</sup> Tunkin, who is perhaps the most ardent among contemporary tacit consent theorists, argues that only the tacit consent theory of customary international law is a correct reading of article 38(1)(b) of the Statute of the International Court of Justice. He writes that:

Formation of a custom<sup>190</sup> constitutes a definite stage in the process of formation of a norm of customary international law. The consummation of this process is the recognition by the States of the custom as juridically binding, in other words, recognition of a customary rule of a conduct as a norm of international law. This is precisely the interpretation to be given, in our opinion, to point (b) of article 38 of the Statute of the International Court of Justice, according to which one of the sources of international law is international custom as evidence of a general practice accepted as law.<sup>191</sup>

Tunkin is not concerned about the effect *opinio juris* has on such a conception of customary international law in spite of the fact that he does not explain what compels States to defer to a nascent norm before it matures into a fully fledged norm of customary international law. He insulates from analysis any controversies inherent in article 38(1)(b). He writes that: "... The question of recognition of practice as a norm of law, or *opinio juris* is undialectical".<sup>192</sup> While he concedes that he cannot legally justify such a conception of customary international law, he insists that:

The creation of a customary norm of international law is an historical process; the elements of the norm of law evolve gradually. *Opinio juris* confirms that States regard this or that customary norm as juridically binding. When other States too express a will in this direction, a tacit agreement is formed to recognise the tacit rule as a norm of law.<sup>193</sup>

One problem with this argument is that it does not account for the creation of universal rules of customary international law, which do not depend for their creation on their acceptance by every State. Yet because these rules are universal, they address all subjects of the international legal system. It cannot be said that until 1993, South Africa had given its tacit consent to be bound by the general rule that apartheid was a crime against humanity. Yet in suffering the consequences of not accepting that rule, South Africa was bound by it even if it had not, as Tunkin suggests, tacitly accepted it. His argument also implies that a rule of customary international law is binding on a State only if the State, by its own acts, has participated in the creation of the particular rule. Such an argument must concede that

universal rules will always be hard to find, or else face up to criticism that it assumes an idealistic co-operation amongst Member States of the United Nations. According to King, the reality is that: “Although man has learnt to fly the skies like birds and to swim the oceans like fish and to build gigantic bridges and towers that challenge the skies, man has not learnt to live together”.<sup>194</sup> To the extent that the tacit consent theory of custom makes universal acceptance of a nascent rule a precondition to the emergence of a universal rule of customary international law it is difficult to see how nearly two hundred members of the United Nations could all agree on any one issue. Yet universal rules of customary international law exist and do obligate even those States that previously did not consent to them. Therefore the tacit consent theory of customary international law preferred by Tunkin appears to introduce in legal discourse what Brierly describes as:

... the virtual denial of the existence of any *universal* system of international law, for to be admitted into such a system a rule must have been consented to by every State, and this is both an improbable state of affairs in itself and also one which it would hardly ever be practicable to demonstrate even if it existed.<sup>195</sup>

Jennings and Watts write that the requirement of common consent of States means that the express or tacit consent of such an overwhelming majority of States is sought: “... so that those who dissent are of no importance whatever, and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to the wills of its single members”.<sup>196</sup> This raises also the question whether the majority have the right to impose their will on the minority - a type of tyranny of the majority over a minority. Brierly writes conclusively that:

It is not disputed that there is a certain sense in which legal obligation may be said to arise *ex consensu*; the obligations of a contract in civil law, or of a treaty in international law, clearly arise in that way. But a contract or a treaty is capable of having this juridical effect only because there exists an underlying general rule of law to the effect *pacta sunt servanda* and we may well speak of a legal obligation as consensual, meaning only that the occasion out of which it arises is a consensus of parties, and not intending to imply that its ultimate basis, the rule of law which gives binding effect to the consensus, is itself consensual in nature.<sup>197</sup>

Therefore, if tacit consent means the same as implied agreement, it can never be the basis upon which international law is based because the idea

that a quasi contractual obligation can arise out of a real agreement of any kind is ludicrous.<sup>198</sup> So too must any attempt to explain custom on tacit consent lines.<sup>199</sup> It would be unwise to dismiss altogether and out of hand the use of the word consent in a discussion of the basis of obligation in customary international law. Brierly writes that the correct interpretation of the meaning of consent in the international legal system, an interpretation which this writer accepts, is that the consent referred to is:

... an occasion on which the law for some reason of policy declares that an agreement is to be imagined. This is clearly the sense in which we are to understand the proposition that international law arises from the consent of nations, express or imagined.<sup>200</sup>

Therefore, the tacit consent theory of custom is practically and technically unworkable.

#### *Practical and Technical Objections to the Tacit Consent Theory of Custom*

Practically speaking, the tacit consent theory of custom does explain what compels States to behave as they do prior to the consummation of State practice and *opinio juris*. Secondly, it is not correct to say, as proponents of this theory suggest, that rules of customary international law apply only to those States that consented to its creation. While that may be the case with regional (particular) rules of customary international law, that is the exception and not the general rule because universal (general) rules of customary international law apply to all the members of the international community, including those that might even have protested against their creation in the first place - the Committee on the Formation of Customary International Law paradigm case.<sup>201</sup> Further, as a precondition to taking up membership of the United Nations, emerging States accept that they shall adhere to the full stock of customary international law applicable at the time of joining even though they might not have participated in its creation. Waldock writes that:

No State has ever argued before the court that it was exempt from a general customary rule simply because it was a new State that objected to the rule. In the Right of Passage Case, for example, it never occurred to India to meet Portugal's contention as to a right of passage to enclaves by saying that she was a new State; nor did Poland, new-born after the second world war, ever make such a claim in any of her many cases before the Permanent Court.<sup>202</sup>



Certain community values may be so fundamental that the international community cannot afford to jeopardise them by waiting for the consent of States dragging their feet. The need to press in a certain direction for communal benefit<sup>203</sup> very often outweighs waiting for the express consent of every State.

Technically speaking, if States are bound only by those rules of customary international law that they have consented to, it does not follow that they are bound only towards those States that have shown similar consent towards the same rules as the tacit theory makes out. This theory perhaps confuses the idea of consent with that of contract. However, the fact is that consent is not the same as contract. Such shortcomings do not however nullify positivism's service to international law. Brierly correctly observes that it was positivism that helped draw the positivist distinction between law and ethics.<sup>204</sup> Much later in his treatise on the basis of obligation, Brierly celebrates positivism's contribution to the development of the international legal system, writing that:

The truth is that positivism has done a much-needed service to international law by its clear insistence on two points: (1) that what the law is and what it ought to be are not always and necessarily the same; and (2) that we can discover the former by examining international practice and endeavouring to note the principles upon which practice is based, and in no other way. But positivism is false to its own professions when it implies that the law can be reduced to a set of formulated propositions, for it fails to observe that international practice itself habitually admits recourse to natural law or reason; and it exceeds its function when it regards itself as a system of legal philosophy, teaching that obligation can find its ultimate source in the consenting wills of the subjects of law.<sup>205</sup>

It would be wrong therefore to regard the tacit consent theory as the basis of obligation for rules of customary international law because it lacks coherence itself. Even if it were accepted that it was coherent, the tacit consent theory's coherence does not circumscribe the process of custom for it to be regarded as an adequate description of that process. Indeed, it is its failure to inscribe custom under its doctrine that costs it a place in the search for a theory of obligation in international law.

Another factor that directly or indirectly may be impairing custom's transparency, consistency, coherency, determinacy and predictability is the application of the idea of jurisdiction.

*Jurisdiction, Obligation and Customary International Law*

The Statute of the ICJ makes it plain that the court's jurisdiction depends on the consent of States.<sup>206</sup> It is important to distinguish between the source of the court's jurisdiction and the application of it. Article 36(2) of the Statute of the ICJ does not say that States *may* confer jurisdiction on the court in all cases which the parties refer to it. It states that:

States Parties to the present Statute may at any time declare that they *recognise* as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, *the jurisdiction of the court* in all legal disputes concerning the four specified categories of matters.<sup>207</sup>

The judicial power of the ICJ is conferred on it once and for all by this Statute. Therefore, is wrong to imagine that the judicial power of the court is bestowed upon it occasionally by litigating States. Article 36 is not a conferral of jurisdiction on the court, but rather an acceptance, by way of recognition, of the jurisdiction of the court, a jurisdiction which the court was fully clothed with at its inception by virtue of its constituent instrument.<sup>208</sup> It is the application of the court's inherent jurisdiction which is dependent on the consent of States. Shahabuddeen writes that:

... The judicial power so given to the court by its statute is given subject to a condition, this condition being that the power should not be exercised in relation to a State without its consent to that exercise.<sup>209</sup>

Thus, in the Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain),<sup>210</sup> the court convened three times to consider whether or not it had jurisdiction to entertain the admissibility of the application.<sup>211</sup> By its Order of 11<sup>th</sup> October 1991, the court decided that written pleadings should first be addressed to the questions of jurisdiction of the court to entertain the dispute, and of the admissibility of the application. Following this, the court ruled on 1<sup>st</sup> July 1994, that:

The exchanges of letters of December 1987 between the King of Saudi Arabia and the Amirs of Qatar and Bahrain, and the minutes signed at Doha on 25<sup>th</sup> December 1990, were international agreements creating rights and obligations for the Parties, and that, by the terms of those

agreements, the Parties had undertaken to submit to it the whole of the dispute between them, as circumscribed by the “Bahrain formula”.<sup>212</sup>

The significance of the requirement that both parties to a dispute must have accepted the court’s jurisdiction over their dispute before the court can determine whether or not the disputants have a justiceable problem is perhaps summed up by judge Koroma. In his dissenting opinion the judge argues that because Bahrain had not recognised the court’s jurisdiction, the court had no jurisdiction.<sup>213</sup> In the Case Concerning East Timor (Portugal v. Australia),<sup>214</sup> the ICJ held that because a decision on whether or not Australia had incurred international responsibility by negotiating the terms of exploiting the Timor Gap with Indonesia required the ICJ to make a prior decision on the legality of Indonesia’s invasion of East Timor in 1975, and her continued presence in that territory to the material time, the case was inadmissible as Indonesia had not consented to the automatic jurisdiction of the court under article 36, nor had she accepted the court’s jurisdiction in the particular dispute - on an *ad hoc basis*.<sup>215</sup> Similar reasoning is to be found in Rolin’s submissions on behalf of Iran in the Anglo Iranian Case. He remarked that:

It is doubtless true that, when the court decides a case in order to settle a dispute, it is acting ... in pursuance of an authorisation given by the parties. However, while it is acting in pursuance of an authorisation given by the parties, its action is taken by virtue of the powers conferred upon it by the Charter and by its Statute.<sup>216</sup>

If this is not a misreading of article 36 it must follow that when States invoke this provision, what they are doing is merely accepting the jurisdiction of the ICJ and not, it must be emphasised, conferring a non-existent jurisdiction on the court. States can declare this recognition by either executing the procedure laid out in article 36 (2) of the Statute of the ICJ, or by authorising it to exercise its jurisdiction in an individual case. Although the first option seems an obvious first choice, State practice indicates that the second option is more popular. This is not surprising given the fact that States generally appear loathe to surrender away part of their sovereign rights to international institutions.<sup>217</sup> They prefer instead to accept jurisdiction of the ICJ for limited specific bilateral or multilateral agreements. There are over two hundred and fifty bilateral and multilateral treaties which direct that cases concerning the application and interpretation of those treaties shall be referred to arbitration of the ICJ or

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some such international or regional tribunal.<sup>218</sup> Recent examples of such treaties include the (1992) United Nations Rio de Janeiro Convention on Biological Diversity,<sup>219</sup> the (1993) United Nations Paris Convention on Chemical Weapons,<sup>220</sup> and the European Charter for Regional or Minority Languages.<sup>221</sup> Of the cases pending before the ICJ in 1995, five of them, including that on the Lockerbie incident,<sup>222</sup> and that on the Vincennes incident,<sup>223</sup> relied on similar Conventions to commit them under that court's jurisdiction. Of the ICJ's jurisdiction, Judge Gillaume writes that:

The jurisdiction of the International Court of Justice has not changed since 1945. ... But whatever the basis of the court's jurisdiction, it is clear that its activity remains dependent on the will of States. It is intrinsically linked with the trust that governments and international organizations place in international law and justice.<sup>224</sup>

The idea that the consent of States forms the source of the court's jurisdiction is a mischievous attempt to clothe the doctrine of consent with a cloak bigger than its stature. Arguments that new members of the United Nations should be handed a clean slate so that they can pick and choose what pre-existing rules they will be bound by have not changed practice on the matter. The occasion of taking up membership with the United Nations is itself a demonstration that the new member accepts the common rules of the organisation regardless of the fact that it did not have the opportunity to contribute to their creation.

These two examples illustrate that the view that consent *per se* is the basis of obligation as tacit consent theorists would have us believe, is not entirely correct. The occasion creating obligation sometimes manifests itself in express assent to individual rules, and sometimes manifests itself with no such express consent. It is therefore important to distinguish between occasions that have the effect of creating binding obligations on States in contradistinction to occasions that do not have that effect.

#### *Occasion Importing Obligation in Customary International Law*

Schachter begins his search for what he calls the "correct" basis of obligation in international law by identifying six factors that have added to the indeterminacy of obligation in the international legal system in recent years:

- 1) The much-lauded quasi-legislative activity by the United Nations General Assembly and other United Nations bodies that has negatively impacted the basis of obligation particularly because this so-called quasi-legislation has been purported to have capacity to create obligatory norms.<sup>225</sup>
- 2) Implicit understandings and unilateral actions, commonly known as rules of the game which have in recent years been clothed with a status consistent with that held by obligatory rules of law.<sup>226</sup>
- 3) Social revolutions have substituted new assumptions on which to base concepts of authority and power for old ones.
- 4) The growing interdependence of States, especially in economic and technological activities, has vastly increased patterns of co-operation and reciprocal behaviour which have not been institutionalised in the traditional modes of law making.<sup>227</sup>
- 5) National borders have become so porous that it is increasingly difficult to distinguish between matters of international concern and those of national concern only. The march of the movement towards a culture of universal human rights often brings national activities before international organs under international criteria.
- 6) Advances in science and technology now make it possible for States, particularly wealthy ones, to apply informal means of setting standards, and monitoring adherence to those standards without necessarily referring to tight and tidy legal instruments.<sup>228</sup>

Schachter argues that the attributes of competence and authority play an enormous role in ascertaining the occasion that imports obligation in law. By competence is meant the requirement that those actors who designate an occasion as norm creating are: "... regarded by those to whom the requirement is addressed as endowed with the requisite competence or authority" to decide so.<sup>229</sup> The essence of this requirement is made plain by the reaction of States when attempts are made to give legal status to reports of expert groups like the International Law Commission, or recommendatory organs such as the United Nations General Assembly, or some similar body. This is an area of difficulty particularly because of international tribunals' attitude towards States' voting practices in international institutions. Further, national military officials, international civil servants, private businessmen who have particular interests in specific aspects of international life,<sup>230</sup> international organisations - both inter-governmental and non-governmental<sup>231</sup> - and scientists<sup>232</sup> all contribute sometimes directly and sometimes indirectly to the formation of rules of

customary international law. At times they actually dictate the pace and content of that process.<sup>233</sup> Therefore article 38(1)(b)'s declaration that it is States that have competence to participate in the creation of rules of customary international law is distant from the reality of the process of custom. When the formal source of a doctrine and the practice of it appear contradictory, the legitimacy of the rules created inevitably suffers the way customary rules have suffered for some time now, and continue to.

Schachter has suggested a checklist for ascertaining whether or not rules of law are imbued with competence and authority. The first of these factors refers to the putative prescribers and the context in which they have acted. He illustrates this with reference to a government official in the national administration. He/she may have no authority to participate in the formulation of rules of international conduct. However, when he becomes a representative to the United Nations and takes part in formulating resolutions explicitly interpreting United Nations Charter provisions, he may come to be considered as possessing the requisite authority. Similarly, diplomats engaged in official correspondence asserting the rights and duties, or generals engaged in hostilities and entering in truce arrangements, will have a measure of authority and will be regarded as exhibiting State practice. "In fact, several recent international arbitral decisions have recognised as authoritative the practice of private airlines and oil companies when their conduct was carried out in pursuance of international agreements."<sup>234</sup>

The second concerns the willingness of the "prescribers" to take the steps necessary to actualise the intentions of their policy projections. The third factor deals with the extent to which the prescribing group represents the principal participants among the intended audience. In the *Asylum Case*, the ICJ described this factor as the requirement that the practice of States, particularly that of States whose interests are most affected by the promulgated rule, should be uniform and consistent.<sup>235</sup> The fourth factor refers to the response of the target audience to the assertion of authoritativeness of a rule as obligatory. Schachter explains that this test is an empirical one, asserting the effectiveness and legitimacy of the rule formulated on the occasion regarded as an obligation forming one. He writes that:

If the tacit rules of the game developed by the major powers are perceived by themselves and other segments of the community as State practice carried out by entities which are appropriate decision-makers for that purpose and in accordance with procedures which are considered as

appropriate, that practice would be authoritative (legitimate) in the sense in which (the term has been used). ... This does not imply that the practice of two or three States imposes obligations on others; it means that such practice may be viewed as authoritative by those others. And if that practice is also perceived as likely to be complied with, it would then appropriately be characterised as practice accepted as law.<sup>236</sup>

Therefore, obligation in international law in general, and in customary international law in particular, is described as originating from the strict consent of States by some, and as resting on the will or consensus of the international community by others. It seems that both these approaches reflect a partial insight and not complete view of the issues involved. There is a case for saying that individually, each of these views tends towards reductionism, which almost always hinders factual inquiry. This is not difficult to prove. If we take the notion of consent to mean the same thing as recognition, it must follow that practice becomes normatively binding on States only when they interpret their specific behaviour as being obligatory. Such a conclusion would not be inconsistent with the proposition that to be binding, a rule of customary international law must be perceived by the target audience as being both authoritative and reasonably effective. Exaggerated, this view of consent can lead to the confusion that tacit consent is the basis of obligation for customary international law.<sup>237</sup> Warning should be taken that:

The use of so elusive a concept as tacit agreement carries with it the risk that an established rule of law long sustained by recognition of its authority and effectiveness will be viewed as subject to rejection by a particular State on the ground that it no longer agrees to it or has never expressly manifested its agreement.<sup>238</sup>

Another danger with such a reductionist approach to obligation is that it fails to represent the experience of the addressees of the international legal system. Evidence suggests that States recognise certain rules of customary international law in the absence of any act of consensual acceptance of those rules.<sup>239</sup>

## **Conclusion**

To conclude, it appears that neither the jurisprudence of international tribunals on customary international law, nor academic comment grounded on Hudson's<sup>240</sup> elements of custom has cleared the confusion surrounding custom. Kelsen's "unanswerable question"<sup>241</sup> and Allot's "imponderable paradox"<sup>242</sup> remain unresolved. The standard of sufficiency for each of the elements of customary international law remains undetermined. International tribunals vary the requirements of State practice and *opinio juris* particularly in difficult cases such as the Nicaragua Case.<sup>243</sup> The result is that certainty remains elusive regarding the creation of rules of customary international law, even though they dominate the body of international laws. This paradox brings to the fore, amongst other things, the issue of legitimacy and obligation in both customary international law, and international law in general. Perry's question: "... By what mysterious process does the normal become the normative?"<sup>244</sup> remains unanswered and Kunz's assertion that the present rules of custom are a fiction that results in legal error,<sup>245</sup> continues to ring true.

Turning to the hypothesis formulated at the start of this chapter, it does not appear that there is a significant correlation of views on the conception of custom between the international tribunals' jurisprudence and the writings of publicists or between publicists themselves.<sup>246</sup> Equally, it does not appear that the null-hypothesis that any coming together of opinion on aspects of custom between international tribunals and publicists, and between publicists themselves is due to chance alone. This chapter has shown that although custom is ridden with inconsistency, incoherency, indeterminacy, and unpredictability, factors that combine to impair the legitimacy of norms it creates,<sup>247</sup> norms of customary international law continue to represent the majority of rules of international law. Therefore, custom's importance to international law is unequivocal. It is the task of this study to try and address the legitimacy deficit in custom. Chapter Two looks at the assumptions that subsume article 38(1)(b). The purpose here is to examine the thinking that influenced the creation of the present doctrine of custom, and to compare its relevance to an international community so different from the one that the drafters of articles 38(1)(b) had in mind when they crafted this provision in 1922. Then the international community comprised a handful of States, perhaps with a monolithic culture. Today, the international community boasts nearly two hundred countries with as many different cultures, languages and expectations of international law. States themselves are individually and collectively confronted by so much need



for change in their behavioural patterns towards one another, and confront so much need for change in the management of humanitarian space.

**Notes**

1 The Oxford English Reference Dictionary defines custom as: 1 “The usual way of behaviour”, 2 “A particular established way of behaviour”. See also The Collins English Dictionary: 1 “A usual or habitual; typical mode of behaviour”; 2 “The long-established habits or traditions of a society collectively”.

2 On general character of customs, see Rene, D. (1984) “Custom”, *International Encyclopaedia of Comparative Law*, vol. II, p.97.

3 <sup>3</sup> Arguing that the diversity of laws is one of today’s major impediments to international commercial activity, Bamodu (1994) writes that this problem is probably worst among African States, where alien legal systems and foreign laws were superimposed over the indigenous customary laws which applied prior to colonisation, and both continue to co-exist. “Transnational Law, Unification and Harmonisation of International Commercial Law in Africa”, *Journal of African Law*, vol.38, p.125, at pp.125 - 8.

4 <sup>4</sup> See International Law Association (1988) “Formation of Rules of Customary (General) International Law”, *Committee Report, Sixty-third Conference*, Wroclawska Drukarnia Naukowa, Poland, p.935. That the International Law Association, albeit a non-governmental body with no legislative authority has found it worthwhile to set up a standing committee to research this question indicates the seriousness of the legitimacy deficit complained about customary international law.

5 <sup>5</sup> See Bos, M. (1988) “The Recognised Manifestations of International Law: a New Theory of Sources”, *German Yearbook of International Law*, vol. 31, p.10, p.62.

6 Summarised in Bos, M. *ibid*.

7 *Ibid*.

8 <sup>8</sup> For a concise discussion see White, N. (1996) *The Law of International Organisations*, Manchester University Press, New York/Manchester, pp.1-23.

9 <sup>9</sup> See Grotius Society (1942) *International Law in Development: Discussion on the Report of the Committee on Sources of International Law*, introduced by W. Friedman, 2 July 1941, *Grotius Society Translation*, vol. 27, p.214.

10 <sup>10</sup> Summarised in Maluwa, T. (1994) “Custom, Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law”, *African Journal of International and Comparative Law*, vol. 6, p.387, at p.389. See also Grotius Society, *ibid*.

11 <sup>11</sup> The Conference of Brussels (1874) met at the invitation of the Russian government and was attended by representatives from fourteen of the major powers of Continental Europe and Great Britain. The preamble to that conference summed up the spirit of the conference: “It has been asserted unanimously that the progress of civilization should have as its result the utmost possible diminution of the calamities of war, and that the sole legitimate end which States should seek during the war is to weaken the enemy without inflicting useless suffering upon him ... War being thus regulated [by definite laws and customs], would entail fewer calamities, and be less subject to the aggravations caused by the uncertainty, the surprises, and passions involved in the struggle; it would lead more effectually to what should be its final aim, the restoration, namely, of a more substantial and lasting peace between the belligerent states”. Hull, W.I. (1<sup>st</sup> edn. 1908) *The Two Hague Conferences and their Contribution to International Law*, Kraus Reprint Co., New York, pp.213-4. On the treaty origins of custom, see also Baxter, R.R. (1970) “Multilateral Treaties as Declaratory of Customary International Law”, *Recueil Des Cours*, 129 (I) p.31; Chingorani, R.C. (3rd edn. 1993) *Modern International Law*, Oxford and IBH Publishing Co., New Delhi/ Bombay/Calcutta; Hudson, M. (1972) *Permanent Court of International Justice 1920-1942 A Treatise*, Garland Publishing, New York/London; League of Nations (1920) “Draft-Scheme for the Institution of the Permanent Court of International Justice Mentioned in article 14 of the Covenant of the League of Nations Presented to the Council of the League by the Advisory Committee of Jurists”, *Official Journal*, Special Supplement No.2, September; Scott, J.B. (1920) *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report and Commentary*, Carnegie Endowment for International Peace, Washington; Simma, B.(ed.) *The Charter of the United Nations: a Commentary*, 1994 , Oxford University Press, Oxford; International Law Association (1988) *Report of the Sixty-third Conference*, Wroclawska Drukarnia Naukowa, Poland; United Nations, Article 38, Charter of the United Nations, Statute and Rules of Court, Series D, Acts and Documents Concerning the Organisation of the court, No. 1, 1946, p.47.

12 The Hague, 29 July 1889.

13 See Harris, D. J. *Cases and Materials on International Law* (5<sup>th</sup> edn. 1998) Sweet and Maxwell, London, pp.21-4.

14 <sup>14</sup> (1972) *Permanent Court of International Justice 1920-1942 a Treatise*, Garland Publishing, New York/London, pp.606-7.

15 <sup>15</sup> Preamble to Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land of 29 July 1899. “... it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders. Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.”

16 <sup>16</sup> Hull, W. I. (1<sup>st</sup> edn. 1908) *The Two Hague Conferences and their Contribution to International Law*, Kraus Reprint Co., New York, 1970, p.216. Emphasis added.

17 *Ibid*. p.219.

18 <sup>18</sup> League of Nations (1920) “Draft-Scheme for the Institution of the Permanent Court of International Justice Mentioned in article 14 of the Covenant of the League of Nations Presented to the Council of the League by the Advisory Committee of Jurists”, *Official Journal*, Special Supplement No.2, September, article 35.

19 <sup>19</sup> See Scott, J. B. (1920) *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report and Commentary*, 35 Carnegie Endowment for International Peace, Washington, pp.97-106.

20 <sup>20</sup> See League of Nations, “Draft-Scheme for the Institution of the Permanent Court of International Justice Mentioned in article 14 of the Covenant of the League of Nations Presented to the Council of the League by the Advisory

Committee of Jurists”, Official Journal, Special Supplement No.2, September, 1920, article 34.

21 <sup>21</sup> Scott, J. B. (1920) *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report and Commentary*, Carnegie Endowment for International Peace, Washington, p.107.

22 Ibid. pp.323, 729.

23 Ibid. p.322. Emphasis added.

24 <sup>24</sup> See the Chairman’s Speech at the 14th meeting of the Committee, in Grotius Society (1942) *International Law in Development: Discussion on the Report of the Committee on Sources of International Law*, introduced by W. Friedman, 2 July 1941, *Grotius Society Translation*, vol. 27, p.322.

25 <sup>25</sup> Ibid. Discussing the reaction of the Great Power jurists to the Descamps Committee proposals, see Wolfke, W. (2<sup>nd</sup> edn. 1993) *Custom in Present International Law*, Martinus Nijhoff, London/Boston/Dordrecht, p.4.

26 <sup>26</sup> The recommendation was that the English translation should read: “International custom, recognition of a common practice accepted as law”.

27 <sup>27</sup> See Statute of the International Court of Justice, 26 June 1945 San Francisco, UKTS 67 (1946) Cmnd 7015; UNTS 993, 59 Stat. 1031.

28 <sup>28</sup> Simma, B. (ed.) (1994) *The Charter of The United Nations: A Commentary*, Oxford University Press, Oxford, pp.975-6.

29 Ibid. p. 976.

30 <sup>30</sup> Ibid. p.170. See also Wolfke, W. (2<sup>nd</sup> edn. 1993) *Custom in Present International Law*, Martinus Nijhoff, London/Boston/Dordrecht, p.5.

31 <sup>31</sup> Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine (Canada v. U.S.) International Court of Justice Reports (1984) p.290

32 Ibid. p.290.

33 <sup>33</sup> See Jennings, R. and Watts, A. (eds) (9th edn. 1992) *Oppenheim’s International Law*, Longman: The Bath Press, Avon, p.45.

34 <sup>34</sup> (2<sup>nd</sup> edn. 1993) *Custom in Present International Law*, Martinus Nijhoff, London/Boston/Dordrecht, p.2.

35 <sup>35</sup> For a general overview see van Hoof, G.J. (1983) *Rethinking the Sources of International Law*, Kluwer Law and Taxation, Deventer, p.87.

36 <sup>36</sup> Higgins, R. (1994) *Problems and Process - International Law and how we use it*, Clarendon Press, Oxford, p.18. Judge Reid in the Anglo-Norwegian Fisheries Case (UK v. Norway) International Court of Justice Reports (1951) p.116, at p.191, stated that: “... Customary international law is the generalisation of the practice of States”. Trimble (1986) writes that: “Customary international law consists of obligations inferred from the general practice of States - what is habitually done by most members of the international community out of a sense of obligation”. “A Revisionist View of Customary International Law”, *University of California Los Angeles Law Review*, vol. 33 No.3, p.665 at p.669; See also Brierly, J.L. (1958) *The Basis of Obligation in International Law*, Clarendon Press, Oxford, p.61; Brownlie, I. (5<sup>th</sup> edn. 1998) *Principles of Public International Law*, Clarendon Press, Oxford, pp. 1- 5; Mahmoudi, S. (1989) “Customary International Law and Transit Passage”, *Ocean Development and International Law*, vol. 20 p.157, at pp.161-2; Baxter, R.R. (1970) “Multilateral Treaties as Declaratory of Customary International Law”, *Recueil Des Cours*, 129 (I) p.31; Chingorani, R.C. (3rd edn. 1993) *Modern International Law*, Oxford and IBH Publishing Co., New Delhi/ Bombay/Calcutta; Hudson, M. (1972) *Permanent Court of International Justice 1920-1942 A Treatise*, Garland Publishing, New York/London; League of Nations (1920) “Draft-Scheme for the Institution of the Permanent Court of International Justice Mentioned in article 14 of the Covenant of the League of Nations Presented to the Council of the League by the Advisory Committee of Jurists”, *Official Journal*, Special Supplement No.2, September; Scott, J.B. (1920) *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report and Commentary*, Carnegie Endowment for International Peace, Washington; Simma, B.(ed.) *The Charter of the United Nations: a Commentary*, 1994 , Oxford University Press, Oxford; International Law Association (1988) *Report of the Sixty-third Conference*, Wroclawska Drukarnia Naukowa, Poland; United Nations, Article 38, Charter of the United Nations, Statute and Rules of Court, Series D, Acts and Documents Concerning the Organisation of the court, No. 1, 1946, p.47.

37 Ibid.

38 <sup>38</sup> Some writers suggest that source and evidence, particularly with reference to custom, mean one and the same thing. See Brownlie, I. (5th edn. 1998) *Principles of Public International Law*, Clarendon Press, Oxford, pp.5-11.

39 <sup>39</sup> Ibid. pp.1-3; Briggs, H. W. (2<sup>nd</sup> edn. 1953) *The Law of Nations: Cases, Documents and Notes*, Stevens, London, p.44; Kunz, J.L. (1953) “The Nature of Customary International Law”, *American Journal of International Law*, vol. 47, p.662, at p.663. Mendelson (1988) writes that: “... the term ‘source’ belongs to hydrography; its application to law is metaphorical, and (should therefore) ... be treated with caution”. Appendix to Second Report of the *Rapporteur, The International Law Association, “Formation of Rules of Customary (General) International Law”, Committee Report*, Report of the Sixty-third Conference, p.935 at p.954.

40 <sup>40</sup> Corbett, P.E. (1925) “The Consent of States and the Sources of the Law of Nations”, *British Yearbook of International Law*, vol. 6, p.20. See also Mahmoudi, S. (1989) “Customary International Law and Transit Passage”, *Ocean Development and International Law*, vol. 20, p.157, at p.158.

41 Corbett, P.E. *ibid.* pp.22-3.

42 <sup>42</sup> International Law Association (1988) *Appendix to the Second Report of the Rapporteur on the Formation of Customary (General) International Law*, Wroclawska Drukarnia Naukowa, Poland, p.956.

43 <sup>43</sup> (1925) “The Consent of States and the Sources of the Law of Nations”, *British Yearbook of International Law*, vol. 6, p.20 at p.23.

44 2<sup>nd</sup> edn. (1994) *The Concept of Law*, Clarendon Press, Oxford, p.89.

45 23 May 1969, UN Doc. A/Conf. 39/27.

46 Discussing dualism and monism see Kelsen, H. (1934) “Pure Theory of Law”, *Law Quarterly Review*, vol. 50, p.474 at p.491.

- 47 <sup>47</sup> Mendelson's chief complaint against Brownlie's commentary on custom in his treatise, *Principles of Public International Law*, is that Brownlie does not make the necessary distinction between material sources of law on the one hand, and evidence of law on the other, although the two certainly overlap. See International Law Association, Appendix to Second Report of the *Rapporteur* on custom, International Law Association (1988) Report of the Sixty-third Conference, Wroclawska Drukarnia Naukowa, Poland, pp.957-8.
- 48Ibid. p.956.
- 49Ibid.
- 50 <sup>50</sup> (1937) "Custom as a Means of the Creation of Customary International Law", *British Yearbook of International Law*, vol. 18, p.127, at p.129.
- 51 <sup>51</sup> (1972) *Permanent Court of International Justice 1920-1942 a Treatise*, Garland Publishing, New York/London, p. 609. Emphasis added.
- 52 <sup>52</sup> (1971) *The Concept of Custom in International Law*, Macmillan Press, London, p.88.
- 53 <sup>53</sup> (1953) "Law and Procedure of the International Court of Justice: General Principles and Sources of Law", *British Yearbook of International Law*, vol. 30, p.1, at p.68.
- 54 <sup>54</sup> (1974-75) "Custom as a Source of International Law", *British Yearbook of International Law*, vol. 47, p.1 at p.26.
- 55See Chapters Five, Six and Seven.
- 56 <sup>56</sup> Anglo-Norwegian Fisheries Case (UK v. Norway) International Court of Justice Reports (1951) p.116 at p.191. Emphasis added.
- 57 Nicaragua Case (Nicaragua v. US) (Merits) International Court of Justice Reports (1986) p.14 at p.95.
- 58 25 United Nations G.A.O.R. Supp. (No.28) p. 121, UN Doc. A/8028 (1970).
- 59 Contrast with Judge Reid's actual physical act argument in the Anglo-Norwegian Fisheries Case (UK v. Norway) International Court of Justice Reports (1951) p.116, at p.191.
- 60 <sup>60</sup> See also Kirgis, F. L. (1987) "Custom on a Sliding Scale", *American Journal of International Law*, vol. 81, p.146.
- 61 Nicaragua Case (Nicaragua v. US) Merits, International Court of Justice Reports (1986) p.14, at pp.99-100.
- 62 Mendelson, M. H. "The Nicaragua Case and Customary International Law", *Coexistence*, 26 No.1 (1989) p.85, at p.92.
- 63 <sup>63</sup> For discussion of the arguments for and against accepting United Nations resolutions as an authoritative indicator of elements of rules of customary international law, see Schwebel, S. (1986) "United Nations Resolutions, Recent Arbitral Awards and Customary International Law", in Bos and Hugo Siblesz (eds) *Realism in Law-Making*, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, p.203; Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/ Boston/ London. p.23.
- 64 See articles 10 to 14 of the United Nations Charter.
- 65 <sup>65</sup> Asamoah, O. (1966) *The Legal Significance of the Declarations of the General Assembly of the United Nations*, Martinus Nijhoff, The Hague, p.47; Kern, I. S. "International Law and International Organisation: Prospects for the Future", *Proceedings of the American Society of International Law* (1952) p.13.
- 66 As an example, see articles 10 to 14.
- 67 See for example article 23 of the Statute of the International Law Commission.
- 68 See for instance the Nicaragua Case (Nicaragua v. US) Merits, International Court of Justice Reports (1986) p.14
- 69 Case Concerning East Timor (Portugal v. Australia) International Court of Justice Reports (1995) p.90.
- 70 Ibid.
- 71 Supra. n.65, p.57.
- 72 <sup>72</sup> (1963) *The Development of International Law Through the Political Organs of the United Nations*, Oxford University Press, London, p.3. See also Mahmoudi, S. (1989) "Customary International Law and Transit Passage", *Ocean Development and International Law*, vol. 20, p.157, at p.168. Contrast with Fitzmaurice, G. Supra. n.53.
- 73 <sup>73</sup> Mehr, F. (1989) "Neutrality in the Gulf War", *Ocean Development and International Law*, 20 p.105.
- 74 (1991) *The Law of the Sea*, Manchester University Press, Manchester.
- 75 <sup>75</sup> Ibid. pp.180-1. Emphasis added. See also Schwebel, S. (1986) "United Nations Resolutions, Recent Arbitral Awards and Customary International Law", in Bos and Siblesz (eds) *Realism in Law-Making*, Martinus Nijhoff Publishers, Dordrecht/ Boston/ Lancaster, p.203 at pp.204-8.
- 76 <sup>76</sup> See Cheng, B. (1965) "United Nations Resolutions on Outer Space: Instant International Customary Law", *Indian Journal of International Law*, vol. 5, p.23.
- 77 <sup>77</sup> See Fitzmaurice, G. (1957) "The Principles of International Law Considered from the Standpoint of the Rule of Law", *Recueil Des Cours*, vol. 92 No.2, p.1.
- 78 <sup>78</sup> (1979) "The Effect of Resolutions of the United Nations General Assembly on Customary International Law", *Proceedings of the American Society of International Law*, vol. 73, p.302 at pp.203-4. See also Arangio-Ruiz, G. (1972) "The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations", *Recueil Des Cours*, vol. 137 (III) p.431 at p.457.
- 79 <sup>79</sup> (1989-90) "Expanding the International Definition of Refugee: a Multicultural View", *Fordham International Law Journal*, vol. 13, p.156, at p.158.
- 80 <sup>80</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3, at pp.26-8.
- 81 <sup>81</sup> (5<sup>th</sup> edn. 1998) *Principles of Public International Law*, Clarendon Press, Oxford, p.5. See also Carnegie (1944) *The International Law of the Future: Postulates, Principles and Proposals*", Carnegie Endowment For International Peace, Washington, p.26.
- 82 <sup>82</sup> See for example, Koskenniemi, M. (1996) "Case Concerning Passage Through the Great Belt", *Ocean Development and International Law*, 27 No.3, p.257, pp. 257-9; Anglo-Norwegian Fisheries Case (UK v. Norway)

- International Court of Justice Reports (1951) p.116, pp.124, 134, 136-7.
- 83 <sup>83</sup> Arguing that this is what transpired in the Asylum Case, see Virally, M. (1968) "The Sources of International Law", in M. Sorensen (ed.) *Manual of Public International Law*, Macmillan, London, p.134. This skeptical view of the practice of the International Court of Justice does not reflect the complete picture. In the same case it stated that: "... In the absence of precise data, it is difficult to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State". Ibid. p.286.
- 84 <sup>84</sup> Wolfke, W. (2<sup>nd</sup> edn. 1993) *Custom in Present International Law*, Martinus Nijhoff, London/Boston/Dordrecht, p.157.
- 85 (France v. Turkey) PCIJ Reports (1927) Series A, No. 10.
- 86 Ibid, pp.253 - 265.
- 87 (Portugal v. India) International Court of Justice Reports (1960) p.6.
- 88Ibid. Emphasis added.
- 89(Columbia v. Peru) International Court of Justice Reports (1950) p.266.
- 90Ibid. p.276. Emphasis added.
- 91 National Decrees in Tunis and Morocco, PCIJ Series B. No.4, p.24.
- 92 Ibid. pp.199-200.
- 93 <sup>93</sup> (1950) "Working Paper on article 24 of the Statute of the International Law Commission", *Yearbook of International Law Commission*, vol. 1, No.5, UN Doc. A/CN.4/16, p.26.
- 94 <sup>94</sup> Maluwa, T. "Custom, Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law", *African Journal of International and Comparative Law* 6 (1994) p387, at p.390.
- 95 <sup>95</sup> (Columbia v. Peru) International Court of Justice Reports (1950) p.266, Emphasis added.
- 96 <sup>96</sup> On the function of acquiescence in the process of custom see particularly, McGibbon, I.C. (1957) "Customary International Law and Acquiescence", *British Yearbook of International Law*, vol. 33, p.115.
- 97 <sup>97</sup> (United Kingdom v. Albania) International Court of Justice Reports (1949) p.41.
- 98 <sup>98</sup> For the discrepancy between the extent of poverty in the world and its treatment in international relations theory see Durfee, M. and Rosenau, J. N. (1996) "Playing Catch-up: International Relations Theory and Poverty", *Millennium Journal of International Studies*, vol. 5 No.3, p.521.
- 99 <sup>99</sup> See Anglo-Norwegian Fisheries Case (UK v. Norway) International Court of Justice Reports (1951) p.116; Brownlie, I. *Principles of Public International Law* (4<sup>th</sup> edn. 1994) Clarendon Press, Oxford, pp.4-6.
- 100 <sup>100</sup> Whiteman, M. M. (ed.) (1963) "Custom", *Digest of International Law*, vol. 1, Department of State Publication, Washington. p.7403.
- 101 <sup>101</sup> (2<sup>nd</sup> edn. 1993) *Custom in Present International Law*, Martinus Nijhoff, London/ Boston/Dordrecht.
- 102 <sup>102</sup> On the view that the process of custom is cumberously slow, see Meijers, H. (1978) "How is International Law Made? - The Stages of Growth of International Law and the Use of its Customary Rules", *Netherlands Yearbook of International Law*, vol. 19, p.3; Mahmoudi, S. (1989) "Customary International Law and Transit Passage", *Ocean Development and International Law*, vol. 20 p.157, at p.162.
- 103 <sup>103</sup> (Columbia v. Peru) International Court of Justice Reports (1950) p.266, p.266.
- 104 <sup>104</sup> Anglo-Norwegian Fisheries Case (UK v. Norway) International Court of Justice Reports (1951) p.116, at p.131. Emphasis added.
- 105 <sup>105</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3, paragraph 74; Brownlie (5<sup>th</sup> edn.1998) observes that the passage of time can usefully serve as evidence of generality and consistency. However, the International Court of Justice does not place so much emphasis on the time factor alone. Rules on airspace and the continental shelf have emerged from fairly quick maturing of practice. *Principles of Public International Law*, Clarendon Press, Oxford, p.5.
- 106 <sup>106</sup> See Cheng, B. (1965) "United Nations Resolutions on Outer Space: Instant International Customary Law", *Indian Journal of International Law*, 5 p.23.
- 107Ibid.
- 108 These include Cheng, Akehurst, Jennings, Kunz, and Wolfke.
- 109 These include Higgins, Walden, Kirgis, D'Amato and Meijers.
- 110 <sup>110</sup> (1987) "Custom on a Sliding Scale", *American Journal of International Law*, vol. 81, p.146.
- 111 <sup>111</sup> (1971) *The Concept of Custom in International Law*, Macmillan Press, London.
- 112 <sup>112</sup> Allot, P. (1977) "The People as Law Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", *Journal of African Law*, 21 p.1.
- 113 <sup>113</sup> See article 38(1)(b). Corbett (1925) compares custom to the process by which a path cutting through a common is formed to show the difficulty with trying to establish the precise moment at which a norm of custom/the path acquires its official character. "The Consent of States and the Sources of the Law of Nations", *British Yearbook of International Law*, vol. 6, p.20. On the evolution of customary maritime law, see McDougal, M. (1955) "The Hydrogen Bomb Tests and International Law of the Sea", *American Journal of International Law*, vol. 49, p.357. On recent cases of custom via International Conferences, see for instance Schweisfurth, J. (1983) "The Influence of the Third United Nations Conference on the Law of the Sea on International Customary Law", *Zeitschrift Fur Auslandsches Offentliches Recht Und Volkerrecht*, vol. 43, p.566; Arechaga, E. J. (1984) "Customary International Law and the Conference on the Law of the Sea", in J. Makarczyk (ed.) *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague, p.575; Bernhardt, B. (1987) "Custom and Treaty in the Law of the Sea", *Recueil Des Cours Collected Papers*, vol. 205 (V) p.247. See also Bravo, L.F. (1985) "Methods of Research of International Custom in the Practice of States", *Recueil Des Cours Collected Papers*, vol. 192 (III) p.261; Raman, F. (1976) "Toward a General Theory of International Customary Law", in Reisman, and Weston (eds) *Toward a World Order and Human Dignity, Essays in Honour of Myres S. McDougal*, New York, p.380; Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/ Boston/London, p.55.
- 114 <sup>9<sup>th</sup></sup> edn. 1992) *Oppenheim's International Law*, Longman: The Bath Press, Avon, p.25.

115 <sup>115</sup> See Allot, P. (1977) "The People as Law-makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", *Journal of African Law*, vol. 21, p.1.

116 (9<sup>th</sup> edn. 1992) *Oppenheim's International Law*, Longman: The Bath Press, Avon, p.27. Emphasis added.

117 <sup>117</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3.

118 (1953) "The Nature of Customary International Law", *American Journal of International Law*, vol. 47, p.662 at p.667.

119 <sup>119</sup> (1965) *The Sources and Evidences of International Law*, Manchester University Press, Manchester, p.61.

120 <sup>120</sup> (1977) "The People as Law-makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", *Journal of African Law*, vol. 21, p.1.

121 <sup>121</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3, at pp.230-1.

122 <sup>122</sup> For a detailed discussion of Verdross' proposal for enhancing custom's legitimacy, see Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/ Boston/London; Maluwa, T. (1994) "Custom, Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law", *African Journal of International and Comparative Law*, vol. 6, p.387. See also Bernhardt, B. (1987) "Custom and Treaty in the Law of the Sea", *Recueil Des Cours Collected Papers*, vol. 205 (V) p.247. See also Bravo, L.F. (1985) "Methods of Research of International Custom in the Practice of States", *Recueil Des Cours Collected Papers*, vol. 192 (III) p.261; Raman, F. (1976) "Toward a General Theory of International Customary Law", in Reisman, and Weston (eds) *Toward a World Order and Human Dignity, Essays in Honour of Myres S. McDougal*, New York, p.380; Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/ Boston/London, p.55.

123 Maluwa, T. *ibid.*

124 <sup>124</sup> As the International Court of Justice appeared to do in the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3.

125 <sup>125</sup> See Allot, P. (1977) "The People as Law-makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", *Journal of African Law*, vol. 21, p.1.

126 <sup>126</sup> (1972) *Permanent Court of International Justice 1920-1942 A Treatise*, Garland Publishing, New York/London.

127 <sup>127</sup> (1971) *The Concept of Custom in International Law*, Macmillan Press, London, p.85.

128 *Supra.* n.121.

129 <sup>129</sup> (1971) *The Concept of Custom in International Law*, Macmillan Press, London, p.85.

130 <sup>130</sup> *Ibid.* p.8. Emphasis added. See also Briggs (1951) "The Colombian-Peruvian Asylum Case and Proof of Customary International Law", *American Journal of International Law*, vol. 45, p.728, at p.730.

131 <sup>131</sup> (1971) *The Concept of Custom in International Law*, Macmillan Press, London, pp.82-83. He invokes the Permanent Court of International Justice's decision in the Lotus Case (France v. Turkey) PCIJ Reports (1927) Series A, No. 10, p.4, to justify this proposition. In that case the court stated that the abstention by states, from certain acts, no matter how conspicuous, could not be relied upon to establish the existence of an international norm of custom barring the particular behaviour they shunned unless it could be proved also that they did so out of a sense of duty to abstain (at p.26). On evidences of the material sources of custom, see also Parry, C. (1957) "Towards a British Digest", *International and Comparative Law Quarterly*, vol. 6, p.657; Green, L.C. (1980) "The Raw Materials of International Law", *International and Comparative Law Quarterly*, vol. 9, p.187; Rovine, R. (1973) "U.S. International Law Digests: Some History and a New Approach", *American Journal of International Law*, vol. 67, p.314.

132 *Ibid.* pp.85-6.

133 <sup>133</sup> Tunkin, G.I. (1961) "Remarks on the Juridical Nature of Customs of International Law", *California Law Review*, vol. 49 No.3, p.419.

134 <sup>134</sup> Meijers, H. (1978) "How is International Law Made? - The Stages of Growth of International Law and the Use of its Customary Rules", *Netherlands Yearbook of International Law*, vol. 19, p.3.

135 *Ibid.* p.13.

136 *Ibid.*

137 (Columbia v. Peru) International Court of Justice Reports (1950) p.266.

138 <sup>138</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3.

139 <sup>139</sup> See Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/Boston/London, pp.24-5; Villiger, M. E. (1985) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/Boston/London, pp.149-52.

140 <sup>140</sup> (1978) "How is International Law Made? - The Stages of Growth of International Law and the Use of its Customary Rules", *Netherlands Yearbook of International Law*, vol. 19, p.3.

141 <sup>141</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) International Court of Justice Reports (1969) p. 3, at p.43.

142 *Ibid.*

143 <sup>143</sup> (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer Law International, The Hague/Boston/London, p.30.

144 <sup>144</sup> The Geneva Conventions for the Protection of War Victims, 12 August, 1949, 75 UNTS 31; UKTS 39 (1958).

145 <sup>145</sup> Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, UN Doc. A/32/144 of August 15, 1977; (1977) *International legal Materials*, vol. 16, pp.1391 and 1442.

- 146 <sup>146</sup> Vienna Convention in Diplomatic Relations, 18 April 1961 Vienna, UKTS 19 (1965) Cmdn. 2565; 500 UNTS  
95.
- 147 <sup>147</sup> Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the  
Interrelation of Sources*, Kluwer Law International, The Hague/ Boston/London, pp.31-2.
- 148 <sup>148</sup> Up to 156 States took part. For a thorough review of the work of UNCLOS III, see in particular Adede, O.A.  
(1975) "Settlement of Disputes Arising Under the Law of the Sea Convention", *American Journal of International Law*,  
vol. 69, p.798; Oxman, B.H. (1982) "The Third United Nations Conference on the Law of the Sea: the Tenth Session  
(1981)", *American Journal of International Law* vol. 76, p.1; Oxman, B.H. (1979) "The Third United Nations Conference  
on the Law of the Sea: The Seventh Session", *American Journal of International Law*, vol. 73, p.1; Oxman, B.H. (1978)  
"The Third United Nations Conference on the Law of the Sea: The 1977 New York Session", *American Journal of  
International Law*, vol. 72, p.57; Stevensen, J.R. and Oxman, B.H. (1975) "The Third United Nations Conference on the  
Law of the Sea: The 1974 Caracas Session", *American Journal of International Law*, vol. 69, p.1; Stevensen, J.R. and  
Oxman, B.H. (1975) "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session", *American  
Journal of International Law*, vol. 69, p.763; Stevensen, J.R. and Oxman, B. H. (1974) "The Preparations for the Law of  
the Sea Conference", *American Journal of International Law*, vol. 68, p.1; Vignes, D. (1975) "Will the Third Conference  
on the Law of the Sea Work According to the Consensus Rule?" *American Journal of International Law*, vol. 69, p.119.
- 149 <sup>149</sup> See also Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice  
of the Interrelation of Sources*, Kluwer Law International, The Hague/Boston/London, p.32.
- 150 <sup>150</sup> Meijers, H. (1978) "How is International Law Made? - The Stages of Growth of International Law and the Use of  
its Customary Rules", *Netherlands Yearbook of International Law*, vol. 19, p.3, at pp.16-7.
- 151 <sup>151</sup> (1978) "Customary International Law: a Jurisprudential Analysis", *Israel Law Review*, vol. 13, p.86.
- 152 Ibid. p. 86.
- 153 Ibid.
- 154 <sup>154</sup> See Hart, H.L.A. (2<sup>nd</sup> edn.1994) *The Concept of Law*, Clarendon Press, Oxford, pp.90-4.
- 155 <sup>155</sup> Such communities are usually homogeneous, kinship ties are strong throughout the populace which hardly shows  
critical class differences.
- 156 <sup>156</sup> (1978) "Customary International Law: a Jurisprudential Analysis", *Israel Law Review*, vol. 13, p.86, at p.89.
- 157 <sup>157</sup> See Hart, H.L.A. (2<sup>nd</sup> edn.1994) *The Concept of Law*, Clarendon Press, Oxford, pp.54-5, on the preconditions to  
the existence of a primary social rule.
- 158 <sup>158</sup> Meijers, H. (1978) "How is International Law Made? - The Stages of Growth of International Law and the Use of  
its Customary Rules", *Netherlands Yearbook of International Law*, vol. 19, p.3, at p.91.
- 159 <sup>159</sup> (1978) "Customary International Law: a Jurisprudential Analysis", *Israel Law Review*, vol. 13, p.86, at p.89.
- 160 Ibid. p.91.
- 161 <sup>161</sup> See also Maluwa, T. (1994) "Custom, Authority and Law: Some Jurisprudential Perspectives on the Theory of  
Customary International Law", *African Journal of International and Comparative Law*, vol. 6, p.387, at p.399.
- 162 (1999) *Custom, Power and the Power of Rules*, Cambridge University Press.
- 163 <sup>163</sup> See Annex 2: Second report of the *Rapporteur* (1988) *International Law Association, Report of the Sixty-third  
Conference*, p.949.
- 164 <sup>164</sup> This is a list of topics on aspects of custom that could do with some clarification. The central issue though  
remains that of ascertaining what constitutes custom on the one hand, and what amounts to evidence of custom. The  
complete list of these topics appears in Annex 1: first report of the *Rapporteur* (1986) *ibid.* pp.936- 8.
- 165 <sup>165</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v.  
The Netherlands) International Court of Justice Reports (1969) p. 3.
- 166 International Law Association (1988) Report of the Sixty-third Conference.
- 167 <sup>167</sup> The International Law Association (1990) Report of the Sixty-fourth Conference.
- 168 <sup>168</sup> The International Law Association (1992) Report of the Sixty-fifth Conference, p.12.
- 169 <sup>169</sup> The International Law Association (1994) Report of the Sixty-sixth Conference.
- 170 <sup>170</sup> The International Law Association (1996) Report of the Sixty-seventh Conference, p.623.
- 171 Ibid. p.624.
- 172 <sup>172</sup> Villiger, M.E. (1997) *Customary International Law and Treaties: a Manual on the Theory and Practice of the  
Interrelation of Sources*, Kluwer Law International, The Hague/ Boston/London, p.25. See also Vignes, D. (1975) "Will  
the Third Conference on the Law of the Sea Work According to the Consensus Rule?" *American Journal of International  
Law*, vol. 69, p.119.
- 173 <sup>173</sup> "Customary International Law and Transit Passage", *Ocean Development and International Law*, vol. 20 (1989)  
p.157, at p.168. See also Brierly, J.L. (1958) *The Basis of Obligation in International Law*, Clarendon Press, Oxford, p.61;  
Brownlie, I. (5<sup>th</sup> edn. 1998) *Principles of Public International Law*, Clarendon Press, Oxford, pp. 1- 5; Mahmoudi, S.  
(1989) "Customary International Law and Transit Passage", *Ocean Development and International Law*, vol. 20 p.157, at  
pp.161-2; Baxter, R.R. (1970) "Multilateral Treaties as Declaratory of Customary International Law", *Recueil Des Cours*,  
129 (I) p.31; Chingorani, R.C. (3rd edn. 1993) *Modern International Law*, Oxford and IBH Publishing Co., New Delhi/  
Bombay/Calcutta; Hudson, M. (1972) *Permanent Court of International Justice 1920-1942 A Treatise*, Garland  
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League by the Advisory Committee of Jurists", *Official Journal*, Special Supplement No.2, September; Scott, J.B. (1920)  
*The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report  
and Commentary*, Carnegie Endowment for International Peace, Washington; Simma, B.(ed.) *The Charter of the United  
Nations: a Commentary*, 1994 , Oxford University Press, Oxford; International Law Association (1988) *Report of the  
Sixty-third Conference*, Wroclawska Drukarnia Naukowa, Poland; United Nations, Article 38, Charter of the United  
Nations, Statute and Rules of Court, Series D, Acts and Documents Concerning the Organisation of the court, No. 1, 1946,  
p.47.

- 174 Ibid. p.167. See also Multilateral Treaties Deposited with the Secretary-General, Status as at the 31st of December 1986, p.740; Oxman, B.H. (1982) "The Third United Nations Conference on the Law of the Sea: the Tenth Session (1981)", *American Journal of International Law*, vol. 76, p.1.
- 175 <sup>175</sup> (Nicaragua v. US) Jurisdiction and Admissibility, International Court of Justice Reports (1984) pp.92-5.
- 176 <sup>176</sup> Article 36 of the Statute of the International Court of Justice, 26 June 1945 San Francisco, UKTS 67 (1946) Cmnd. 7015; UNTS 993, 59 Stat. 1031.
- 177 <sup>177</sup> (Nicaragua v. US) Jurisdiction and Admissibility, International Court of Justice Reports (1984) p.31.
- 178 Ibid. p.92.
- 179 Ibid. p.95.
- 180 Ibid. pp.96-7.
- 181 <sup>181</sup> Schachter (1968) argues that this points to a foundational deficit in international law. "Towards a Theory of International Obligation", *Virginia Journal of International Law*, vol. 8, p.300, at pp.301-2.
- 182 <sup>182</sup> (1958) *The Basis of Obligation in International Law*, Clarendon Press, Oxford, p.3. A similar view is held by Higgins, R. (1982) "The Identity of International Law", in B. Cheng (ed.) *International Law: Teaching and Practice*, Stevens and Sons, London, pp.31-2. See also Fitzmaurice, G. (1956) "The Foundations of the Authority of International Law and the Problem of Enforcement", *Modern Law Review*, vol. 19, p.1.
- 183 <sup>183</sup> Summarised in Hart, H.L.A. (2<sup>nd</sup> edn.1994) *The Concept of Law*, Clarendon Press, Oxford, p.25.
- 184 <sup>184</sup> See Lauterpacht, H. (1970) *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, Achron Books, USA, p.157.
- 185 Ibid.
- 186 <sup>186</sup> See Walden, R.M. (1977) "The Subjective Element in the Formation of Customary International Law", *Israel Law Review*, vol. 12 No.3, p.344, at p.350.
- 187 <sup>187</sup> Ibid. The notion of equality of States is one of the fundamental principles governing international relations. See Cassese, A. (1986) *International Law in a Divided World*, Clarendon Press, Oxford, p.129.
- 188 <sup>188</sup> (1970) *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, Achron Books, USA, p.161.
- 189 <sup>89</sup> The point to be made is that the wish to be bound implicit in agreements is not the same as the belief that one is already bound which the substantive definition of custom makes. The target of this view of customary international law is to avoid the problem of creating a mythical juridical person for every treaty, and ending up with several such mythical juridical persons. However, its method of achieving this appears equally disastrous.
- 190 <sup>190</sup> Some writers use the term "custom" to refer to "usage" or "practice". In this discussion, "custom" refers only to the process by which norms of customary law are created. It will help the reader to bear this application in mind.
- 191 <sup>191</sup> (1961) "Remarks on the Juridical Nature of Customary Norms", *California Law Review*, vol. 49, p.419, at p.422. The difference between Tunkin, and most Western European Scholars appears to be that while the former seems entirely satisfied with the drafting of article 38(1)(b) of the Statute, the latter vehemently oppose what they perceive to be poor draughtsmanship in its creation.
- 192 Ibid.
- 193 Ibid. at p.422.
- 194 <sup>194</sup> Quote from speech delivered at Freedom March, Birmingham, 1963. The United Nations has grown from a mere handful of nations in 1945, to nearly 200 in 1999. It is not possible in this situation to secure total agreement of all member States of the United Nations on any one thing on any one thing. Certainly their self-interest has never had such good fortune of coinciding. Even the European Union, which is arguably the most successful example of a successful supranational organisation cannot boast of such luck most of the time.
- 195 <sup>195</sup> (1958) *The Basis of Obligation in International Law*, Clarendon Press, Oxford, p.13.
- 196 <sup>196</sup> (eds) (9<sup>th</sup> edn. 1992) *Oppenheim's International Law*, Longman: The Bath Press, Avon, pp.14-19.
- 197 Supra. n.195, p. 10.
- 198 Ibid. p.11.
- 199 <sup>199</sup> For a discussion of some of the probable consequences of the tacit consent theory of custom, see Brierly, J. *ibid.* pp.12-8.
- 200 Ibid. p.11.
- 201 Supra. n.64.
- 202 <sup>202</sup> (1962) "General Course in Public International Law", *Hague Academy Recueil, Des Cours*, 106 (II) p.5 at p.52.
- 203 <sup>203</sup> For example, in order to preserve what is left of the environment that man has destroyed over the years, or to prevent the breakdown of peace in any one region of the world.
- 204 <sup>204</sup> Brierly, J. (1958) *The Basis of Obligation in International Law*, Clarendon Press, Oxford, p. xviii. See also Freeman, M.D.A. (6<sup>th</sup> dn. 1994) *Lloyd's Introduction to Jurisprudence*, Sweet and Maxwell Ltd., London.
- 205 Ibid. p.18.
- 206 <sup>206</sup> See article 36 of the Statute of the International Court of Justice, 26 June 1945 San Francisco, UKTS 67 (1946) Cmnd 7015; UNTS 993, 59 Stat. 1031.
- 207 Ibid. Emphasis added.
- 208 <sup>208</sup> Shahabuddeen, M. (1993) "The International Court of Justice: the Integrity of an Idea", *Commonwealth Law Bulletin*, vol. 19, p.738, at p.741. See also Rossene, S. (4<sup>th</sup> edn. 1989) *The World Court: What it is and how it works*, Martinus Nijhoff, Dordrecht/Boston/London, p.81.
- 209 Ibid.
- 210 <sup>210</sup> (Qatar v. Bahrain) Jurisdiction and Admissibility, International Court of Justice Reports (1995) p.6.
- 211 <sup>211</sup> See Order of 28th April, 1995, International Court of Justice Reports, 1995, p.83; See also Fisheries Jurisdiction Case (Spain v. Canada) Order Of 8 May, International Court of Justice Reports (1996) p.4.
- 212 See Order of 28th April 1995, p.84.
- 213 See judgment of 15th February 1995, pp.67-8.



214 <sup>214</sup> Case Concerning East Timor (Portugal v. Australia) International Court of Justice Reports (1995) p.90.

215 <sup>215</sup> Ibid. In the Case Concerning the Gabčíkovo-Nagymaros Project on the Danube (Hungary v. Slovakia) International Court of Justice Reports (1997) p.3, after having agreed to pursue a judicial settlement to their dispute, the parties who have could not invoke the compulsory jurisdiction of the court, have for the purposes of this dispute only, brought themselves within the jurisdiction of the court.

216 <sup>216</sup> International Court of Justice Pleadings, Anglo-Iranian Oil Co. Case 1952, p.467. Translation by Shahabuddeen, M. (1993) “The International Court of Justice: the Integrity of an Idea”, *Commonwealth Law Bulletin*, vol. 19, p.738, at p.741.

217 <sup>217</sup> The US had conditionally accepted the International Court of Justice’s compulsory jurisdiction under article 36 of the statute of the International Court of Justice, effectively attempting to limit that acceptance to a case by case review. See the Nicaragua Case (Jurisdiction and Admissibility).

218 <sup>218</sup> See Guillaume, G. (1995) “The Future of International Judicial Institutions”, *International and Comparative Law Quarterly*, vol. 44, p.848, at p.850.

219 <sup>219</sup> United Nations Convention on Biological Diversity, 5 June 1992, Rio de Janeiro, Misc. 3 (1993) Cm 2127; (1992) International Legal Materials, vol. 31, p.818.

220 <sup>220</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993, Paris, Misc. 21 (1993) Cm2331; (1993) International Legal Materials, vol. 32, p.800.

221 <sup>221</sup> European Charter for Regional or Minority Languages, 5 November 1992, Strasbourg, ETS 148.

222 <sup>222</sup> Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) International Court of Justice Reports (1995) p.282.

223 Settled out of Court with the US agreeing to compensate Iran.

224 <sup>224</sup> (1995) “The Future of International Judicial Institutions”, *International and Comparative Law Quarterly*, vol. 44, p.848.

225 <sup>225</sup> See Higgins, R. 1963, *The Development of International Law Through the Political Organs of the United Nations*, Oxford University Press, London, pp.1-10; Falk, R. (1966) “On the Quasi-Legislative Competence of the General Assembly”, *American Journal of International Law*, vol. 60, p.782; Schachter, O. (1968) “Towards a Theory of International Obligation”, *Virginia Journal of International Law*, vol. 8, p.300; Jennings, R. (1964) “Recent Developments in the International Law Commission: Its Relation to the Sources of International Law”, *International and Comparative Law Quarterly*, vol. 3, p.385.

226<sup>226</sup> For a lucid discussion on the recognition of “rules of the game” as obligatory by the super-powers with regard to use of armaments see Henkin, L. (1965) “How Nations Behave”, *Hague Academy Recueil Des Cours*, vol. 114 (I) p.175, at p.200.

227 <sup>227</sup> Schachter, O. (1968) “Towards a Theory of International Obligation”, *Virginia Journal of International Law*, vol. 8, p.300, at p.303.

228 Ibid. pp.302-3.

229 Ibid. p.309.

230 <sup>230</sup> See Chinkin, C. (1983) “The Foreign Affairs Powers of the US President and the Iranian Hostages agreement: Dames and Moore v. Regan”, *International and Comparative Law Quarterly*, vol. 32, p.600.

231 <sup>231</sup> See for instance Neuwahl, N. (1991) “Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements”, *Common Market Law Review*, 28 No.4 p.717.

232 <sup>232</sup> See for instance the court’s judgment in the Corfu Channel Case (United Kingdom v. Albania) International Court of Justice Reports (1949) p.41.

233 See the Corfu Channel Case, *ibid.* See also Chapter 5 of this study.

234 <sup>234</sup> Ibid. pp.309-310. See also Air Traffic Rights Dispute (USA v. France) (USA v. France) (1964) ILM, vol. 3, p.668; Air Traffic Rights Dispute (USA v. Italy) (1965) ILM, vol. 4, p.974; Saudi Arabia v. Aramco (1963) ILR, vol. 27, p.117.

235 <sup>235</sup> See Lachs, M. “The Law in and of the United Nations” (1961) *Indian Journal of International Law*, vol. 1, p.429, at p.439; South West Africa Cases (Second Phase) International Court of Justice Reports (1966) p.6, at p.441.

236 <sup>236</sup> “Towards a Theory of International Obligation”, *Virginia Journal of International Law*, vol. 8 (1968) p.300 at p.311.

237 <sup>237</sup> Arguing that primary rules of customary international law established by consistent and uniform practice of many States are not binding on States that neither acquiesced nor approved of it, see Tunkin, G.I. (1961) “Remarks on the Juridical Nature of Customary Norms”, *California Law Review*, vol. 49, p.419; Tunkin, G.I. (1958) “Coexistence and International Law”, *Hague Academy Recueil Des Cours*, vol. 95 (III) p.5, p at pp.12-21.

238 <sup>238</sup> Schachter, O. (1968) “Towards a Theory of International Obligation”, *Virginia Journal of International Law*, vol. 8, p.300, at p.312.

239 <sup>239</sup> See Fitzmaurice, G. (1953) “Law and Procedure of the International Court of Justice: General Principles and Sources of Law”, *British Yearbook of International Law*, vol. 30, p.1; Kunz, J.L. (1953) “The Nature of Customary International Law”, *American Journal of International Law*, vol. 47, p.664; McGibbon, I.C. (1957) “Customary International Law and Acquiescence”, *British Yearbook of International Law*, vol. 33, p.115; Shahabuddeen, M. (1993) “The International Court of Justice: The Integrity of an Idea”, *Commonwealth Law Bulletin*, vol. 19, p.738; Guillaume, G. (1995) “The Future of International Judicial Institutions”, *International and Comparative Law Quarterly*, vol. 44, p. 848.

240 <sup>240</sup> (1972) *Permanent Court of International Justice 1920-1942 A Treatise*, Garland Publishing, New York/London.

241 Supra. n118.

242 Supra. n.120

243 <sup>243</sup> Nicaragua Case (Nicaragua v. US) Merits, International Court of Justice Reports (1986) p.14.

244 Supra. n.119.

245 Supra. n.118.

246 <sup>246</sup> Kelsen's "unanswerable question", Allot's "imponderable paradox", Parry's claims that custom is a "mystery", and Judge Tanaka's resignation to the view that custom is both "delicate and difficult" are good enough testimony of this. Ibid.

247 <sup>247</sup> For instance article 38(1)(b) whose drafting has provided a huge minefield for scholarly work on treaty drafting and treaty interpretation among other topics.