THE CONSENT OF STATES AND CUSTOMARY INTERNATIONAL LAW

Thesis submitted for the degree of Doctor of Philosophy in the University of London

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ABSTRACT

This dissertation is an examination of the role of consent in the process by which rights and obligations are created under customary international law. Two related issues are examined. One is the role of consent in the creation of customary law generally, and the other is the question whether the consent of a State or a group of States to a stipulation of customary international law is a condition of the applicability of that law to those States.

Part One examines the relationship between the notions of consent, state practice and opinio juris. Chapter I examines the nature of the law governing the creation of customary law. Chapter II compares opinio juris with consent. In Part Two, Chapter III sets up a framework for the enquiry, namely, a spectrum of views expressed about the role of consent. Chapters IV and V then examine the decisions of tribunals and the practice of States to see which of the points on the spectrum corresponds most closely to those decisions and practice. Chapter VI compares general and nongeneral custom as far it relates to the role of consent. Chapter VII examines the position of newly independent States in relation to customary law established before they achieve statehood, and is concerned more with evidence than with general considerations. Part Three deals with the main objections to, and the possible advantages of, the requirement of consent in the contemporary customary law process.

It will be suggested that consent does, and should, play an essential part in the customary law process.

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INTRODUCTION

It is common to preface a discussion of the conditions for the creation of customary law with a statement of the pervasiveness of the practical and theoretical difficulties involved in such a discussion; those difficulties do not need to be listed here. This study is intended to be a part of the old but evergreen debate on the role played by consent in the process of creating rights and obligations under customary international law. This topic is particularly relevant today given the on-going expansion of international society, in view of what some commentators perceive to be a majoritarian tendency in contemporary international relations, a tendency which would naturally have important consequences for the role played by consent. The implications of the change in the composition of international society would naturally affect the existence of its customary law, and in particular the processes through which that law is made. It is the role of consent in the context of these changes that is the subject-matter of this study.

More precisely, this study is concerned with two related (but distinct) issues. One is the role played by consent in the creation of rules of customary law. The other is the role played by consent in determining the applicability of a rule of customary

¹ See, e.g., Akehurst, "Custom as a Source of International Law", 47 BYBIL (1974-75), p. 1 (hereinafter Custom).

² See Change and Stability in International Law-Making (1985, Cassese and Weiler, eds., hereinafter Change and Stability), especially Chapter III.

³ See, e.g., Brownlie, *Principles of Public International Law* (1990), hereinafter *Principles*, p. 10; Stein, "The Approach Of The Different Drummer: The Principle of the Persistent Objector in International Law", 26 *Harvard Journal of International Law* (1985), pp. 457-82 (hereinafter *Different Drummer*), esp. pp. 463-475.

law to particular States. The difference may be expressed as follows: the former is concerned with customary rules, and the latter is concerned with the scope of rights and obligations under customary law. In many ways, however, there is a very clear link between the two issues.

Firstly, if it is the case that consent plays no part in the formation of customary rules (the first question), then it may become difficult to argue that it should play a part in the creation of rights and obligations flowing from those rules. Conversely, if it is the case that consent does play a part in the formation of customary rules, then there would seem to be a case for arguing that it should have a role to play in determining the rights and obligations flowing from those rules.

Secondly, it could be that the difference between saying that a given rule of customary law does not exist and saying that a State is not bound by a given rule of customary law is a matter of taste. In the end, what would matter would be whether a given State has a right or is under an obligation under customary law. Under a consensual conception, it would not seem to matter much whether one speaks of rules or whether one speaks of the rights and obligations thereunder. And it is such a conception that is the object of this study.

These issues will be dealt with in the course of this study. A distinction will be drawn between them where necessary.

⁴ See Koskenniemi, "From Apology to Utopia: The Structure of International Legal Argument" (1989), hereinafter From Apology to Utopia, p. 395.

It will be apparent that the thesis is concerned with the existence and content of a rule governing law creation, in particular, either (a) whether there is a rule which says consent is required or (b) whether there is a rule which says that consent is not required in the process of creating rights and obligations under customary law.

The question is one of fundamental importance given the central role played by customary international law in the international legal system. Clarity, consistency, and uniformity in its rules of law-making would seem to suggest the existence of a well-defined legal system. On the other hand, inconsistency and lack of uniformity in those rules will pose serious problems for anyone interested in speaking of a system of rules based on the municipal model. It would suggest, to some, anarchy and chaos. By its very nature, consent is central to this question. Since it is States themselves who make the law, it would appear that any consistency in the rule with which this study is concerned would be based on an inconsistency in the views and practice of States.

The role of consent will be examined with a view to seeing (a) whether it is a legal requirement, bearing in mind (b) whether, if it is a legal requirement, it bodes ill for international order, or (c) rather, to see whether it can help strengthen the rule of law in contemporary international relations.

⁵ See, e.g, Green, "The Impact of the New States on International Law", 4 Israel Law Review (1969), p. 39, @ pp. 28, 29, 30-31.

La combinaison de ces divers éléments, catalan, romain et canonique, a produit la coutume andorrane. Cette coutume est incomplète, et même sur le points où elle est fixée, elle fait de larges emprunts à d'autres législations. La loi de l'Andorre est faite avant tout de pratiques, de précédents; or, un groupe aussi restreint n'a pas un nombre suffisant de litiges pour alimenter une jurisprudence. Ce n'est pas tout, et cette jurisprudence, n'étant consignée dans aucun recueil méthodique, est indécise et flottante...De là, même sur des questions courantes, une incertitude qui déconcerte parfois. Pour savoir quels sont les droits de la veuve sur les biens du mari, je me suis adressé à des notables, à d'anciens bayles, aux bayles en exercice, à des juristes: ils m'ont donné cinq réponses.

Est-ce à dire que la coutume d'Andorre n'existe pas? J'ai entendu soutenir cette opinion, qui est une erreur, à moins que ce ne soit un malentendu.

J. Brutails, La coutume d'Andorre (1st edn. 1904), p. 55

CHAPTER I

SOME PRELIMINARY ISSUES

This study is concerned with the role of the consent of States in the process of creating rules of, and rights and obligations under, customary international law. Clarification of some issues is necessary at the outset.

A. THE BASIS OF OBLIGATION AND THE LAW-CREATING PROCESS

This study is not concerned with the more general issue of the basis of obligation in international law. Discussions of that issue normally seek to answer the question why States obey, or why they must obey, international law; they involve a search for the source of the binding force of international law. The present enquiry, on the other hand, is concerned with a description of a part of the process of creation of rights and obligations in customary international law. In other words, while an enquiry into the basis of obligation asks why law is binding, the present enquiry asks the question how rules of law (and the rights and obligations flowing therefrom) come into existence. As Hall puts it.

...international law as a whole is binding upon all civilised states irrespective of their individual consent, and...no state can by its own act release itself from the obligation either of the general law or any well-established rule. At

¹ See, generally, Schachter, "Towards a Theory of International Obligation", 8 Virginia Journal of International Law (1968), Vol. 2, p. 300 ff. The utility of such enquiries may be questioned. It has been argued that since the subjects of international law do not claim the right to disregard international law even when their vital interests are at stake, but rather argue about what international law requires or permits them to do, there is no real dispute about the proposition that States (or any other subjects of any kind of law) must obey the law. See Tesón, "Customary International Law and the Theory of Hypothetical Consent", 15 Yale Journal of International Law (1990), pp. 84-86. Schachter thus proposes that, as a result, it is more useful to make "obligatory legal norms" identifiable; in other words, he looks to the law-making process to ground international obligation. Raz has argued that there is no moral duty to obey the law: see The Authority of Law (1979), p. 233. In fact, the idea of a duty to obey the law seems somewhat superfluous, in the sense that it is axiomatic that if a rule of law exists, the subjects of that law are under a duty to obey it. However, the present project does not require one to pronounce on the merits of these claims.

the same time it is equally clear that the existence of any particular rule of law which may be in dispute is a question of fact to be proved by the evidence of practice. In other words, consent is the legislative process of international law, though it is not the source of the obligation. A rule once established by consent...is binding because it has become a part of the general law, and it can then no longer be repudiated by the action of individual states. (emphasis added.)

In other words, law is binding because it is law; but how is it created?

This project is concerned with the identity of the legal rules governing the way in which rights and obligations are created in customary international law as evidenced in the actions and statements of States and decisions of tribunals, and is therefore a narrower, and primarily empirical, enquiry.³

B. THE MEANING OF "CONSENT"

The meaning of "consent" must be clarified at the outset. The Oxford English Dictionary⁴ defines the term in the following way:

² Hall, Great Britain and International Law, Vol. 1 (1932), pp. 12-13. See also Fitzmaurice ("The Foundations of the Authority of International Law and the Problem of Enforcement", 19 Modern Law Review (1956), p. 1 @ p. 9), who wrote that the proposition that "There is a rule of international customary law that the consent of the States to a rule makes that rule binding upon them" (which is to a large extent the claim being examined in this study) does not deal in any way with the question why such a rule is binding. See also Dixon, Textbook on International Law (1990), p. 15: "...consent is a method for creating binding rules of law, rather than the reason why they are binding".

³ This is not to suggest that there cannot be an overlap between the questions of the basis of obligation and the way in which law is made; in fact it will be argued in the final chapter that many writers do not distinguish between the two questions. All that is being claimed here is that it is possible, and indeed useful, to focus on the issue of how law is made without dealing with the basis of obligation (particularly since the latter has been the subject of a long-standing and apparently inconclusive debate; see Schacher, *supra* n. 1), and the inconclusiveness of this debate has not stopped the participants in the international legal system from considering the law to be binding upon them. Neither is it claimed here that the question of the basis of obligation is not an important question. It just is not the subject of the present enquiry.

⁴ 2nd. edn. (1989), Oxford University Press, pp. 760-61. The choice of this dictionary is not capricious. It was chosen because it conveys, as do most dictionaries, the essential fact

- 1. Voluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission...
- 2. Agreement by a number of persons as to a course of action; concert...
- 3. Agreement or unity of opinion, consensus, unanimity.

From the meaning thus provided, consent includes (a) voluntary agreement to or acquiescence in the practice of other States (b) compliance (c) concurrence (d) permission. These are all different ideas (which presumably is why different words are used). What these different things have in common is that they all involve a deliberate choice/decision on the part of the consenting party; but they are still different.

1. The Relationship Between Consent/Will And "Voluntary Choice" For example, the word "voluntary" requires comment. When the word "consent" is used to convey the idea of voluntary agreement, it must be distinguished from its use to convey the ideas of compliance, concurrence and permission, so as to exclude some of the consequences that could be read into the word "voluntary" (which is used to describe only agreement, but not compliance, concurrence or permission). Generally speaking, a voluntary act is one that does not involve constraint or compulsion. But the fact that "voluntary" is used only in relation to agreement and (probably) acquiescence and not in relation to compliance, concurrence or permission, would suggest that it is not essential that consent, or exercise of will, be voluntary, in the sense of there being absolutely no restraint whatsoever. On the contrary, to insist that a deliberate choice (consent) must always be totally free of constraint would be asking too much. Making a choice, or exercising will, involves weighing a number of different considerations, and the eventual choice/decision will most probably be the one with the most advantages, or at least the fewest disadvantages. Individuals, be they States or human beings, do not exist in a vacuum; there are always other members of the community whose interests (not necessarily, in this context, legal interests) and wishes must to be taken into account. A choice/decision to act or to refrain from acting will normally be made in order to achieve the most favourable result for the

that the word "consent" embraces a number of different ideas. The Oxford Thesaurus (1991, BCA in association with the Oxford University Press), contains an even wider list of synonyms; see p. 70 thereof.

party involved; but it is nevertheless a deliberate and desired choice/decision. A choice/decision based on no constraint is consent and is also voluntary, but one not characterized by *total* freedom is still consent but it may not be voluntary.

To illustrate: if State A wishes to perform an act which involves W, X, Y, and Z, but State B does not want it to do Y and Z, and State A does not want to antagonize State B (for whatever reasons), then in altering its claim to doing only W and X, State A is giving effect to its will to do W, X, Y and Z as much as it is giving effect to its will not to antagonize State B. In this sense, consent does not necessarily have to be absolutely voluntary (particularly where the latter means focusing only on expressing one of its desires and no other). In Cheng's words (and he is not a consensualist), "it is a

However, an important qualification must be made to the foregoing. It is perfectly correct to maintain that if a State acts in a way which has legal consequences (whether because this is the State's intention or because the system considers the act as producing legal consequences), then that State, although it may not accurately be described as consenting to a state of affairs (because, for example, that state of affairs does not exist where the State is the first in the field), can legitimately be described as having consented to the legal character of the position it takes (whether the act thereby becomes opposable to others is a separate question), or to a/the rule subsequently derived from that practice. It makes perfect sense to say that even a State which is the first to act in a particular way has consented, not to what it wills, but to the legal position contained in the expression of its will. The State certainly implies that it has an intention to be bound by its acts, and other States will normally cite a State's past practice as evidence of what that state is bound by. It is not useful, for instance, to say that the United States did not consent to the rule based on the Truman Declaration of 1945 concerning the existence of sovereign rights of the coastal State over its continental shelf. As Skubizewski puts it, "It is to state a truism to say that States which through their actions contribute to the growth of the custom-creating practice consent to the making of the customary law which originates in that practice" ("The Elements of Custom and the Hague Court", 31 ZaöRV (1971), p. 810 @ 845). See also Lowe, 17, Journal of Law and Society (1990), p. 388. Without meaning to prejudge the issue (since there seems to be no real disagreement on this point), customary international law is deduced or inferred from the practice of States. If a State does something, then that is relevant in the customary law process. (The argument that

⁵ One may further highlight the difference between a voluntary choice and consent by calling attention to the fact that it is possible to make a voluntary choice without reference to any pre-existing state of affairs. This would simply and purely be an exercise of will on the part of the actor in question; it is simply what the actor in question desires. But does this amount to consent? It appears not. The meaning of consent described above seems to require a state of affairs to which one is voluntarily agreeing, acquiescing in, complying with, concurring in, or permitting. In other words, one cannot meaningfully consent to what one alone wills. It is thus possible to distinguish between a voluntary choice which amounts to a simple act of will or a desire on the one hand, and consent on the other.

misconception to think that consent must always be totally free...Coacta voluntas tamen voluntas est."6

consent plays no part in the process of formation of customary law (since, at the formative stages, there is no customary law to which the consent could be expressed), but practice does, is considered shortly, n. 8, below.)

In any event, even if the preceding argument (that a State is consenting to "customary" law since it is the first in the field) is unconvincing, this would be a problem only as far as the initiating State(s) are concerned. The minimum number of States required for one to speak of customary law is two (see Chapter VI, below). The States acting after the initiating State(s) have something to which their consent could be expressed, so that their acting would amount to consent *stricto sensu*. It is true that there may not be general uniformity in the practice in the earlier stages; but then there would (or at least *could*) still be "particular" customary law governing the rights and duties of the participating States (*ibid*.).

In any event, what we seek to establish is the role of a State's consent vis-à-vis a rule of customary law. So, even admitting that a State cannot be bound simply by what it wills, and even if consent plays no part in the formative stages of a rule, a State surely cannot be bound by a general rule which does not yet exist. On the other hand, the more general a practice becomes, the more feasible it is to look for consent or lack thereof in relation to the rule.

In sum, an act of will can, and indeed must, be seen as evidence of consent. But will and consent are still different things; see the next sub-heading.

⁶ Cheng (ed.), International Law: Teaching and Practice (1982), pp. 217-18. To the same effect, see Ihering, Law as a Means to an End (1924), pp. 10-15. As Arangio-Ruiz has put it (see Change and Stability, Cassese and Weiler, eds.), Ch. 3., on "Voluntarism and Majority Rule"), there is no real doctrine on "flaws in consent" at least as far as customary law is concerned; doctrine on vitiating factors (such as duress) has been developed in the realm of treaty law and not in relation to custom. Pellet also adds that "if rules of law could coincide in a perfect way with the interests of all existing States there would be no more need for law" (see "The Normative Dilemma: Will and Consent in International Law-Making", 12 Australian Yearbook of International Law (1991), p. 42 ff, @ p. 44). However, he adds that there must be a threshold of admissible coercion, and his conclusion, based on a very brief (but accurate, it is submitted) review (ibid.), is that "non-military coercion invalidates the rule if and only if it is obvious and out of proportion to the usual practices which cannot be avoided in an international society strongly marked by an imbalance of power."

One example which may be cited against the foregoing propositions is Article 75 of the Vienna Convention on the Law of Treaties, according to which a peace treaty which imposes obligations on an aggressor State may be valid, in spite of the fact that the aggressor has not really consented. Apart from the fact that this is a treaty rule and not a customary rule (which would also mean that its validity as customary law would depend not on its inclusion in the Convention but on its acceptance by States independently of the Convention), it is clearly an exceptional rule: the provision is stated as an exception to Article 52 of the Convention which provides that treaties procured by the use or threat of use of force are void. One exception (Art. 75) to an exception (Art. 52) to the general rule on the requirement of consent only confirms the validity of the general rule. In any case, is Article 75 not concerned with enforcement action taken under the provisions of the Charter? More importantly, the International Law Commission's commentary on the Article clearly indicate that the rule it

2. The Relationship Between Consent And Desire/Will/Motive/Reasons For Acting (Or

Not Acting) While, as has just been argued, consent and will have something in common which may serve to distinguish them from a "voluntary" act, consent does have a meaning that will does not. The existence of a motive or reason for acting is both logically and chronologically prior to the making of a choice on the basis of that desire; and that choice is consent, as it could take the form of compliance, concurrence or permission. One normally agrees, acquiesces, complies, concurs or permits because there is a reason for doing so;⁷ the reason why one makes a choice is as different from the reason why one expresses that choice as it is from the choice itself.⁸ To say otherwise

The argument against these seemingly truistic views seems to proceed on the assumption that both consent and will are "internal" elements. But the truth is that States do not act without thinking, especially where such acts are performed by organs which are familiar with international law. If a State signs a treaty, is it really a possibility that it did not mean to sign that treaty or that it did not want to consent to the rules therein? If a State makes a certain claim (consider again the Truman Proclamation), does it make sense, or is it useful, to maintain that its claim did not include consent to the particular legal position expressed therein? It may not really reflect the will (in the sense of voluntary choice) of that State (as explained in see Section B (i) above), but how is it not the consent of that State? (The argument seems to have affinities with the view that claims cannot consitute customary law, and that there must be actual actions, which neither Lobo de Souza nor Haggenmacher accept; see the last footnote in this chapter.)

Above all, consider acquiescence and omissions (both of which are recognized as being relevant to the formation of customary law); do these notions require acting? It is precisely

contained should, in Sinclair's words, be expressive of the universally applicable rule of general international law prohibiting the threat or the use of force. It is in the context of this prohibition (which is *jus cogens*) that Art. 75 operates. See, on these points, Sinclair, *The Vienna Convention on the Law of Treaties* (1973), p. 180.

⁷ And of course, in theory, one may consent for no reason, but it would still be consent; in other words, consent can exist without a reason or motive.

⁸ It has been argued that consent plays no part in the process of formation of customary law, but practice does; see Lobo de Souza, University of London Ph.D. Thesis, 1993 (hereinafter *EEZ*); see also Haggenmacher, "Des deux éléments du droit coutumier dans la practique de la Cour internationale", 90 *RGDIP* (1985), p. 5 (hereinafter *Deux éléments*). But surely a State consents to what it practices, and States following its lead consent to the same legal position through their practice/claims etc.? Cf Skubiszewski, *op. cit. supra*, n. 5. See also Fitzmaurice; "[W]here a general rule of customary international law is built up by the common practice of States...it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, so constituting a binding rule of law" (30 *BYBIL* 1957, p. 68).

would amount to a failure to distinguish between two distinct groups of ideas, namely, what one really wants to be the case on the one hand (i.e. will/desire/motive), and what one says one wants to be the case or actually agrees is (or shall be) the case (i.e. consent) on the other. Consent may be said to be present in both cases of these categories, but only the former necessarily tells us why the consenting party is consenting. But in a legal setting, we are not primarily interested in the (internal) motives or reasons for consenting (although it may help to understand the significance of the (external) manifestation thereof); what we are concerned with is the expression of those reasons or motives, regardless, in principle, of why that expression may or may not be forthcoming. Otherwise, all the difficulties concerning proof of a state of mind of a

All of this is confirmed by the consideration that later on in the thesis, when he considers the real process of creation of customary law, Lobo de Souza refers, as the foundational elements of a rule, to the concepts of claim, acquiescence, and recognition (where the latter is described as meaning the same thing as acquiescence); *ibid*, @ p. 160, and @ p. 162, where the Court's dictum in the *Land*, *Island and Maritime Frontier Dispute* case was cited with approval ("the conduct of Honduras vis-à-vis earlier effectivities reveals an admission, recognition, acquiescence *or* other form of tacit consent to the situation" [emphasis added]). See generally *ibid*., pp. 153-169. At p. 159, he states that at the formative stages, "A common feature of all legal claims in the customary process is that they convey a statement of willingness, on the part of the claimant State, to have the same claim enforced against it" (emphasis added). It is impossible, it is submitted, to exclude consent from the customary law-making process.

the opposite of acting that is the essence of both ideas. But they clearly amount to consent, if for no other reason, because they imply awareness, consciousness, toleration; in other words, they are tacit consent. The dictionary definition of consent used above includes "permission"; does permission have to be express? We must not prejudge the issue and assume that the meaning of consent is confined to only one or other idea. What is being sought is consent, and while practice may be the best proof of such consent, it is not absolutely coterminous with it. Consent stands on it own, and while it is psychological in character, practice is not. And surely, in spite of what some writers have maintained, the practice of States and the International Court require this psychological element. Therefore, it is not true that "If 'acting' is the same thing as 'acting and consenting', then acting is what really counts" (see Lobo de Souza, EEZ, p. 52); rather, it is the 'consenting' that makes the practice count. We cannot do without the psychological element (on which see Chapter II, below, where consent and opinio juris are compared).

⁹ See Ihering, op. cit. supra, n. 6, @ pp. 8-10.

¹⁰ This seems true of the requirement of intention in domestic (common) law. To take two examples, criminal responsibility arises on the part of an individual only when there is a coincidence of actus reus and mens rea; the existence of the latter alone has no legal consequences. In contract law, where there is the requirement of the (external) facts of offer,

State will have to be faced. ¹¹ In short, consent comfortably straddles both (a) the notions of "(external) manifestation of will/reasons" as well as (b) the idea of a psychological (and therefore internal) phenomenon.

3. Consent And Agreement Another reason why consent in the sense of "voluntary agreement" must be kept distinct from consent in any other sense relates to the term "agreement". The idea of agreement is not coterminous with that of consent. Agreement can involve a deliberate arrangement established between a number of individuals, so as to suggest a contractual setting based on direct negotiation; in other words, concert. Used in this sense, the essence of agreement is, then, that the consent is directed at both a state of affairs and at least at another individual person or persons. But consent does not always have to be directed specifically at a person; all that is needed is that it is directed at a (nascent or established) state of affairs. In other words, consent can be expressed by a State without there being any question of concerted action; 12 a State consents to a given legal position, without any necessary reference to the identity of the other States who may accept the same position. And when a State adopts position A which differs from position B adopted by other States, it is not agreeing with anyone else, while it clearly has consented to something different from what the others have agreed to. Agreeing that x is the case is not the same as agreeing with someone. A series of unilateral choices/decisions (which would amount to consent) may or may not amount to

acceptance and consideration, there must also be an intention to create legal relations. The intention to create such relations alone cannot create a contractual relationship unless it is expressed in some form or another.

¹¹ See Chapter II, Section B, below.

¹² See Cheng, "Custom: The Future of General State Practice in a Divided World" (hereinafter *Custom*), in *The Structure and Processes of International Law* (1984, MacDonald and Johnston eds.), pp. 536 ff, @ 537). Referring to the Truman Proclamation, he states that it seemed

^{...}this is a unilateral act, that no 'proposal' or 'offer' was made to any other state, and that while the United States obviously hoped that no-one would oppose its move, it was not subjecting the legality or validity of its own action to the acceptance or approval of other States. No tacit agreement or any consensual bond is involved. It is a unilateral act under a new unilateral opinio individualis juris generalis.

concerted action. In other words, while consent and agreement have a substantial area of intersection, they differ to the extent that consent is not contract.¹³

4. An Illustration To illustrate the points made thus far concerning the meaning of consent and the fact that consent does play an important part in the formation of rules of customary law, let us take a hypothetical example of the development of customary law, which, it is hoped, is not far from reality.

A State has discovered that there are valuable mineral resources lying in the subsoil adjacent to its territorial sea, and (a) it wishes to exploit these resources for itself. It then considers the legal implications of such a move.

It is told by its legal advisers that, as the law stands, (b) the mineral resources in such areas are not susceptible of exclusive unilateral appropriation by individual States. Furthermore, (c) it has important political and economic links with two neighbouring States, whose economic well-being depends greatly on the rights they exercise in relation to the living resources in the waters superjacent to, and on the bed of, the said areas. It also anticipates that some other States will probably object to any limitations on the exercise of their rights and interests which they believe to exist in the superjacent waters.

The State therefore seeks the establishment of a legal régime which would (i) permit the unilateral appropriation of the mineral resources in these areas, (ii) but it will frame its claim to these resources in a way that will distinguish between the rights to the living resources in the said areas and the mineral resources thereunder, so as not to interfere with the former category of rights (as it will thereby avoid antagonizing its friendly neighbours).

This can be effected in a number of ways. It may (d) rally support for the setting up of an international convention, which it duly signs and ratifies. Alternatively, it can (e) unilaterally assert sovereignty over those areas by domestic legislation, or by assertion of exclusive rights, e.g by arresting interfering vessels or by actual mining. (f) Other States may also sign the convention, or similarly assert their sovereignty in the same way as that the first State. (g) Others may protest against the legality of these actions, (h) and others may claim even more than the first State. (i) Some other States may

¹³ See, e.g., Strupp, "Les règles générales du droit de la paix", 47 Recueil des Cours (1934), pp. 309 ff, where it is argued that since agreement is what matters, it is difficult to see how abstentions can count as practice. But if the issue is properly defined as involving consent and not agreement, abstentions can be taken into account as State practice; consent does not require a pactum stricto sensu (in any event, one may ask whether it is not possible to be contractually bound by conduct). See Chapter VIII, nn. 18-22, and Section A, Subsection 5, below, on the further point that customary law does not require mutuality of obligation, which is an element often included in the notion of agreement.

remain silent.

Let us now take each of these points (a)-(i) in turn.

(a) above is what the first State wills or desires, or its motive, or reasons for action; but this is not really a choice, and is thus not consent *stricto sensu*; it has no legal consequences.

(b) and (c) are considerations that it will take into account in choosing a course of action which will give effect to this will, but, like (a) above, they are not, strictly speaking, consent, because no choice has been made; they are simply reasons for acting.

(d) and (e) amount to the choice of that course of action expressing will, and can correctly described as consent, because, although there is no pre-existing state of affairs beyond that State's will and one cannot meaningfully consent to what one alone wills, the State hereby consents to the legal consequences entailed in its action; either (i) it consents to be bound by a rule which may subsequently become established, or (ii) it could frame its claim in such a way as to suggest that its practice is in accordance with, or does not violate, existing international law, and thus consent to an established legal position (which may or may not amount to a customary rule. And although the State has consented, its action, while being voluntary is the sense of being an exercise of its will, has not been completely voluntary in the sense that the State's freedom of action is limited by the legal, political and economic considerations in points (b) and (c).

(f) also illustrates consent; there exists a prior state of affairs (namely the first State's new practice) which is being consented to. Now, while it may be called agreement as far as ratification of the treaty is concerned, it is not necessarily agreement in the sense of joint or concerted action where the other actions (namely domestic legislation, arrests and mining) are concerned. Furthermore, the choice made by these States may be based on

¹⁴ See, e.g, the Truman Proclamation, XIII Department of State Bulletin.

any number of reasons which prevent the choice from being completely voluntary, but they still consent to a particular state of affairs.

(g) is the opposite of consent (i.e. dissent), and is consent to a legal position different from that of the previously mentioned States.

(h) further illustrates the difference between consent and agreement. The States making more extensive claims can be said to be in agreement to the extent to which their claims and those of the first State coincide, 15 but there is clearly no agreement in any real sense; they are claiming different things.

The position of the States mentioned in (i) may or may not amount to consent; it depends on what, if anything, can be inferred from their silence.¹⁶

Conclusions

To summarize: consent is a term whose meaning intersects with the meaning of many other terms (in particular will, desire, motive, agreement, voluntary choice), but which is nevertheless not the same as those other terms. The essence of consent, which it shares with some of these different ideas is the element of *choice* on the part of the consenting

¹⁵ See the Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Arechaga, Nagendra Singh and Ruda in the *Fisheries Jurisdiction* cases (*ICJ Reports* (1974), p. 46 @ 47, paras. 6-9):

^{8...}to recognize the possibility that States might claim without risk of challenge or objection an exclusive fisheries zone of 12 miles cannot by any sense of logic necessarily lead to the conclusion...that such a figure constitutes in the present state of maritime international law an obligatory maximum limit and that a State going beyond such a limit commits an unlawful act. [This contention asks a different question, i.e.]

^{9...}is there an existing rule of customary law which forbids States to extend their fisheries jurisdiction beyond 12 miles?

This seems to countenance the possibility that generally applicable rules can be derived from the minimum limit reflected in diverging practice. For further discussion of the difference between agreement and consent, see Chapter VIII, Section A(v), below.

¹⁶ See Mendelson, "State Acts And Omissions As Explicit Or Implicit Claims", Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally (1991), p. 373, (hereinafter Hohfeld), @ pp. 379-381.

party in relation to a(n established or desired) state of affairs.¹⁷ To restrict or confine the meaning of consent to only one of these ideas would be unduly narrow, because consent has meanings which these other terms do not, and vice-versa.¹⁸

C. THE MEANING OF "CUSTOMARY INTERNATIONAL LAW"

In this section, two things will be considered, namely, (a) the meaning of the phrase "customary international law", and (b) the nature of the rule(s) governing the creation of rights and obligations in customary international law.

1. The Meaning Of The Phrase "Customary International Law" As regards the meaning of the phrase "customary international law", the important point is its identity when compared with other sources of international law. As Henkin has stressed, if it is important to distinguish between customary law stricto sensu and other forms of non-conventional law. At least four categories of non-conventional law can be identified. 20

¹⁷ See Walden ("Customary International Law: A Jurisprudential Analysis", 13 *Israel Law Review* (1978), p. 86), who describes the various meanings of consent in the customary law process as follows:

⁽¹⁾ The contractual sense: an intention to create obligations on a basis of reciprocity; (2) The intention to create obligations generally...(3); Willingness to be bound by rules already created; (4) Acquiescence in claims put forward by others.

¹⁸ The extent to which discussion of the role of consent in customary international law, both favourable and unfavourable, pays attention to the meaning of consent, and the consequences thereof, will be considered later: see Chapter VIII, Section A, Subsections 5 and 6, below.

¹⁹ "General Course on Public International Law", 216 Recueil des Cours (1989), Vol. IV, p. 51 ff.

²⁰ The following classification is based on Henkin's scheme (*ibid*.), with modifications. It must be stressed that the examples given to describe the contents of each of these categories are not the only ones there could be; neither is it necessarily the case that the examples given must necessarily fall within one category only. The categorization is intended only to illustrate the different kinds of non-conventional law that there could be. Any rule or principle of non-conventional law can be placed in at least one of the following categories, and no more is claimed.

- i. Constitutional Law
- ii. Fundamental Legal Principles of the International System
- iii. Customary International Law
- iv. Élite Norms

i. Constitutional Law. This category comprises those concepts which constitute the assumptions upon which the modern inter-State system is based. In Stein's words, they are "a set of postulates which define the international legal order". In strict theory, these are logically prior to the existence of the system. These include "the concepts of State and Government", sovereignty, the concepts of Statehood and territorial integrity and inviolability, and the necessary implications thereof (such as "the requirement of State consent and the effectiveness of consent to bind the State" and "the concept of nationality"). The modern system

inherited these principles at birth; the basic assumptions of the system were in place. Its origins are not only misty but jurisprudentially insignificant.²⁴

The constitutional assumptions are not the result of practice/opinio juris;25 if they were,

²¹ See his Different Drummer, @ 459 (n. 6).

²² See Brownlie, *Principles*, p. 287: "The sovereignty and equality of States represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality".

²³ See Brownlie, *ibid.*, who identifies one of the corollaries of the principle of sovereignty as "the dependence of obligations arising from customary law and treaties on the consent of the obligor".

²⁴ Henkin, op. cit., pp. 51-52. Henkin would include the principle of pacta sunt servanda and "established norms of diplomatic intercourse" in this category. But (a) it is possible to argue that the former would fall in the next category, because it seems to be valid on the constitutional assumption that consent is effective to bind a State. See Suganami, "A. V. Lowe on General Rules of International Law", 10 Review of International Studies (1984), p. 175 @ 179. See also Kunz, The Changing Law of Nations (1968), p. 352, and Kelsen, Principles of International Law (1966, 2nd. edn, Tucker); (b) the latter seems to be a wide notion comprising different notions that could fall in any of the first three categories (see Fennessey, 70 AJIL (1976), p. 72).

²⁵ Suganami (*ibid.*) argues that there is a problem of circularity here, in that the content of the rules in this category can only be determined after we know what rights and duties States possess under general international law (p. 180), so that these constitutional principles themselves require some prior grounding (most probably in the rights which States already

that would mean that they were mutable, and lack of agreement as to their existence would undermine any claims as to the existence of an international legal system.

iii. Fundamental Legal Principles Of The International System This category is a something of a mixed bag. It comprises, for example, principles which exist in the common conceptions of the ideas of law and legal system. These would include basic ideas of property, contract (including perhaps the principle of pacta sunt servanda) and tort; responsibility for breach of obligations; basic principles applied in judicial reasoning (including, e.g., lex posterior derogat priori and lex specialis derogat generali²⁶). Fitzmaurice would add other examples peculiar to the international legal system; the principles that deficiencies or provisions of domestic law, changes of régime or the sovereign, and that pleading its own wrongdoing or other act as a ground of non-compliance, are not sufficient to exempt a State from non-compliance with its international obligations. Another example he gives is the rule that new States are automatically bound by all rules of international law in force at the time of their acquisition of statehood.²⁷ Brownlie, includes as "general principles of international law" the principles of "consent, reciprocity, equality of States, finality of awards and

exercise), and are thus not logically prior to the system. But the point is, as Lowe responds ("A Reply", *ibid.*, pp. 186-7), that if, for example, the actions of one State encroach upon the sovereignty of another State to legislate regarding the latter's territory, the former State violates the principle of State autonomy in any sense in which it is used. Disagreement as to the extent of some of the implications of these constitutional principles may put the subject-matter of the disagreement, and not the constitutional principle itself, into a category of mutable law (such as the third one).

It matters little whether these principles constitute the international order or vice-versa. Whatever their source, and there is disagreement about their source (see, for example, the discussion of the opposing views of Schmitt and Krabbe in Koskenniemi, *From Apology to Utopia:* pp. 192, the system cannot be conceived of without them.

Others examples are listed in Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), Part 4. Brownlie also speaks of "logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies" (Principles of Public International Law, (4th edn., 1990), p. 19).

²⁷ "Some Problems Regarding the Formal Sources of International Law", in *Symbolae Verzijl* (1958), p. 153 @ pp. 161-8. On "new States", see Chapter VII, below.

settlements, the legal validity agreements, good faith, domestic jurisdiction, and the freedom of the seas". 28 Again, it is not meaningful to seek the source of rules and principles in this category of non-conventional law:

...it is common to all developed legal systems, and there is no question as to continuing consent or the need of consent by new States. Consent is assumed, and generally, consent has been universal in fact.²⁹

In Brownlie's words,

In many cases, these principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules, and have been so long and so generally accepted as to be no longer *directly* concerned with state practice. In a few cases, the principle concerned, though useful, is unlikely to appear in ordinary state practice.³⁰

Therein lies the similarity with the first category; they both comprise basic/fundamental principles. However, this category differs from the previous one in that the norms of the first category, if they can be changed at all, could not be changed without transforming the character of the system. The principles in the present category can be changed by practice, whether customary or conventional. The principles of the common heritage of mankind, the view that new States are not automatically bound by all rules of pre-existing law³¹ and the recent debate about international crimes (undermining the erstwhile general principle of delictual liability), can be viewed as challenges, with whatever degrees of success, to principles in the present category, and they attest to their mutability.

iii. Customary International Law The essence of this category is that the rules here are the product of the consent of States manifested through the classic formula of State

²⁸ Op. cit.

²⁹ Henkin, op. cit., p. 53.

³⁰ *Op. cit.*, p. 19.

This issue is examined in full in Chapter VII. It is interesting to note that, unlike Fitzmaurice, Henkin would classify the rule about the creation of rights and obligations (of which the new States question is an example) as falling under the next (third) category of normal customary law; see Henkin, op. cit. supra, n. 19, @ p. 54. On either analysis, the rule about law-making is a mutable one.

practice and *opinio juris*. These principles are derived from what States do, and it matters not whether one takes a constitutive or declaratory view of the consequences of the actions of States in the law-making process.³² It is this category of non-conventional law that is referred to in Article 38(1)(b) of the Statute of the International Court of Justice. It is this category that the present enquiry is about. It covers an extremely large complex of rules and principles, but the essence of all of these is that, unlike the previous two categories, they are based on State practice, and were not "natural" to the international system by definition or inherited by it at birth.³³ Accordingly, they can be changed by subsequent practice, in accordance with whatever law that exists for the creation of new law.

iv. Élite Norms By this is meant two relatively recent categories of norm, namely norms of ius cogens and norms imposing obligations erga omnes. The essential feature of norms in the former category is their "relative indelibility"; they are "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent rule of the same character.³⁴ The controversy surrounding the existence and content of these norms is outside the scope of this enquiry, concerned as it is with customary international law, which is of the character of ius dispositivum. As regards norms imposing obligations erga omnes, the problems are essentially similar.³⁵ If their

³² See Chapter II below.

³³ See, e.g., *ICJ Pleadings* (1951), Vol. II, pp. 428-9, where the United Kingdom argued in the *Anglo-Norwegian Fisheries* case that some "fundamental principles" existed irrespective of the will of States. Norway agreed, but argued that the rules of maritime delimitation were not of that character; rather, "Ces sont des règles techniques, fondées sur les consentement des États" (*ibid.*, Vol. II, p. 292 @ 293, para. 349). The Court's judgment seems to have treated the rules in question as belonging to the present category.

³⁴ The literature on this is extensive. See Brownlie, *Principles of Public International Law* (1990), pp. 513 ff., and the footnotes thereto.

³⁵ See Brownlie, *ibid*. As explained by the International Court, these obligations seem to be conventional in character, at least as far as the method for the protection of the correlative rights is concerned; and the difficulty is that their essence lies in these methods of protection. See Thirlway, "The Law and Procedure of the International Court of Justice: Part Two", 61 BYBIL (1990) p. 1 (hereinafter Law and Procedure) @ pp. 92-102. See also Gaja, "Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of

mode of creation is the same as that of customary law, then they would fall within the subject-matter of this enquiry and would deserve no special mention; if not, they are outside the scope of this enquiry.

2. The Nature Of The Rule Governing The Creation Of Customary Law Having identified the different kinds of non-conventional law, it remains to place the rule about the creation of customary law, which is the subject matter of the present enquiry, into that scheme.

To begin with, some of the writers quoted above view the requirement of consent as a constitutional principle.³⁶ But this must be qualified.

The central question that arises in this context concerns the nature of such "rules about rules"; in particular, the conditions for their existence, and whether these differ from the conditions for the existence of the "ordinary" rules which these "rules about rules" are about. The conditions for the existence of these "ordinary" rules, as far as customary law is concerned, have been discussed extensively by international jurists (and these are very much the subject of this enquiry); a rule of customary law requires state practice and *opinio juris*, although some have argued that one of these two criteria is sufficient.³⁷ But the conditions for the existence of "rules about rules" have not been discussed to such an extent. Stein has asked the following question: "Do propositions about the sources of law require empirical support? Or, on the contrary, is deduction from a set of postulates that define the international legal order a sufficient basis for their validity?" ³⁸

Three Related Concepts", in *International Crimes of State* (1989), Weiler, Cassese, Spinedi (eds.), p. 151 ff. It seems that it is one thing to stress the gravity of the violation of a socially important obligation, while it is quite another to identify and articulate special legal consequences for these breaches.

³⁶ Henkin, and Brownlie, *supra*, nn. 19 & 23.

³⁷ See Chapter II, below.

³⁸ Stein, Different Drummer, @ n. 13.

The answer to this question, it is submitted, lies in the distinction we drew between customary law and other kinds of non-conventional law. Propositions about the sources of customary law would require empirical support in the practice of the law-makers, while the foundational propositions about the sources of principles of constitutional law (and to a lesser degree, fundamental legal principles of the international system) are not based on state practice, but on deduction from a set of postulates that define the international legal order.³⁹

In any event, as will be seen in the preceding chapter(s), the actors on the international scene (i.e. States and tribunals) refer primarily to empirical criteria to determine the existence of rules. In the *Reservations* case, for example, the International Court of Justice based its ruling regarding a secondary rule of customary law (regarding reservations to treaties) on the practice of States.⁴⁰ If the law governing the creation of law exists, and we assume that it does, then the best (even if not the only) way to know what that law is by an empirical enquiry.⁴¹ In Lowe's words,

³⁹ It should be remembered that Stein was writing about the lack of empirical support for the persistent objector rule (see Chapter III, Section C, below). Since this was the case, it could have been that he was implying that deduction was the next best thing, in the absence of empirical support. After all, if a certain deduction was made from "a set of postulates", and this deduction conflicts with the practice of States, the validity of that deduction would at least be called to question.

⁴⁰ This case (and this assertion) is discussed in Chapter IV, Section A.(3)(i), below.

⁴¹ Even Dworkin, who disagrees with legal positivists like Hart and Kelsen on the grounds that they seek to postulate some illusory secondary rule, identifies two kinds of disagreement in law, i.e. empirical disagreement and theoretical disagreement. He focuses on the "participant's" point of view in his discussion of the latter, which he argues (convincingly, it is believed, particularly in the case of the customary law where the law-makers are also the addressees of the law they make) is most illuminating. The methodology he adopts is one based on judicial practice, and from the way judges decide cases, he purports to distil what it means to say that propositions of law are true or false (see his *Law's Empire* (1986), especially Chapter One). Thus even the nature of theoretical disagreement is verifiable empirically. While Dworkin is concerned with municipal law, there is no reason (except the point that there is no system of compulsory adjudication in international law) why the same does not apply where international law is concerned.

Even if it is the case that propositions about the sources of law can be determined otherwise than empirically, the present enquiry is an empirical one only.

The secondary rule of law-creation will itself be a rule of customary international law derived from state practice...⁴²;

in Venkata Raman's words

...the so-called pre-existing rule of law, entailing legal obligation by customary practice, is itself a product of customary practice. 43;

in Verzijl's words44

in any legal order, the question regarding the birth of customary law must be answered in accordance with the positive law obtaining in it in respect of the formation of law.⁴⁵

and finally, in Henkin's words

The norm governing the making of customary law - the requirement of consistent general practice plus *opinio juris* - is based on the constitutional conceptions of the State system, but developed by custom, by general repeated practice and acceptance.⁴⁶

It is therefore proposed to examine the rule about the creation of customary law, empirically, and to that extent, that rule will itself be treated as a rule of customary

Lowe, "Do General Rules of International Law Really Exist?", 9 Review of International Studies (1983), p. 207 (hereinafter General Rules), @ p. 209.

⁴³ Toward World Order and Human Dignity: Essays in Honour of M. McDougal (1976 Reisman and Weston eds.), p. 367.

⁴⁴ International Law in Historical Perspective (1968), Vol. 1, p. 32.

[&]quot;rules about rules" on the one hand, and rules with which these rules are concerned on the other by stating that the former are the concern of officials (i.e. courts and legislature) and not (necessarily) the "mass of the population"; see e.g., Hart, *The Concept of Law*, pp. 59-61, 111 ff; Kelsen, *The Pure Theory of Law*, e.g. p. 10 (drawing a distinction between the application of a norm by officials and its obedience by the people as conditions for the effectiveness of a norm). But this distinction is difficult to sustain in the international system where States are both "officials" and "ordinary people" (dédoublement fonctionelle {see Scelle, "Règles générales du droit de la paix", 46 Recueil des Cours (1933), Vol. IV, p. 358). In any case, even if we could draw the distinction, the practice of States in their "official" capacity must be the best (and indeed the only) means of ascertaining the content of the secondary rule of customary law creation.

⁴⁶ Op. cit supra, n. 19, @ p. 54.

law.⁴⁷ Further testimony to the mutability of rules about the creation of law (which would place such rules in the category of customary law) are the relatively recent categories of norm described above as "élite norms" - ius cogens and obligations erga omnes.⁴⁸

It remains only to stress again, at the risk of repetition, that the question of consent is unilluminating where the constitutional law of the international system is concerned. If, for example, States choose to limit their sovereignty in any way (which itself would be an exercise of sovereignty⁴⁹) then this, while perhaps resulting in a direct change of say, the *customary law* situation, would affect, at the very most, only the *extent* of the principle of sovereignty, but not the *existence* of the principle of sovereignty itself, being a constitutional principle. Could States have legislative capacity if they were not already sovereign? The first international law-making act, as a matter of logic, could have occurred only with law-making capacity.⁵⁰

Conclusions

To summarize: customary international law, for present purposes, refers to those principles and rules which are derived from the practice of States and *opinio juris*, and which are mutable. It is not taken to refer to those rules (i) whose origins are not traceable (solely) to the practice of States, (ii) whose continued existence is not based on the practice of States, (iii) which would exist under any conception of (international) law,

⁴⁷ It seems that on either Henkin's or Fitzmaurice's view (see *supra*, n. 19), it is one that is mutable; the former would consider it to be a rule of customary law while the latter would consider it to be a fundamental legal principle. Its existence must be based on the way States see it.

⁴⁸ See *supra*, nn. 34 & 35, and accompanying text.

⁴⁹ See the Wimbledon case (PCIJ Reports, Series A (1923), pp. 24 ff).

⁵⁰ See Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), pp. 29 ff, on the paramountcy of what he terms the principle of "self-preservation", and the authorities he provides therefor.

or (iv) which are based primarily on judicial (or arbitral), rather than State, practice.⁵¹

sues need to be clarified here. There has been some doctrinal disagreement as to what amounts to State practice. The view which seems most acceptable, and which is adopted in this study is that the term "State practice" means any act or statement (and also omissions), by a State from which views can be inferred about international law. See Akehurst, "Custom as a Source of International Law", 47 BYBIL (1974-5, hereinafter Custom), pp. 1-11, and Lobo de Souza, EEZ, pp. 70-83, and especially the latter, for convincing criticism of those who advocate a restrictive meaning of State practice.

The act, statement or omission can itself be the practice, and it could be evidence of the practice (cf Article 38(1)(d) of the Statute of the International Court of Justice, which speaks of subsidiary means for the determination of rules of law). The distinction between practice and evidence is not always strictly drawn. As will be seen in Chapters IV and V, all kinds of statements and acts and omissions are cited by States and tribunals as State practice. This is not really a problem. If one accepts the view that State practice is constitutive of the law, then we need to look at the practice to know what the law is. If one accepts the view that State practice is declaratory of the law, then we would still need to look at the practice as evidence of the law, since such evidence would prove the law, and it is doubtful whether there is any other, or better, evidence. If one accepts the view that custom is a dynamic and evolutionary process (i.e. practice can be both constitutive and declaratory), one would still need to look at the practice to determine the state of the law at a given point in time. As has just been argued, the essence of customary law is the practice of States; we cannot refer to the first without the second.

CHAPTER II

THE RELATIONSHIP BETWEEN CONSENT AND OPINIO JURIS

From the description of consent given in the previous chapter, it should have become apparent that it is a psychological phenomenon; it is rooted in the choices made by the parties involved. Doctrine on customary law, however, already deals with another psychological phenomenon in the law-making process, namely, opinio juris. It is widely accepted that customary international law is made up of two elements, namely, a material element, i.e. State practice, and a psychological element, i.e. opinio juris. In order to determine properly the meaning of consent, we should compare it to, and if appropriate, distinguish it from, this other psychological phenomenon, and this is aim of the present chapter.

Discussion of the role of *opinio juris* can for our purposes be put into two categories. Each of these will be considered, and then compared with the role played by consent as sketched out in Section B of the previous chapter. (a) The first relates to the role of *opinio juris* in the law-creating process (i.e. whether it is declaratory or constitutive of the law). (b) The other issue relates to the role of *opinio juris* in qualifying State practice, in the sense of distinguishing between acts which are legally relevant and those which are not. It is essential to distinguish between practice which is considered to be legal and practice based on courtesy, morality or fairness, and the recognition by States of the legal quality of practice (i.e. *opinio juris*), is considered to be the touchstone of this distinction. This second function (b) does not seem to be very different from the first if what we are concerned with is the question of cognition (i.e. how to identify a rule of customary law).

¹ The point on which doctrine is divided in this respect is whether *opinio juris* is capable of performing this task of differentiation satisfactorily, not whether the task needs to be performed. See Thirlway, *Law and Procedure*, pp. 43-44.

A. OPINIO JURIS, CONSENT AND THE CREATION OF CUSTOMARY LAW

1. The problem In this section we will consider whether the role played by opinio juris in the law-making process is different from the role played by consent outlined in Section B of the previous chapter.

The issue is whether it is constitutive or is only declaratory of customary law. It is declaratory if the *opinio juris* of States is needed only to demonstrate the existence of customary law which arises independently. It is constitutive if it is taken to be the source of the law, i.e. if the law is created (whether exclusively or in conjunction with other elements, such as State practice) by the *opinio juris* of States. It has been said that

...as regards the nature of the psychological element, doctrines are in conflict - the positivists reduce *opinio juris* to an act of will of numerous States to be bound by a tacit agreement (the voluntarist conception). The objectivists state that the *opinio* constitutes the obligatory recognition of a pre-existing right (the intellectualist conception).²

In other words, while the "voluntarist" conception equates opinio juris and the will of States the intellectualist conception views the two notions as being completely different.

A dictum of the International Court of Justice, which is one of the more frequently cited statements on the requirement of *opinio juris*, requires that the practice of States must

...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 existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.³

This may be taken to indicate a declaratory conception of opinio juris. However,

² See *ICJ Pleadings* (1966), Vol. 10, p. 8, per Dr. Verloren van Themaat, arguing on behalf of the Republic of South Africa in the South-West Africa case.

In the Asylum case ((1950) ICJ Reports, p. 266) Judge Azevedo stated that

The opponents of the voluntary theory even go so far as to say that it is impossible to seek a psychological element which remains necessarily intangible... (@ p. 336)

³ See the North Sea Continental Shelf cases, ICJ Reports (1969), p. 3 @ p. 44, para. 77.

discussions of *opinio juris* virtually always make reference to the logical difficulty posed by this classic statement in particular and the declaratory view in general; "How can custom create law if its psychological component requires action in conscious accordance with law pre-existing the action?" It is widely acknowledged that such a conception of *opinio juris* is simply unable to account for the creation of new rules of customary law, requiring as it does that something must already be legal before it can become law. One way round this problem has been to suggest that during the period of formation of the "new" rule, the States acting in accordance with it were mistaken, and they erroneously believed that their actions were required by law when in fact they were not. But it is difficult to accept that ill-founded beliefs are the source of customary law. The declaratory theory, therefore, seems inadequate.

⁴ D'Amato, *The Concept of Custom in International Law* (1971, hereinafter *Concept*), pp. 66-68, and also pp. 47-56 (including a survey of the literature on this circularity problem). Similarly, the criticisms of Hudson's proposals in the International Law Commission seem to confirm this view. He had argued that the practice should be in accordance with prevailing international law, but the other members disagreed on the basis that the character of custom as a formal source of law would be denied. See *Yearbook of the International Law Commission* (1950), Vol. I, pp. 4-7.

⁵ This was, at one time, suggested by Cheng, "United Nations Resolutions on Outer Space: "Instant" International Customary Law?", 5 *Indian Journal of International Law* (1965), p. 23, @ p. 45, n. 107, and Kelsen, "Théorie du droit international coutumier", 1 *Revue international de la théorie du droit* (1939), pp. 253 @ 263.

⁶ See Suy, Les Actes Juridiques Unilateraux en Droit International Public (1962), pp. 223 ff; Kelsen, *ibid*. D'Amato, Concept, stresses the difficulty in imagining that "all States participating in custom-formation were erroneously advised by their counsel as to the requirements of prior international law" (@ p. 66).

Another related problem with the declaratory theory is that it necessarily implies that custom cannot be a source of law; opinio juris is simply evidence of law which is created by another source. This is similar to the criticisms directed at the wording of Article 38(1)(b) of the Statute of the International Court, which speaks of "International custom, as evidence of a general practice accepted as law". As Anzilotti wrote, the reverse is the truth; "...it is precisely the generally accepted practice which constitutes customary law" (Corso di Dirrito Internazionale, Vol. I (3rd edn. 1928), p. 99. See, in this regard, Wolfke, Custom in Present International Law (2nd. edn., 1993), pp. 26-28. The wording of Article 38(1)(b), unless it is the result of a mistake or negligence on the part of the drafters, smacks of the work of the historical school of legal theory, who found the true source of law in the spirit of the people (Volksgeist). The utility of this theory has been criticized; see e.g., D'Amato, Concept, p. 47-48, and Walden, "The Subjective Element in the Formation of Customary International Law", 12 Israel Law Review (1977), p. 359-362.

2. The suggested solutions This inadequacy has evoked a number of responses. One suggested solution is to abandon altogether or minimise the need for proof of a psychological element. But this is not satisfactory; opinio juris cannot be abandoned in this way. As Brownlie has written,

it is in fact a necessary ingredient. The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of States recognizes a distinction between obligation and usage. The essential problem is surely one of proof, and especially the incidence of the burden of proof." ⁹

To jettison *opinio juris* would involve throwing the baby out with the bathwater; some similar criterion for distinguishing between law and non-law would still be needed.

A related suggestion as how to solve the problem of circularity has been, instead of abandoning *opinio juris* outright, to *circumscribe* its role, in the following way. Since the problem with the declaratory view is that it cannot account for the creation of new law, some have argued that it was never intended to serve that function, but was only meant to serve the function of distinguishing between the legal and the non-legal. If this view is correct, *opinio juris* can at once be dismissed as being irrelevant to the present enquiry, which is concerned specifically with the creation of law.

For example, D'Amato traces the origins of the modern conception of opinio juris to Gény, who employed the term opinio necessitatis to describe the psychological element

⁸ See e.g., Kelsen, 1 Revue internationale de la théorie du droit (1939), pp. 253, 264-6, and Guggenheim, Traité de droit international public (1st edn. 1953), Vol. 1, pp. 46-8, both of whom altered their positions subsequently; Kopelmanas, "Custom as a Means of the Creation of International Law", 18 BYBIL (1937), p. 127 ff; Séfériades, 36 Revue général de droit international public (1936), pp. 129, 144; Lauterpacht, The Development of International Law by the International Court (1958), (hereinafter Development), p. 380; de Visscher, Theory and Reality in Public International Law (1957), p. 149, n. 29; Silving, 31 Iowa Law Review (1946), p. 614 @ 626; D'Amato, Concept, Chs. 3 and 4; Haggenmacher, Deux éléments pp. 124-5. See also Judge Azevedo in the Asylum case, ICJ Reports (1950), p. 266 @ 336, and Judges Tanaka, Lachs and Sørensen in the North Sea Continental Shelf cases, ICJ Reports (1969), p.4, at pp. 176, 231, and 246-47 respectively.

⁹ See Brownlie, *Principles*) p. 7. See also Akehurst, *Custom*, pp. 32-34, and 36-37, stressing that the concept is too well established to be abandoned so easily.

which was needed to distinguish (domestic) legal custom from other usages which "claim in vain the character of a source of positive private law". ¹⁰ D'Amato argues that while Gény's analysis greatly influenced contemporary writers on international law, he states that most of them forgot or overlooked his (Gény's) reason for introducing the concept, namely to separate the legal from the non-legal. ¹¹ Similarly, Walden, in distinguishing between consent-based theories of custom and theories based on *opinio juris*, writes that while the former category was concerned with explaining how customary law is created, the latter was "postulated in order to explain the difference between custom on the one hand and comity, usage etc., on the other". ¹² If these views are correct, *opinio juris* cannot validly be criticized for not fulfilling a role which it was never intended to fulfil, i.e. accounting for law-creation.

But there are difficulties with this view. Firstly, a theoretical one; even if opinio juris serves only to distinguish law from non-law, so that some other notion would be expected to account for law creation, this latter function could never be served precisely because opinio juris precludes it. Nothing can be a source of new customary law if opinio juris requires that any action must be in accordance with the existing law. So while the declaratory conception of opinio juris cannot itself explain law-creation, it prevents any other concept from serving that function. This view of opinio juris is therefore unacceptable, as it is impossible to divorce it from the problem of law-creation.

Secondly, the bases upon which this restricted role is attributed to opinio juris are arbitrary. As D'Amato admits, Suarez, writing as far back as 1612, had spoken of the

¹⁰ Méthode d'interpretation et sources en droit privé positif (1899), para. 110.

¹¹ See D'Amato, Concept, pp. 48-49 (cf. Guggenheim, op. cit., supra).

¹² See Walden, op. cit., supra, n.7.

need to distinguish between *civil* and *irrelevant* customs.¹³ Furthermore, the modern conception of *opinio juris* is generally traced back to the historical school of legal theory, exemplified by Puchta and Savigny.¹⁴ Now the role attributed to *opinio juris* in the writings of these jurists did not relate primarily to the distinction between the legal and the non-legal, but to the true source of law, *Volkgeist*, or the spirit of the people of a nation. While Puchta denied the existence of international law because of the absence of a people whose spirit it expressed, Savigny recognized a community of race and religion, at least in Europe, which he found to be the basis of international law.¹⁵ If these writers spoke of *opinio juris*, it is not clear why we should ignore their treatment of the concept and focus instead only on that of Gény. If it is considered that writers before Gény have dealt with *opinio juris* in relation to the creation of law and not only in relation to the separation of the legal and the non-legal, perhaps it is not surprising that writers since Gény "forgot" or "overlooked", as D'Amato puts it, the role he ascribed to *opinio juris*. It seems, therefore, that the concept had a wider meaning than D'Amato ascribed to it. For the same reason, it is difficult to accept Walden's suggestion that *opinio juris* was not

¹³ Suarez, A Treatise on Laws and God the Lawgiver (Carnegie Series, 1944), p. 446; see also Classics of International Law, no. 20, (Scott ed. 1964), Vol II, pp. 565-566, where he refers to the requirement of intention to create law before practice can become law. See also Parry, The Sources and Evidences of International Law (1965), p. 61, who attributes the concept of opinio necessitatis to Blackstone. See Stern, "La coutume au coeur du droit international: Quelque réflexions", in Le droit international: unité et diversité (Mélanges offerts à Paul Reuter) (1981), pp. 485 ff., for a history of the concept.

¹⁴ See the surveys of the writings of jurists of the historical school on the concept of opinio juris in Kosters, Les Fondements du Droit des Gens, Bibliotheca Visseriana (1925), Vol. IX, pp. 201-202, and Allen, Law in the Making (7th edn.), pp. 87-97.

¹⁵ See Kosters, ibid. See also Guggenheim, 94 Recueil des Cours (1958), Vol. II, pp. 52 ff., who attributes the first use of the concept in international law to Rivier (*Principes du Droit des Gens* (1896), vol. I, p. 35).

The consideration that the historical school was more concerned with the differences in municipal substantive law and why these differences existed would tend to support D'Amato's arguments. But this would only call into question the utility, on the part of Rivier and Gény, of applying the work of Puchta and Savigny to a completely different context, i.e. international law. Puchta and Savigny did not seem to be concerned with the positive law-creating process, and did not therefore concern themselves with the implications of their ideas for the law-making process. But it is that process that concerns us in this study.

Thirdly, even if the arguments of D'Amato and Walden are correct, subsequent doctrine has treated the concept differently. For example, the International Court has treated the concept in an ambivalent way. In the Lotus case¹⁷, the Court spoke of "being conscious of having a duty", and in the North Sea Continental Shelf cases¹⁸, it spoke of "a belief that the practice is rendered obligatory by the existence of a rule of law requiring it". These would suggest that opinio juris serves only to distinguish between a practice required by law and a practice required by other considerations. But even in the North Sea Continental Shelf cases, the Court said that "...the need for such a belief, i.e. the existence of a subjective element, is *implied* in the very notion of the opinio juris sive necessitatis" (emphasis added). 19 What the Court said was that the function of distinguishing between law and non-law was implicit in the concept, not that it was coterminous with it; in other words, it is quite possible that it is only one, and not the only, aspect of opinio juris. This is supported by the fact that, at other times, the Court has spoken of a requirement of "acceptance" as law, of the "view" of States that a practice is binding, and of the "attitude" of States regarding a practice.²⁰ These terms would seem to suggest that opinio juris is not intended simply to distinguish between legal and non-legal practice, as it is possible that it is this "acceptance", "view" or "attitude" that makes practice legal, which would in turn suggest that opinio juris has a part to play

¹⁶ Similarly, Quadri ("Cours général du droit international public", 113 Recueil des Cours (1964), Vol. III, p. 327), argued that the subjective element is not the cause but the effect of the existence of the rule, and therefore serves as evidence thereof. But (a) this is not supported by the Court's practice (see below); (b) even if the rule exists, does it have a legal character without the subjective element?

¹⁷ PCIJ Reports (1927), Series A, No. 10, p. 28.

¹⁸ ICJ Reports (1969), p. 44, para. 77.

¹⁹ *Ibid*.

²⁰ See, e.g., the Asylum case, ICJ Reports (1950), p. 277; the Nottebohm case, ICJ Reports (1955), p. 22; the Nicaragua case, ICJ Reports (1986), pp. 99-100, para. 188, respectively.

in accounting for law creation.²¹ A theory of *opinio juris* that fails to take account of the way it is presently perceived is flawed.

To sum up thus far: opinio juris as traditionally conceived cannot account for the creation of new rules of customary law. The question then arises as to whether it can be rejected entirely, but this would be unacceptable. The further question is whether it can be partially maintained, since some have argued that it was only ever intended to serve only a limited function; but this is also unacceptable. Some modification of the traditional view is therefore necessary, because the concept cannot be dismissed in its entirety.

As stated above, the problem arises from the conception of *opinio juris* which makes it necessary to have recourse to an erroneous belief or conviction that something is already law before it can become law. Several alternatives have been proposed in the literature²², but two seem to be most acceptable.

²¹ Similarly, many writers have treated opinio juris as having a law-creating function. Stein writes that "...opinio juris is no longer seen as a consciousness that matures slowly over time...but instead a conviction that instantaneously attaches to a rule believed to be socially necessary or desirable."; (Different Drummer @. p. 465). See also Cheng, in The Structure and Processes of International Law (MacDonald and Johnston eds., 1983), pp. 531-32; Dupuy, Mélanges offert à Charles Rousseau (1973), pp. 83-87; Tunkin, Theory of International Law (transl. Butler, 1974), p. 133; Akehurst, Custom, pp. 36-37.

²² Those theories which seek to abandon or minimize the need for opinio juris have already been considered supra, nn. 10-21 and accompanying text; for criticism, see Akehurst, Custom, pp. 32-34. Another group of theories refers to a naturalistic idea of "social necessity"; see e.g., de Visscher, 6 Recueil des Cours (1925), Vol. 1, p. 235 @ 349-353; Kopelmanas, "Custom as a means of the Creation of International Law", 28 BYBIL (1937), p. 127 @ 148; Kelsen, General Theory of Law and State (1945), p. 114, and Principles of International Law (1952), p. 307; Sørensen, Les Sources du droit international (1946), pp. 106-107, and 101 Recueil des Cours (1960), Vol. III, p. 50; McDougal et al, Law and Public Order in Space (1963), p. 117; Verdross, Völkerrecht (1964), p. 138; Thirlway, International Customary Law and Codification (1972), pp. 53-56, and Law and Procedure, pp. 42 ff; Charpentier, L'Élaboration du droit international public (Société français pour le droit international, 1974)), p. 115. See also the various writings and judicial pronouncements of Judge Alvarez, e.g. ICJ Reports (1951), pp. 148-49. Bos, A Methodology of International Law (1983), p. 223, suggests that opinio juris (and not voluntas, which he considers to be insignificant in the law making-process), is the "belief that a certain practice should or may be followed by rights because it satisfies a conception of legal propriety held by the States

The first argues that the belief or conviction does not have to be well-founded, honest or genuine, as long as it is expressed to be a belief.²³ Now such a statement made by a State or a group of States can never be true, because new law is necessarily different from old law. Therefore the State or States in question are really putting forward a new rule of law.²⁴

concerned...". The problem with these theories is that one State's idea of social necessity may not correspond to that of others; and in any event, it is left up to the States themselves to decide what amounts to social necessity or legal propriety, which, for practical purposes, amounts to an espousal of constitutive doctrine. Furthermore, inasmuch as these theories take us back to the idea of belief, they are unsatisfactory because they bear all the difficulties inherent in the declaratory theory. See Akehurst, *Custom*, p. 37. See also and D'Amato, *Concept*, p. 71-72.

²³ See Akehurst, ibid., pp. 36-37; Tunkin, *Theory of International Law* (1974, trans. by Butler, hereinafter *Theory*), pp. 123-133, esp. p. 133; Cheng, *Custom*, pp. 530-533; Stern, op. cit., p. 487. Suy, Les Actes Unilateraux en Droit International Public (1962), p. 234, actually treats opinio juris as "acceptance", thereby equating it with consent. Thirlway, International Customary Law and Codification (1972), pp. 54-56, seems to come close to accepting this view when he states that "...what counts is the view held by a State of its own conduct in relation to the law...if a State considers, rightly or wrongly, that its recognition would be socially desirable...then this is sufficient...". (emphasis added). He also writes that "Only if the view that the custom should be law has the effect of making it law (provided it is coupled with sufficiently general usage), can subsequent practice be coupled with the correct view that custom is the law" (ibid.) This actually supports the constitutive theory; while it is true that he stresses the social desirability of the rule, it is ultimately up to the States to decide whether the rule is socially desirable or not. See, similarly, Stein, Different Drummer, p. 465, and Scelle, Droit International Public (1944), p. 398. Even D'Amato, who rejects opinio juris in its entirety, however suggests an alternative which comes very close to the constitutive theory. In putting forward his "realistic" theory of custom, he states that "...international law is entirely phenomenological; it does not exist apart from the way the representatives of states perceive it." The alternative qualitative element he proposes is promulgative "articulation", "a requirement that an objective claim of international legality be articulated in advance of, or concurrently with, the act which will constitute the qualitative elements of custom". This, he maintains, is reflected in Article 38 of the Statute of the International Court defining custom as evidence of a practice "accepted" as law. He then states that "This voluntaristic aspect of international law is precisely what makes it acceptable to nation-state decision makers": see Concept, pp. 74-5. It is, however, difficult to determine exactly how "voluntaristic" his theory is, because, in spite of the above, he rejects the definitions of opinio juris as consent; ibid., pp. 68-70; see also pp. 187-199.

²⁴ As Walden, who equates opinio juris with Hart's notion of the "internal aspect" of rules, puts it, "For customary law to be generated, conduct must be treated as a standard of behaviour; this may take the form, either of complying with an existing standard, or of creating a new one" (emphasis added); see "Customary International Law: A Jurisprudential Analysis", 13 Israel Law Review (1978), p. 98. Even though, as seen earlier, he denied in an earlier work (see n. 12 supra) that opinio juris was intended to have a law-creating function, his reformulation of the concept ascribes that role to it, and he thereby espouses the

The second alternative is the group of theories which hold that *opinio juris* operates at a later point in the life of a practice. This involves postponing the role of *opinio juris* (to a later stage in the formative process of a customary rule), so that States initiating a practice are not required to have *opinio juris* as traditionally conceived, while other States must at some point accept, acquiesce in or recognize (i.e. have *opinio juris* regarding) the legality of the new practice.²⁵

- 3. A comparison of the workable theories of opinio juris and consent Taking these two modified theories of opinio juris in turn, we may compare the descriptions therein with the idea of consent.
- (a) The theory that belief does not have to be genuine. Consent was described above as a choice (on the part of the consenting party) that signifies agreement, compliance,

constitutive view. See also Rama Mao, 19 Indian Journal of International Law (1979), p. 519, who in arguing that Akehurst's view is artificial, states that "Why should one take the statement of a State which it knows is a false one in law, to be a necessary element?...It is submitted that the formation of customary law may well be explained by stating that an assertion of a right gets the sanction of customary law...provided it is acquiesced in or agreed to...and that no other mental element is needed except an assertion of a right" (emphasis added). But this is exactly what Akehurst said.

²⁵ See e.g. MacGibbon, "Customary International Law and Acquiescence", 33 BYBIL (1957), pp. 130-31; Meijers, 9 Netherlands Yearbook of International Law (1978), p. 3 ff; van Hoof, Rethinking The Sources Of International Law (1983), pp. 91-93 (who would include Thirlway's theory in this category on account of the fact that he does away with the traditional requirement of simultaneousness of usus and opinio); Mendelson, International Law Association (Report of the 33rd Conference (Warsaw) 1988), Annex 1, First Report of the Rapporteur, p. 938-39 (distinguishing between opinio necessitatis, which is what the States initiating the practice have in the first place, and opinio juris, which is what develops in relation to the practice in question (cf. Fitzmaurice, 92 Recueil des Cours (1957), pp. 101-106); Villiger, Customary International Law and Treaties (1985), pp. 29-30.

The difference between this group of theories and that which hold that opinio juris has no role to play in the law-creating process is that the former takes note of the evolutionary character of customary law. They would argue that at a later stage in the life of a rule, opinio juris can be both constitutive and declaratory, but opinio juris does play some part in the process through which a customary rule is created, because, as seen above, the alternative is that no new practice can be legal because the pre-existing opinio juris precludes that possibility. So even at the later stages, for a State to say that it believes its new practice to be law, it would still have the problem explaining away the old opinio juris. It is by claiming or acting as if there is a new opinio juris that the newer practice acquires a legal character, and it is in this sense that these theories are constitutive.

concurrence or permission regarding a given state of affairs. Here, *opinio juris*, in order to account for law-creation, becomes the same as claims made by States, which means that it is being equated with the consent of States.²⁶ Thus viewed, there does not appear to be any meaningful distinction between the two ideas.

(b) The "postponement" theories. Consent being a choice ratifying a given state of affairs, opinio juris on this view is identical to consent. Some states initiate a practice, but we do not look to them for opinio juris; rather we look to the reactions of other States to the new practice. If these other States consent to (i.e. agree, comply, concur with, or permit) this new practice, then there is opinio juris in relation to this new practice.²⁷

To sum up: if *opinio juris* is modified so as to account for or to permit) law-creation, it becomes indistinguishable, at least *functionally*, from consent.²⁸

²⁶ See *supra*, p. 3 ff. Of course, one State's claim as to a new *opinio juris* differing from an established *opinio juris* would probably have to be acquiesced in or consented to by other States for the rule contained therein to be opposable to those States.

It could be that the effect of the acceptance of those States which follow the lead of the initiating State(s) is not purely constitutive; for example, they may already recognize the legality of the pre-existing practice, so that their subsequent ratification becomes merely declaratory. They may think the practice is already law. But if recognition is required, is it not their (and other States') original recognition which would confer a general normativity on the practice of the initiating States in the first place? Even if it is maintained that, at the later stages, the *opinio juris* of States is both constitutive and declaratory, the constitutive element is still there. In a case where a truly general *opinio juris* exists, it may be difficult for a State or some States to sustain a different *opinio juris*; but this does not suggest a difference between *opinio juris* and consent, but only a difference between the general and the particular. See the next footnote.

²⁸ It might be objected that there is still a difference between *opinio juris* and consent, as both subjective elements can exist on the part of the same party; in other words, a State ϕ might will or consent to X, but believe/recognize that it is bound by Y. To put the same objection differently, *opinio juris* is what counts; consent and will cannot oust the binding *opinio juris*. But there are a number of responses to this.

⁽a) The objection just described causes difficulty for the conclusion reached in the text only if one adheres to the declaratory view, which draws a distinction between consent and belief/recognition in the declaratory sense (see the Section C of the present Chapter for a discussion of this distinction). If we abandon the conception of opinio juris as "belief" (i.e. the declaratory theory, which we should reject because it precludes the possibility of new customary law), and focus instead on a conception of opinio juris which can account for the making of new law, the problem will be avoided.

- (b) The objection under consideration deals with a situation where a State is already under an obligation. In other words, our State ϕ would be attempting to revoke its established obligations. But to say that consent is indistinguishable from opinio juris is not to say that established obligations can be revoked willy-nilly. In other words, the objection under consideration is based on the situation where new rights are claimed in the face of already established obligations. It does not necessarily tell us anything about the relationship between opinio juris and consent. The objection may also beg the question of how the obligation arose in the first place; could it not be the said recognition of this State that established the obligation in the first place?
- (c) Even we are talking about new law, rather than established obligations, the objection under consideration does not underline a difference between opinio juris and consent, but only a difference between the general and the particular/individual. In other words, one could say that State A has an opinio individualis juris which differs from the opinio generalis juris, just as one can say that State A has consented to something which differs from that to which other States have consented. In other words, just as consent can be individual, aggregate, or unanimous, so can opinio juris. One of the main purposes of this thesis is to examine the relationship between the general and the particular/individual; all that is being suggested here is that it makes no difference whether we speak of general or individual opinio juris or general or individual consent. Therefore, the objection prejudges the issue: what we want to find out in this enquiry is whether a general opinio juris binds a particular State regardless of its own opinio juris, and thus prevents it from having a different opinio juris, even though it wills/consents to something else. Only when that question is answered in the affirmative can we depend on words and suggest that if a State in the same situation wills/consents to a different practice, that different will/consent cannot be described as opinio juris, but only as will/consent.

If it is true that requiring opinio juris is "little more than a slightly obscure way of asking the question" (Jennings, "What is International Law and How Do We Tell It When We See It", 37 Schweitzerisches Jahrbruch für internationales Recht (1981), p. 69), one can simply say the following: A State cannot oppose its own new conception of law against those who have not consented to it (or who do not have the relevant opinio juris).

Since we are yet to examine the issue of the effect of a general opinio juris on that of particular States, we can anticipate the possibilities. There seem to be two.

- (i) If the State is bound by the *opinio juris* or general consent of other States, then its own individual *opinio juris* or consent is inconsequential. (ii) Alternatively, if the more general *opinio juris* or consent is not automatically binding, then we would look at the position taken by the particular State. (a) If it had not participated in the more general *opinio juris*/consent, then its own *opinio juris*/consent could become the (or at least a) determining factor. (b) If it was a part of the more general *opinio juris*/consent, then it would be seeking unilateral termination of its obligations by having a different *opinio juris*/consent. In all these situations the two terms, *opinio juris* and consent, are interchangeable.
- (d) In the example given at the beginning of this footnote, the new position X to which State ϕ now wills or consents can give rise to particular, rather than general customary law. In other words, while it may be difficult (but certainly not impossible; see Chapter I, n. 6) to say that the very first State has opinio juris (rather than opinio necessitatis or simply will/consent), since it cannot be right in saying that its practice is already law, States following the practice after that State would not have a similar problem. Customary law only requires two States. See Chapter VI, below, for a fuller comparative discussion of the nature of both kinds of custom.

B. *OPINIO JURIS*, CONSENT AND THE DISTINCTION BETWEEN LAW AND NON-LAW

Akehurst has written that

If States habitually act in a particular way...is this because international law requires them so to act, or because international law merely permits them so to act? The frequency or consistency of the practice provides no answer to this question; *opinio juris* alone can provide the answer. Moreover, *opinio juris* is also needed in order to distinguish legal obligations from non-legal obligations, such as obligations derived from considerations of morality, courtesy or comity.²⁹

Even those who are sceptical about the traditional justification of opinio juris do not contest the fact that this function should be served in some way.³⁰ What they question

D'Amato, Concept, pp. 68-70, distinguishes between consent and opinio juris thus: "State A may 'consent' because it is a small power and State B is a major power, but such consent will not be at all the equivalent of a conviction that B is entitled to act as it is doing". But this (a) confuses motives/political reasons for acting with consent (see Chapter I, Section B, supra), and ignores the consideration that law is a consequence of practical politics, even in domestic systems; (b) distinguishes between consent and the declaratory view and not, significantly, between consent and the preferred constitutive view; (c) ignores the consideration that the requisite consent must be consent to a/the legal position, not just consent to a one-off agreement for the sake of convenience or consent for any other reason. This last point is confirmed by the Aminoil case (ILM 1982, p. 976), where the tribunal held that consents given in a particular setting was not evidence of opinio juris, generalis or individualis. There is a difference between consent and consent to legal character. See, on the issue of coercion, Chapter I, p. 5, n. 6.

⁽e) It is submitted that the "postponement" theories give the most convincing explanation of the operation of opinio juris; see, for example, the excellent version given by Lobo de Souza, EEZ, Chapter V, especially pp. 137 ff. Now, if a rule cannot be said to be legal without opinio juris, then opinio juris must be a requirement. The point being made here is that unless one can speak of a duty to recognize a practice, opinio juris is indistinguishable from consent. It is submitted that there can be no such duty, as a matter of logic; the duty would be meaningless, empty and unnecessary if the normativity of the rule is a fact regardless of the recognition required. On this duty, see n. 45, below, and Chapter V, especially Section C.

²⁹ Akehurst, *Custom*, p. 33.

³⁰ See, e.g., Lauterpacht, *Development*, p. 380; D'Amato, *Concept*, pp. 85-87, and also pp. 66-68; Haggenmacher, *op. cit.*, pp. 124-25; Judges Lachs and Sørensen, *ICJ Reports* (1969), pp. 231 and 246-247 respectively.

is whether *opinio juris* (or indeed any other notion) can fulfil this function adequately.³¹ Traditional theories of *opinio juris* are problematic because it is often difficult to find clear indications that States consider a given rule or practice to be obligatory. The problem is largely one of proof. If *opinio juris* is described as belief or conviction, the problems involved in finding out its content are patent.³²

The problem seems to be tied up with the idea of belief. But if we accept the modifications to the traditional theories of *opinio juris* described above, it could be that the position could be improved. The treatment of the matter by Akehurst is pertinent:

The traditional view implies, even if it does not state expressly, that opinio juris consists of the genuine beliefs of States. It is submitted, however, that a statement by a State about the content of customary law should be taken as opinio juris even if the State does not believe in the truth of the statement. It will often be impossible to prove that a State did not believe that its statement was true; however, even if such proof is forthcoming, it does not detract from the value of the statement.³³

On this view, a State making such a statement is to all intents and purposes consenting to the rule contained in its assertion.³⁴ It is true that such statements are not always forthcoming; but the essence of this lies not so much in the proposition that statements are helpful in themselves, as in the fact that we hereby move away from some of the

³¹ But see Thirlway, Law and Procedure, pp. 44-45 (and authorities cited thereon), who states that "It may be doubted whether there is in fact any real risk of confusion between established, but non-binding, protocolary practices, and rules of customary international law." To this, one might respond as follows: what about the equidistance principle in the North Sea Continental Shelf cases? See ICJ Reports (1969), p. 4, @ p. 43, para. 74, and p. 44, para. 77.

³² Principles, p. 7, and see Akehurst, Custom, p. 34, n. 4. See also D'Amato, Concept, pp. 33-41, for a discussion of the difficulty in finding out the beliefs of States.

³³ Akehurst, Custom, p. 37.

³⁴ See *supra*, Chapter I, n. 5. Of course, this does not mean that it thereby becomes free of existing obligations. The State's new will must be accepted by other States for it to be opposable to them. On whether this can only be called will and not *opinio juris*, see n. 28, *supra*.

The way in which the consensual explanation of *opinio juris* could improve upon belief can be demonstrated thus: when a State makes a novel claim or acts in a novel way, it is much easier to take the State's claim at face value, and assess the possible legal consequences thereof, than it is to ask whether that State really did believe in the legality of what it claims or what it purports to do. For example, if States A to M deliberately exploit the resources of the exclusive economic zones of States N to Z, it would be easier to say that States A to M have willed/consented to a different régime or have an *opinio juris* different from the old one, than it would be to prove that the States in question believed their actions to be in accordance an existing rule of law. And as we have seen, belief makes it difficult to explain changes in a customary law régime. Consent seems easier to prove than belief.

Alternatively, even if this argument (that consent is easier to prove than belief) is unconvincing, the position would be that *opinio juris* and consent are not different in this respect, in that the same difficulties of proof will exist in either case. On such a view, no problems would be caused by speaking of consent to the legality of a practice as distinct from belief in the legality of that practice.³⁶ A question asked rhetorically by Koskenniemi sums up the point that both belief and will/consent suffer from the same defects: "How can we speak of 'will' or 'belief' or make a meaningful distinction between the two in respect of such corporate entities as States?"³⁷ It is true that consent

³⁵ See D'Amato, Concept, pp. 135 ff.

³⁶ For example, it will make no difference if one accepts the view that only a majority of States, including perhaps those whose interests are specially affected by the subject matter of a given rule, need to have *opinio juris*; the same criticism is often levelled at the sometimes alleged requirement of universal consent.

³⁷ Koskenniemi, From Apology to Utopia, p. 374-75. This passage is accepted only insofar as it stresses the similarity between will and belief. The part of it that seems to imply that States can neither will or believe because they are not natural persons is not accepted here (for such arguments, see Slama, 16 Oklahoma City University Law Review (1990), 652-653 and footnotes, and Tesón, 15 Yale Journal of International Law (1990), pp. 99 ff). States do

may not be synonymous with belief; what one believes to be the case may not be what one wills/consents to. But once we move away from the declaratory theory (which requires us to make reference to belief) to the constitutive theory, the distinction between will/consent and belief vanishes.³⁸ All that the constitutive theory does, in taking us away from enquiring into the reasons why a State acts in a particular way, is to highlight the fact-that belief does not have to be genuine; what matters is the fact that it is expressed as a belief.³⁹

The foregoing would suggest that there is nothing to be lost, but perhaps something to be gained, by treating *opinio juris* as consent.

C. OPINIO JURIS: SOME REMAINING PROBLEMS

It could be argued, in response to the foregoing, that the way in which *opinio juris* is described precludes adoption of (a variant of) the constitutive theory. Terms like "recognition", 40 "conviction", 41 "sense of legal duty" 42 or "consciousness" 43 seem

sign treaties, just as companies sign contracts in domestic law, and these are based on consent; surely all that matters is to determine whose consent can bind the State? It is the external manifestations of "State psychology" that are important, as has been argued in the text above about the relative advantage of consent over belief, and in Chapter I, Section B, supra, about the difference between will and consent. See also the last footnote in Chapter I, supra.

³⁸ Even D'Amato (see n. 25, supra), who argues against *opinio juris*, puts in its place a theory of articulation which in effect attributes constitutive effect to the actions of States rather than what they believe.

³⁹ For example, one may consider the Truman Proclamation of 28 September 1945 (see 40 AJIL (1946), Supplement, p. 45), which claimed that international law gave a coastal State exclusive rights over its continental shelf. In Akehurst's words, it made "no difference whether the United States genuinely believed that international law gave such rights to the coastal State or not; the important thing is that the United States said that international law gave such rights to the coastal State..." (Custom, p. 37, italics added).

⁴⁰ See, e.g., *ICJ Reports* (1969), p. 25, para. 27, p. 43, para. 74; pp. 173 and 181 (per Judge Tanaka); p. 232 (per Judge Lachs).

to imply a declaratory view of opinio juris. 44 But this is not so.

"Recognition", for instance, while it could in one sense mean "belief" or "involuntary" acceptance, can connote *choice*. Actually, if *opinio juris* is necessary, and it is defined as recognition of something as law, it follows that if something has not been recognized as being legal, then it is not legal. But States can choose to recognize or not to recognize.⁴⁵ As Fitzmaurice has put it,

To recognise a rule as binding is surely to consent to it at that point. Equally, to consent to a rule, is to recognise it as binding.⁴⁶

⁴⁶ Fitzmaurice, 92 Recueil des Cours (1957), Vol. II, p. 102. Schacter (op. cit. supra, Ch. 1, n. 1, @ p. 20 ff) argues that recognition does not necessarily imply consensual acceptance; the argument could indeed be made that as a matter of logic, recognition antecedes acceptance. But this does not get us very far. Firstly, the practice of the Court, as has been shown, has been to use various terms interchangeably to describe the subjective element. The Court simply did not have this distinction in mind. Secondly, if the distinction is drawn between recognition and consensual acceptance, it would mean that all that is needed is knowledge of the existence of a rule. But the concept of knowledge per se is devoid of normative consequences as far as the creation of rules of customary law are concerned. It



⁴¹ *Ibid.*, p. 231, (per Judge Lachs).

⁴² *Ibid.*, p. 44, para. 77.

⁴³ Ibid., p. 130, per Judge Ammoun, and p. 231, per Judge Lachs.

⁴⁴ See p. 2 supra for the third meaning of consent given in the Oxford English Dictionary, which describes it as covering both "agreement" (hence will/choice) and "opinion". Judge Lachs' Dissenting Opinion in the *North Sea Continental Shelf* case, *ibid.*, pp. 230-231, is also of especial instructiveness; in the space of one page, he uses a range of terms from "acceptance" to "consciousness" to refer to *opinio juris*.

Procedure, p. 54, where the contrary is suggested). Inasmuch as there is a right to dissent from a nascent rule of customary law, there cannot be a duty to recognize that rule, especially if recognition is what makes the rule legal. Even where the rule is so well established that any dissent therefrom is considered ineffective as a matter of law, it seems inappropriate to treat the ineffectiveness of dissent in such a case as a duty to recognize. If one must speak of a duty, it may be possible to speak of a much more fundamental one, namely, that all subjects of the law have a duty to obey it, in other words, that law is binding on its subjects, which is hardly a startling proposition. But even the existence of this duty as a *legal* duty to obey the law is doubtful, and its existence as a moral obligation has been seriously questioned; see Raz, The Authority of Law (1979), Ch. 12. It is submitted that rather than speaking of a duty to recognize the law, it is more appropriate to say that all States are bound by the law, including the law concerning the creation of law.

The same point may be made in relation to *any* term used to describe *opinio juris*. If *opinio juris* is needed before something becomes legal, and there *is* a right to dissent from general practice, ⁴⁷ *opinio juris must* have a "constitutive" meaning, even if it has a declaratory one as well. Otherwise, *opinio juris* is not necessary in determining the legal character of a practice, for the practice alone *is* law if there is no need for *opinio juris*.

As for the terms particular terms "conviction", "sense of legal duty" and "consciousness", apart from the point just made, they beg the question concerning the *reason* for the "feeling" they describe. In other words, what gives rise to the conviction, sense of legal duty or consciousness of duty? These terms seem to revive the declaratory theory which, as we saw, leaves the function of law-creation to some other notion (while at the same time preventing that same notion from fulfilling the function).⁴⁸ Could it not be that a conviction, sense of duty or consciousness arises *after* an obligation is *consented* to? If the process of law-creation implied in the foregoing discussion is correct, that would seem to be the case. There is also the consideration that other terms, such as "attitude".⁴⁹

surely cannot be the case that because a State or some States know of the existence of rule, it is binding on them. It is not the knowledge, but the acquiescence (to which knowledge is a logical antecedent), that creates rights and obligations (cf the Anglo-Norwegian Fisheries case (ICJ Reports (1951), p. 116, @ pp. 137-139). Is it the case that because legal subject X recognizes that two or more other legal subjects are bound by a rule (the problem is thrown into relief if the rule in question is a treaty or contractual rule) that that rule is binding on subject X? Or, to illustrate the problem even better, is it the case that because 70% of States recognize that the remaining 30% are bound by a practice, that practice becomes thereby binding on the 70%?

Lobo de Souza, who also considers that recognition does not necessarily refer to consensual acceptance (*EEZ*, @ p. 126), also states at later in his thesis that the way the Court uses the concept does not really suggest that it had this distinction in mind *Ibid.*, and p. 160).

⁴⁷ See Chapter IV, Section A, Subsection 4(ii)(a), below.

⁴⁸ Also, as regards these terms, the considerations discussed above regarding belief also apply: see supra, Section B.

In the North Sea Continental Shelf cases, *ibid.*, the Court also spoke of the lack of evidence that States acted "because they felt *legally compelled*" (italics added). Compulsion suffers from the same difficulties as the belief theory; (a) it is unable to tell us where this legal compulsion comes from and (b) it is unable to account for the way rules of customary international law are created or changed.

⁴⁹ See, e.g., ICJ Reports (1986), pp. 99-100, para. 188.

"view", 50 "opinion" 51 and "acceptance" 52 (which, at the very least, are ambiguous in that they could refer either to consent/will or belief; a State could have an attitude, view, or opinion, or accept something which differs from the position of others) have also been used to describe opinio juris. Furthermore, in many of these cases, the Court does not even use the term *opinio juris* at all. 53 So while all the terms used to describe *opinio juris* do not exclude some natural "constitutive" meaning, it has (already) been demonstrated that the declaratory view is too problematic to be sustained. We are thus left with their constitutive meaning, as that is the only one that can account for law-creation.

In the light of the foregoing, it would now be worthwhile to consider some pronouncements of the International Court and some juristic opinion which suggest a difference between consent and *opinio juris*.

In the Nicaragua case⁵⁴, the Court stated that

...there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States...[in accordance with Article 38] the Court may not disregard the essential role played by general practice...Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself

⁵⁰ See, e.g., *ICJ Reports* (1955), p. 22.

⁵¹ See, e.g., ICJ Reports (1969), p. 235, per Judge Lachs.

⁵² See, e.g., *ibid.*, p. 25, para. 27; p. 43, para. 73; p. 230 and 231, per Judge Lachs. See also *ICJ Reports* (1950), p. 277.

⁵³ See, e.g., the *Asylum* case, the *Anglo-Norwegian Fisheries* case, and the *Nottebohm* case, all considered in Chapter IV below.

⁵⁴ ICJ Reports (1986), p. 4.

that the existence of the rule in the *opinio juris* of States is confirmed by practice.⁵⁵

It would seem that the Court was talking about *opinio juris* (the terms used are *recognition* and *shared view*) and not consent; the *opinio juris* of States in general, and not the consent of the Parties to the case, was what mattered.⁵⁶ The distinction drawn between treaty and custom in the latter part of the passage quoted above would tend to support this, since it could be said that unlike the position in customary law, "to conclude a treaty is to consent to the application of... [the rule contained therein] to oneself⁵⁷ (parentheses added). It thus seems that while consent may be relevant in the case of treaties it is not so with customary law, and that *opinio juris* is what counts in customary law, and that *opinio juris* is therefore different from consent.

But it is not clear why the position should be different depending on whether the rule is contained in a treaty or whether it is a customary rule. Surely the fact that a rule is incorporated in a multilateral treaty does not mean that whatever interpretation that is given to the rule by any one or two parties to the treaty must necessarily be the right one in law. The text of the treaty is the law; what one or two of the parties deem it to mean may not always coincide with, for example, the plain meaning of the text or the intention of the drafters, or the meaning attributable to the rule by the other parties.⁵⁸ Similarly, in customary law, the view of particular parties as to the content of the general law is not necessarily accurate, particularly where, as far as the Court was concerned, the law was already clearly established.⁵⁹ In other words, the shared view of the parties as to the

⁵⁵ @ pp. 97-98.

⁵⁶ See Thirlway, Law and Procedure, p. 51, who draws this conclusion.

⁵⁷ Ibid.

⁵⁸ See, e.g. the Wimbledon case, PCIJ Reports (1923), Series A, No. 1.

⁵⁹ As far as the Court was concerned, this rule existed already, and was clearly established before the present dispute arose. That this was the case is confirmed by the Court's statement, made in the same context and concerning the tenacity of an established rule of customary law:

content of a rule, whether treaty or custom, is not necessarily enough. If we cannot sustain a distinction between the two kinds of law (i.e. treaty and custom) in the way the Court suggests, the conclusion must be that the purported distinction between consent (relevant in the case of treaty but not custom) and opinio juris (relevant in the case of custom but not treaty) becomes difficult to maintain.

It is submitted that the problem here could be that the Court was confusing two separate stages in the life of a rule of law.⁶⁰ The Court, when dealing with the position in customary law, was not dealing with the stage of its creation, but with ascertaining the existence/content of the rule, since as far as the Court was concerned, the law was clearly settled; thus consent was not important. Instead of staying at the stage of ascertaining the existence/content of the rule when it referred to treaty, so that the analogy would be exact, the Court switched to the stage of creation, the consequence being that it began talking about consent. The analogy/comparison is thus misplaced; what the Court thus seemed to be saying is that consent is relevant for the *creation* of treaty obligations, but that it is not relevant for the *ascertaining the continued existence* of a previously

^{...}instances of State conduct inconsistent with that rule should generally be treated as breaches of that rule, not as indications of recognition of a new rule. If a State acts in a way *prima facie* inconsistent with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself...the significance of that attitude is to confirm rather than weaken the rule (@ p. 98, para. 186)

The point is that the Court was not dealing with the way in which the customary law rule was created. Rather, the Court was concerned with ascertaining the continued existence of the settled rule. Established obligations cannot be revoked willy-nilly; if a rule is binding, what the parties to a case consider the rule to mean is never conclusive after that rule has been established. The role of consent, as far as the formation of a rule is concerned, would have been served by this stage, particularly where, as in the present case, the customary law in question is as good a candidate as there could be for the category of peremptory norms (jus cogens; see pp. 99-100, para. 188, and Judge Sette-Camara's Separate Opinion, @ pp. 199-200). The role of individual consent in revoking obligations is a different issue from its role in creating them.

It is true that it is not always possible to distinguish sharply between a clearly established rule and a rule that is still in the process of formation. But the Court, in this case, rightly or wrongly, did not consider itself as having been faced with such a difficulty.

⁶⁰ See Fitzmaurice, 92 Recueil des Cours (1957), Vol. II, p. 98 ff.

established customary rule. The proper comparison would have been to examine either the role of consent (a) in the *creation* of treaty obligations *and* customary law obligations, or (b) in determining the *existence* (as distinct from the process of creation) of a treaty rule *and* a customary rule. The result, in any case, is that insofar as the Court was not concerned with *creation* when it was dealing with customary law, the passage in question does not support a difference between consent and *opinio juris*. It is submitted that nothing in the Court's passage quoted here conflicts with the propositions that consent is relevant for the creation of both treaty and customary law obligations, and that in both cases, after the relevant rule is established, consent plays a much less significant role, and that in the case of customary law, since the consent of the parties is "not enough", reference must be made to the general *opinio juris*.⁶¹ Only at that stage in the life of a customary rule can a meaningful difference be drawn between the two concepts.⁶²

In any event, the Court stated that

...apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" - the expression used by the Court in its 1969 Judgment in the North Sea Continental Shelf cases (I.C.J.Reports 1969, p. 44) - that the Court has to appraise the relevant practice. (italics added.)⁶³

The fact that the "subjective element" is "express recognition" (which, as we have seen, can have both consensual and non-consensual connotations) underlines the possibility that the Court did not intend to stress any difference between *opinio juris* and consent.

In the North Sea Continental Shelf cases⁶⁴, concerning the applicability of the

⁶¹ See Chapter IV, Section A, Subsection 4 (i), below.

⁶² It is true that, custom being an evolutionary process, it may be hard to draw a distinction between law-creating and application of law. But a Court, and the International Court often does this, may find a rule clearly established, so that some discrepancies may be insufficient to undermine a rule. See the *Nicaragua* case (*ICJ Reports* (1986), @ p. 98, para. 185), and the *Anglo-Norwegian Fisheries* case (*ICJ Reports* (1951), p. 138. In any case, would the task not be made easier if reference is made to what the States in question have consented to instead of looking for a general practice?

^{63 @} p. 98, para. 185.

⁶⁴ ICJ Reports (1969), p. 4.

Dissenting Opinion, found that the Federal Republic was bound, as it had manifested opinio juris as to the applicability of the rule in its Proclamation of 1964 which referred to "the development of general international law, as expressed in recent State practice and the Geneva Convention on the Continental Shelf", so that

...if it may be claimed that the *opinio juris* of certain other States is in doubt or not fully proven, this is certainly not the case of the Federal Republic.⁶⁵

This would suggest, as was argued earlier, 66 that opinio juris is capable of individualization, as is consent. Thirlway, however, seems to be of the view that opinio juris does not operate in this way, that opinio juris means opinio generalis juris generalis. As he has written,

Could Germany become bound, otherwise than by acquiescence or estoppel, by a purported rule which had not yet attained full customary law status?⁶⁷

The implication is that where general customary law is concerned, reference is not to be made (solely) to the *opinio juris* of individual States, if such a notion exists, but to the views of several States, from which the *opinio juris* is to be inferred. Judge Lachs, he argued, appears to have been mistaken.⁶⁸ But as has been argued (apart from the consideration that "particular" customary law, which requires no more than two States, has "full customary law status"⁶⁹), there are some theories of *opinio juris* which hold that the concept is not simply used to confirm the recognition of existing obligations, but is also, in one form or another, concerned with the creation of new law. If these theories are right (and it is submitted that they must be if *opinio juris* is to be a workable

^{65 @} pp. 235-36.

⁶⁶ See *supra*, n. 28.

⁶⁷ Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989, Part One", 60 BYBIL (1989), p. 1, @ pp. 41-42. To estoppel and acquiescence may be added regional/local customary law.

⁶⁸ Judge Lachs also stated that
In sum, the general practice of States should be recognized as *prima facie* evidence that it is accepted as law. Such evidence may, of course, be controverted...on the test of *opinio juris* with regard to "the States in question" or *the parties to the case* (italics added). (@ p. 231)

⁶⁹ See Chapter VI, below.

concept), it would mean that opinio juris can operate prospectively, which would itself mean that there is no difficulty in speaking of a State having opinio juris only for itself. That State could be contributing, at the very least, to the development of the general customary law. After all, opinio generalis juris generalis must, at least in the earlier stages, have been no more than one or a few States' opinio individualis juris⁷¹, which, exactly like individual consent, may or may not have the effect of conferring rights and duties as a matter of customary law. In sum, it would appear that opinio juris can mean (and this is not meant to be an exhaustive list) opinio individualis juris individualis, opinio individualis juris generalis, or opinio generalis juris (including, conceivably opinio generalis juris individualis, e.g. a universally recognized historic right). The conceivably opinio generalis juris individualis, e.g. a universally recognized historic

⁷⁰ There are several dicta in the Nicaragua case which would suggest that opinio juris can be individual or at least confined only to a number of States, even in the context of general customary law. See, e.g, the passage quoted above, from p. 98, para. 185, of the judgment. At p. 100, para. 188, the Court stated that "...opinio juris may...be deduced from...the attitude of the parties and the attitude of States towards certain General Assembly resolutions...The effect of consent to the text of such resolutions...may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves". In the next paragraph, the Court, referring to the Helsinki Final Act, stated that "Acceptance of a text in these terms confirms the existence of an opinio juris of the participating States...". On the following page (@ para.191), the Court stated that "...the adoption by States of this text [i.e. Resolution 2625 on Friendly Relations] affords an indication of their opinio juris as to customary law on the question". See also the Joint Separate Opinion in the Fisheries Jurisdiction cases (ICJ Reports, (1974), p. 46, @ p. 48, para. 13: "...such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and their opinio juris on a subject regulated by customary law".

⁷¹ See Cheng, *Custom*, pp. 535-538.

⁷² See, e.g., *ICJ Reports* (1951), pp. 138-139. Haggenmacher (who provides, it is submitted, the most thoroughgoing, and highly critical, treatment of the requirement of *opinio juris* in the Court's jurisprudence (Deux éléments, @ p. 99), concludes from the treatment of the concept in the *North Sea Continental Shelf* cases that:

^{...}l'opinio juris...est d'abord et avant tout une conviction générale de la communauté internationale; mais elle est également perceptible dans chaque cas individuel, par le truchement de traités et des lois internes relatives à la délimitation du plateau continental...Ces convictions étatiques individuelles attesteraient ainsi une conviction collective, qui à son tour expliquerait et guarantirait la cohésion de la practique des États.

If, as he argues, the elements of practice and opinio juris are artificial constructions, would consent (not in the sense of a tacit treaty; see Chapter VII, Section A, Subsection 5, below)

This supports the argument that there is nothing inherent in the concept of *opinio juris* which would require that it can only be spoken of in relation to the community of States as a whole, and not in relation to a section thereof or even every State. It is then easily possible to use the terms "consent" or "opinio juris" without losing anything. As stated by Jiménez de Aréchaga (concerning General Assembly Resolutions),

the submission of proposals and amendments, abstentions or tacit acceptance of a given provision reveal the *opinio juris of each government represented* (emphasis added).⁷³

It is submitted that, if there is a difference between consent and *opinio juris*, it is, in the final analysis, a question of argumentative strategy. It is more convincing to "objectify" a rule, and thereby attempt to shift a burden of proving otherwise onto the opposing party. As Mendelson has written (albeit in a different context),

...if you can present your demand as an existing right, it is the other government who would ostensibly be disturbing the status quo by denying it, and not you by making the demand.⁷⁴

States will always try to find as much support for their position as possible, and where better than in the practice of other States? The less peculiar and individual that position is, the more acceptable it is likely to be. It is better to say "Everybody else agrees that x is the case", than it is to say "I think x, so there".

not seem to be a better term, given that it covers both psychology (opinio juris) and its manifestation (state practice)?

⁷³ See Change and Stability, Cassese and Weiler (eds.), p. 2.

⁷⁴ "Practice, Propaganda and Principle in International Law", *Current Legal Problems* (1989), pp. 8-9.

of the sea before 1977, in the face of increasingly extensive claims made by many States to jurisdiction over the waters adjacent to their coast. Japan claimed a three-mile limit to the territorial sea on the basis that "the great majority" of States followed that rule. But the simple and well-known fact is that the majority of States did no such thing. This claim was altered only in 1977, shortly after, even according to a Table compiled by the Japanese Ministry of Foreign Affairs, only twenty-two out of a total of a hundred and twenty-four States included in the survey still claimed the three-mile rule, while fifty-nine claimed a twelve-mile limit. See the 21 Japanese Annual of International Law (1977), p. 51. Brownlie, writing in 1966 (Principles of Public International Law, 1st edn., p. 178, @ n. 1), concluded

Conclusions

To conclude on the comparison between opinio juris and consent as far as the creation of law is concerned, the foregoing shows that opinio juris is needed, and if it is to operate satisfactorily, it cannot be distinguished, at least functionally, from consent.76

on the basis of claims made at the Second United Nations Conference on the Law of the Sea

⁽A/CONF. 19/8, p. 157), official declarations, legislation and actual practice of States, that twenty-three States claimed three miles, twenty-nine claimed twelve miles, four claimed four miles and seventeen claimed six. Other claims varied from five to a hundred and thirty miles. By 1973, the position was that twenty-three States claimed three miles while fifty-three claimed twelve (Principles of Public International Law, 2nd edn., p. 194, n. 2). See also the Fisheries Jurisdiction cases (ICJ Reports (1974), pp. 22-23, paras. 49-52), for a description of the lack of uniformity on the limits of the territorial sea for most of this century. It would be difficult to maintain that Japan's belief, prior to 1977, in the continued generality of the three-mile rule was based on State practice. Doubts may also be cast on the genuineness of such belief. But the point is that Japan said it based its claim to the three-mile rule on the opinio juris of States, and in fact, many States were prepared to sign bilateral agreements (usually of limited duration) recognizing Japan's claim. See Chapter V for a further discussion.

⁷⁶ It is also submitted that the only time when a meaningful distinction can be drawn between opinio juris and consent is after the rule has become established. At that stage, consent as such has no further role to play; the law is settled and subsequent attempts at departure may encounter difficulties (as Bos has written, "...the objector-State may have to accept the consequences of what might be considered to be a change of heart..." (Bos, A Methodology of International Law (1983), p. 247.) But we are concerned with the creation of customary law rights and obligations. It is submitted that the role of opinio juris in the lawmaking process is indistinguishable from the role of consent. The objections in this regard revolve around the distinction between contract and opinio juris (see Villiger, Customary International Law and Treaties, (1985), p. 27, para. 71, and references therein), but it has already been demonstrated that consent is not contract (see Chapter I, Section B, Subsection 3, supra).

CHAPTER III

A FRAMEWORK: THE DIFFERENT THEORIES

In the first two chapters, the role of consent in the creation of rules was examined. It is now proposed to examine how rules of customary international law come to be binding on individual States. At one end of the spectrum, there is the State that positively participates in, or accepts the legality of, a practice followed by others. At the other end of the spectrum is the State that expressly refuses to participate in, or accept the legality of, a practice. Between these two extremes is a State that does not clearly adopt a position. This study is concerned with the role played by the consent of States in the three different categories in determining the legal position of such States vis-a-vis the rule of customary law.

For the purposes of the present enquiry, it is proposed to identify a number of different ways in which the relationship between individual consent and "general" customary law can be described. Each is based on views that have been expressed in the literature on the subject, and they may be viewed as points on a continuum.

A. The "Intellectualist" Theory¹ The consent or practice of States may have only a minimal role to play, in the sense that the existence of a rule of customary law depends on its objective necessity or importance to the international community. An example of this is Judge Tanaka's statement in his Dissenting Opinion in the North Sea Continental Shelf case:

We must not scrutinize formalistically the conditions required for customary law and forget the social necessity, namely the importance of the customary law in question.²

He distanced himself from the positivists and voluntarists and aligned himself with

¹ This phrase comes from Verloren van Themaat's oral arguments in the *South-West Africa* cases, quoted *supra*, Chapter II, @ p. 34.

² ICJ Reports (1969), p. 4, @ p. 178.

those who advocate the objective existence of law apart from the will of States, [and] are inclined to take a more liberal and elastic attitude in recognizing the formation of a customary law attributing more importance to the evaluation of the content of the law than to the process of its formation(emphasis added).³

B. The Majoritarian Theory Individual consent may have no role to play; where there is a sufficiently general practice, the fact that a State has not accepted, or that a State has even expressly dissented from, this general practice, is inconsequential. In other words, rules of general customary international law are created by a system of majority rule, whatever the required majority may be (it could include, for example, the practice of States "whose interests are specially affected".) As Cheng has written,

The most important difference is of course that, while treaties are binding on only parties to them, rules of general (i.e. customary) law are binding on all parties to the international system (*erga omnes*)...the applicability of rules of general customary law is normally unconditional, subject only to such rules as those relating to reprisals and desuetude.⁵

C. The Persistent Objector Theory It may be that the situation described in (i) above is correct, but that there is an exception, to the effect that rules of general customary law, while in principle being applicable to all, will not be applicable to States which have

³ Ibid. See also, e.g., Judge Koretsky's Dissenting Opinion in the same case, @ p. 156; and O'Connell, International Law (2nd. edn. 1970), pp. 20-21); Schachter, 178 "International Law in Theory and Practice: General Course in Public International Law", Recueil des Cours (1982), Vol. IV, p. 118; Bos, A Methodology of International Law (hereinafter Methodology), pp. 247 ff; De Visscher, Problèmes d'interpretation judiciare en droit international public (1963), p. 221, 237-242, and 6 Recueil des Cours (1925), Vol. 1, @ 353; Verdross, Völkerrecht (1st edn. 1960), pp. 138 ff; Charney, "Universal International Law", 87 AJIL (1993), 529 (hereinafter Universal Law).

⁴ See the North Sea Continental Shelf cases, ICJ Reports (1969), p. 4 @ p. 43, para. 74.

⁵ Custom, p. 539. See also, e.g., Charney, "The Persistent Objector rule and the Development of Customary International Law", 56 BYBIL (1985), p. 1 (hereinafter Persistent Objector), and authorities cited thereat, esp' pp. 16-21; Judge Tanaka in the South-West Africa cases (1966), p. 3, @ pp. 291 ff; Condorelli, "Custom", in International Law: Achievements and Prospects (1991, Bedjaoui ed.), @ pp. 202-207. See also D'Amato, Concept, Chapter Four, whose theory of custom would make the activities of only two States in relation to a specific incident between them binding on all others.

unequivocally and consistently manifested their dissent from the rule during its formation.⁶

D. The Consensual Theory It may be that rules of general customary international law are not applicable to a particular State unless that State has in some way consented to that rule. In Tunkin's words,

the operative sphere of a customary norm is limited to relations between states who have recognized it as a norm of international law...[i.e.] to relations between those States which are parties to the tacit agreement.⁷

E. The Veto Theory It may be that no rule of general customary law will arise (even if there is a general practice) if any State dissents from that general practice; this differs from (ii) and (iii) above in that it would prevent the normativity of the practice not just for the dissenting State(s), but also for those States which do follow that practice inter se, at least as far as general customary law is concerned.⁸

F. A Comment On The Classification This categorization calls for comment, particularly as regards the relationship between the majoritarian theory, the persistent objector theory, and the consensual theory. It is apparent that the persistent objector theory is a tertium quid between the majoritarian and the consensualist theories. But it is equally clear that

⁶ See, e.g., Brownlie, *Principles*, pp. 10-11; Cassese, *International Law in a Divided World* (1986), p. 180, para. 97, and *Change and Stability*, p. 112; Akehurst, *Custom*, pp. 23-27; Waldock, "General Course on Public International Law", 106 *Recueil des Cours* (1962), p. 50. This theory is also referred to here as the "persistent dissenter" theory.

⁷ Theory, pp. 118, 124. See also, e.g. Strupp, "Les règles générales du droit de la paix", 47 Recueil des Cours (1934), pp. 309 ff; Anzilotti, Il diritto internazionale nei giudizi interni (1905), pp. 286-88; Watson, "State Consent and the Sources of International Obligation", ASIL Proceedings (1992), pp. 109 ff; Weil, "Towards Relative Normativity in International Law", 77 AJIL (1983), @ pp. 433-438; Lowe, General Rules, generally; Parry, The Sources and Evidences of International Law (1965), pp. 61-62.

⁸ See, e.g., Judge Altamira's Dissenting Opinion in the *Lotus* case, (*PCIJ Reports* (1923), Series A, No. 10, @ p. 103), and Judge de Castro's Separate Opinion in the *Fisheries Jurisdiction* cases (*ICJ Reports* (1974), pp. 89-90.

there are differences between the three theories.

Firstly, the relationship between the majoritarian theory and the persistent objector theory. According to the majoritarian theory, individual consent of a State is unnecessary, and even irrelevant, for the application of a general rule to it. The persistent objector theory, on the other hand, does give a limited role to consent, in a negative way; non-dissent, and not consent *stricto sensu*, is what counts.

Secondly, as between the persistent objector theory and the consensual theory, the difference is as follows. The persistent objector theory attributes a limited role to individual consent, i.e. that it is relevant only where lack of it is made manifest; i.e. dissent is what counts, and non-dissent would make a State bound. Under the consensual theory, consent would make the State bound. But consent and non-dissent are different things; while non-dissent may signify consent, it could also be based on ignorance or lack of interest (both of which are different from consent). Furthermore, the persistent objector theory imposes limitations of time (dissent must commence before the general rule becomes "established") and persistence; these requirements do not exist under the consensual theory. Perhaps the best way to put the difference in practical terms is that the persistent objector theory would hold silent States bound by sufficiently general practice, so that their silence/non-dissent (an essentially negative condition), be it based on ignorance or lack of interest or consent or whatever, is what makes them bound. The consensual theory, on the other hand, would hold those States bound only if they have consented (an essentially positive requirement).

Also, under the persistent objector theory, dissent operates to create an *exceptional* position from the general norm for a dissenting State, while there is nothing exceptional about it under the consensual theory, which proceeds from the viewpoint that a general practice does not have an *ipso facto* prescriptive force for individual States. Under the persistent objector theory, a distinction would have to be drawn between the question of the existence of the rule on the one hand, and its applicability to a particular State on the

other. There would be no need to draw this distinction under the consensual theory.

It is sometimes said that the persistent objector rule is the illustration of the consensual nature of customary international law⁹ (a view which would underline the similarity between the persistent objector theory and the consensual theory). But this must be put in proper perspective. Firstly, as has just been pointed out, the persistent objector rule is not a complete illustration of the consensual theory; the consent (or lack thereof) of silent States, and indeed States which for some reason do not dissent, is irrelevant. Secondly, the persistent objector rule requires something more than (lack of) consent simpliciter; as we have seen, the rule is subject to the requirements of persistence and timeliness. The fact that a State is not persistent in its dissent, and/or the fact that a State does not commence its dissent before the rule is "established", would result in that State being bound by the rule, even though it may in fact not have consented. In other words, the burden of proof (noting always the operation of the maxim iura novit curia), under the persistent objector theory, would in practice seem to fall on the non-consenting State to prove that it is a persistent objector. On the other hand, under the consensual theory, the burden would fall naturally on the State alleging that another State is bound to prove that the latter has consented. Proof of consent or lack of consent (the consensual theory) is not the same as proof of persistent objector status (the persistent objector theory). 10 Unlike the situation under the consensual theory, the element of putting other

⁹ See, e.g., the views of Charney and Condorelli (*supra* n. 5), compared with those of Cassese and Weil (*supra* nn. 6 & 7 respectively). Weil writes that

It is this opportunity for each individual state to opt out of a customary rule that constitutes the acid test of custom's voluntaristic nature (op. cit., p. 434). Cassese writes that

This fear of majority rule, and Weil's conviction that voluntarism is dying or on the wane, is not warranted, because actually dissent still plays a role in the international community (*Change and Stability, op. cit*).

¹⁰ Some writers could be seen to remove a consensual base from the persistent objector rule. See, for example, Brownlie's treatment of the persistent objector rule. In the earlier editions of *Principles of Public International Law*, he states that the rule is based on consent (see pp. 9 in the second (1973) and third (1979) editions), while in the current edition, he states that the rule has been accepted by tribunals "[w]hatever the theoretical underpinnings of the principle might be..." (see *Principles*, p. 10). He seems

States on notice seems to assume an important role under the persistent objector theory. Thirdly, classic consensualists, while referring to consent, make no reference to the persistent objector rule.¹¹

Also, the majoritarian theory and the intellectualist theory are sometimes used in conjunction with each other; the social desirability of a rule is sometimes used to buttress the view that the consent of an individual State is irrelevant especially where the "desirable" rule is supported by *some* State practice. 12

These are the differences in principle. Whether they can be, or are actually, maintained in practice is a different matter, which will be examined in the following chapters (i.e.

to imply that the persistent objector rule is not coterminous with consent. Similarly, Akehurst (*Custom*, p. 22 ff) adopts the persistent objector theory while stating that individual consent is not necessary. If this is what is intended by these writers, it may be asked whether such views are tenable; as will be shown in subsequent chapters, when States have referred to the principle, they have always tied it to the idea(s) of will/consent. In any case, by definition, objection or dissent necessarily imply will or consent (to something else).

See also Stein, Different Drummer, @ p. 477, who lists a number of possible qualifications (other than those mentioned so far) to the operation of this so-called persistent objector principle. One of these is that the principle may only apply to preserve rights already enjoyed by the dissenting State. But this cannot be a real limitation if it is accepted that international law constitutes the rights and duties of States, and the system abhors lacunae in the law, then there is no such thing as a subject previously ungoverned by international law. Whatever position a State takes vis-a-vis a nascent rule must perforce be a position sanctioned by the existing law. For a different suggestion as to the limitations to the persistent objector principle, see the oral argument of Gross in the South-West Africa case, distinguishing between rules of law involving inter-state interests and those, like racial discrimination, which do not, and that persistent objection should be irrelevant in the latter (see ICJ Pleadings (1966), Vol. 9, pp. 347-352. This is reminiscent of the pleadings of Norway and the United Kingdom in the Anglo-Norwegian Fisheries case, on the question of a fundamental principle (see below).

¹² Cf. the views of De Visscher and Judge Tanaka (*supra*, nn. 2 and 3). See also the discussion of the *Reservations* case, in Chapter IV, Section A, Subsection 3(i), below (especially the views of Lauterpacht).

Part Two). It could even be the case that there is support for interstitial positions.¹³ In the next four chapters what will be considered is whether speaking of a "(general) rule of customary law" is a **prescriptive**, rather than a **descriptive**, statement, i.e. whether it means that that rule binds all States or that it describes the fact that the generality of States adhere to the rule.

¹³ It will be argued, in the Chapter IV, Section A (4)(ii)(a), that there is some support for a theory of dissent different from the persistent objector theory.

CHAPTER IV

THE ROLE OF CONSENT IN THE JURISPRUDENCE OF TRIBUNALS

Before examining the decisions of tribunals, their value as material from which a rule of customary international law can be inferred must be discussed. They are described in paragraph (1)(d) of Article 38 of the Statute of the International Court of Justice (which is regarded as a statement of the sources of international law) as "subsidiary means for the determination of rules of law". While they are not, strictly speaking, formal sources of international law, they can constitute (authoritative) evidence thereof. As Brownlie puts it, "[A] coherent body of jurisprudence will naturally have important consequences for the law".

Nevertheless, caution must be exercised in the treatment of judicial decisions. *Dicta* in cases could be the result of particular circumstances in particular cases, and a statement may even be made in hyperbolic terms in order to stress a point. And in relation to the International Court, Article 59 appears to exclude a system of binding precedent. As the Permanent Court of International Justice stated in the *German Interests in Upper Silesia*² case

The object of [Article 59] is simply to prevent the legal principles accepted by the Court in a particular case from being binding on other States in other disputes.

Generally speaking, at least in legal theory, the value of a judicial decision as customary law would seem to depend primarily upon the acceptance of the principle used in the case by States in general, either before, or consequent upon, the judgment, rather than its

¹ Principles, p. 19. It is primarily for this reason that the consideration of judgments of the World Court in this chapter will be detailed.

² PCIJ Reports (1927), Series A, no. 7, @ p. 19.

³ Judgments, and particularly pleadings, provide evidence of the practice of States. As Basdevant stated in the pleadings in the *Lotus* case (*PCIJ Reports*, Series C, no. 13, Vol. II, p. 34):

^{...}dans une instance internationale, les gouvernments ont à énoncer d'une

A. THE WORLD COURT⁵

Article 38(1) of the Statute of the International Court of Justice (which adopts the formulation in Article 38 of the Statute of its predecessor, the Permanent Court of International Justice) is normally taken to be the starting point in discussions of the sources of international law. It states in paragraph (b) that the Court is to apply "international custom, as evidence of a general practice accepted as law". Reliance is sometimes placed on this by both the authorities advocating the adequacy of only a general, rather than universal, practice for the creation of rules of customary law binding on all states, as well as by those attaching significance to the word "acceptance", who refer to individual acceptance. It is not proposed to rely on the wording of Article 38. For present purposes, it would be more helpful to examine the practice of the Court when dealing with customary international law, because, as will become apparent, the Court has departed from the strict wording of Article 38.

It must be remembered at the outset that in many cases, the Court's application of

The term "World Court" refers to both the Permanent Court of International Justice and the International Court of Justice.

façon précise, sur l'objet en litige, ce qu'ils considèrent comme étant le droit. Ils ont à le faire, parce que, tout en étant plaiduers, ils collaborent ici à l'oeuvre de justice que, par l'énoncé du point de vue qu'ils soutiennent, ils collaborent aussi à la formation de la coutume international.

⁴ See Principles, p. 20.

⁵ A note on the use of the judgments of the World Courts. The issue is that, noting what has just been said about the value of judicial decisions, they will be used partly as examples of central arguments pertinent to this study, and not only necessarily because of any authoritative potential they may have. For example, while it is true that an individual opinion has much less weight as authority, it may still serve as a basis for discussion of pertinent issues, and will be used as such. Also, while the Court may often make laconic or elliptical pronouncements, these pronouncements will be considered with a view to an examination of their possible meanings.

international custom is often "inconspicuous". It has been suggested that "whenever the Court applies international law it has recourse to international custom - unless expressly or by implication it is a treaty which provides the source of the decision". The Court also frequently uses epithets which are at least potentially ambiguous. Recently, it has frequently spoken of "general international law" in circumstances where it appears to be referring to custom. The following survey will attempt to concentrate on those cases in which the Court has been concerned with the actual problems of the formation/application of customary law, and not with those cases in which the reference thereto has been incidental only (as would be the case where the parties had not argued as to the existence/applicability of a customary rule).

The practice of the Court will now be examined to see whether any (and if so which, and to what extent) of the theories outlined in the preceding chapter (or other theories) have been followed.

1. The Intellectualist Theory

It appears from a survey of the decisions of the Court that there is very little support for this theory. The only espousal of such theories is to be found in individual (usually

⁶ *Ibid.*, p. 392.

⁷ *Ibid.*, pp. 392-393.

⁸ In the *Lotus* case, it referred to "usages generally accepted as expressing principles of law" (*PCIJ Reports*, Series A, No. 10 (1927), p. 18.). It has referred to "generally accepted international law" (*German Interests in Polish Upper Silesia*, PCIJ Reports, Series A, No.7 (1926), p. 22), and to "almost universal opinion and practice" (*German Settlers in Poland*, PCIJ Reports, Series B, No. 6 (1923), p. 36)).

⁹ North Sea Continental Shelf Cases, ICJ Reports (1969), pp. 28, 37, 41, 45; Tehran Hostages Case, ICJ Reports (1980), pp. 31, 44, to name but very few. This is an issue that will be returned to later. On dissatisfaction with the term "general international law", see Weil, Towards Relative Normativity in International Law, 77 AJIL (1983), pp. 433 et seq. For the view that "general international law" is not different from customary international (at least in the recent practice of the Court), see Thirlway, Law and Procedure, pp. 31-37.

Dissenting) Opinions (often of the same judges in different cases).¹⁰ The primary objection to this theory is that it can be too far removed from the practice of States, which is undoubtedly an essential element in customary law. It thus results in attributing a definite legislative role to third-party decision-makers.¹¹ In any event, the majority of the Court has stated that it could take account of

...moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.¹²

In other words, "social necessity" itself requires that judges do not legislate.

¹⁰ See, e.g, the individual Opinions of Judge Alvarez in the Conditions of Admission of a State to Membership of the United Nations (ICJ Reports, (1947-48), pp. 67-72); Corfu Channel case (ICJ Reports, (1949), pp. 39-48); Competence of the General Assembly for the Admission of a State to the United Nations (ICJ Reports (1950), pp. 13-14); International Status of South-West Africa (ibid., pp. 175-178); Reservations to the Convention on the Prevention of the Crime of Genocide (ICJ Reports (1950), pp. 50-51); Anglo-Norwegian Fisheries case, ibid., pp. 146, 148-149; Anglo-Iranian Oil Company case (ICJ Reports (1952), pp. 124 ff; Effects of Awards of Compensation Made By The United Nations Administrative Tribunal, (ICJ Reports (1954) pp. 69-72). See also the Opinions of Judge Tanaka in the North Sea Continental Shelf cases, p. 178 (quoted above, see n. 1). What Judge Tanaka found to be required by social necessity (i.e. the equidistance rule) was held not to be so by the Court in that case. Examples of writers who would seem to support this approach are Kopelmanas, "Custom as a Means of the Creation of International Law", 18 BYBIL (1937), p. 148 ("conformity with the needs of a legal order"), Scelle, "Règles générales du droit de la paix", 46 Recueil des Cours (1933), Vol. IV, p. 434; McDougal, 49 AJIL (1955), p. 361 (who seems to posit the element of reasonableness as a necessary one); Venturini, "La portée et les effets juridique des attitudes et des actes unilateraux des états", 112 Recueil des Cours (1964), Vol. II, p. 389 et seq; Le Fur, "Règles générales du droit de la paix", 54 Recueil des Cours (1935), p. 198. See also the authorities quoted in Chapter III, Section A, supra.

¹¹ See Allott, "Language, Method and the Nature of International Law", 45 BYBIL (1971), p. 79 @ 105 et seq..

¹² South-West Africa case, ICJ Reports (1966), p. 24, para. 49. See also the Free Zones case (PCIJ Reports, Series A, no. 24, p. 10. In the Corfu Channel case (ICJ Reports (1949), @ p. 22), the Court applied "elementary considerations of humanity, more exacting in peace than in war". But the ruling was not based solely on this dictum without the fact that the principles were "general and well-recognized principles"; see n. 51, below, and accompanying text. In any case, was the Court referring to customary law stricto sensu? Brownlie (Principles, p. 28), for example, deals with this dictum under the category "Considerations of Humanity" rather than under customary law.

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2. The Veto Theory

There is even less support for this theory in the judgments and individual opinions of the Court.¹³ This is not surprising; it should not be possible for the dissent or lack of consent on the part of one State or a minority of States to prevent the operation of a rule between those who wish to subscribe to it at least *inter se*.

3. The Majoritarian, Persistent Objector and Consensual Theories

Many of the pronouncements made by the Court have been relied on by writers as

It is impossible to create an international custom, or to presume the existence of any rule in favour of the uninhibited freedom of each legislation as regards foreigners, and binding on all other States, except within the same limits and subject to the same conditions as any other international rule or custom ... The necessity for consent is just as much a fundamental principle of international law, which is based entirely on the free will of States, as the principle of the protection of nationals or the freedom to legislate internally... Consequently, the consent of the interested State must be requisite in every case belonging to the category (i.e. of the principle of the protection of nationals or the freedom to legislate internally)... and a fortiori its express dissent must be taken into account. (emphasis added)

On this somewhat extreme view, those States that have not positively participated in a practice need to have expressed their consent, or at least non-dissent, before the rule becomes binding on them. Whether this affects the creation of obligations even for those States who participated is not discussed. The most significant point here is that Judge Altamira draws no distinction between the subject-matter of the custom involved in this case and the subject-matter of any other customary rule. He goes beyond saying that the consent of States other than those claiming extraterritorial jurisdiction is necessary for such claims to amount to custom; such consent is required for the creation of all customary obligations. For him, the requirement of consent is a 'secondary' rule of process, and not just a requirement peculiar to the customary rule alleged in this particular case. This view appears to suggest not simply that international customary law is not binding on a State which has not consented (meaning that States which were silent would not be bound by the custom), but that a customary rule cannot arise without that State's consent.

¹³ The only support is to be found in the two individual opinions cited at Chapter III, n. 8, *supra*, and even then it is not clear that the judges involved necessarily intended these somewhat extreme consequences. Judge Altamira, for his part, argued against the holding of the majority of the Court, which found (presumptively) the existence of a permissive rule on criminal jurisdiction by a process which it had rejected in dealing with the prohibitive rule claimed by France. He argued that since the practice required for establishment of the prohibitive rule was either non-existent or insufficient, the same conclusion must be reached when considering the permissive rule, since the existence of either rule must necessarily be ascertainable only on the same evidence. He stated that

authority for one theory or the other, so that detailed discussion of these cases is warranted. It is proposed to deal first with the cases which are ambiguous or irrelevant, and then with the relevant ones.

3.(i) The ambiguous cases

In the Wimbledon case, 14 the Court was requested to interpret Article 380 of the Treaty of Versailles, which provided that

"The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality".

Germany, a party to this treaty, had contended that its sovereign rights as a neutral power would be compromised if vessels of states at war with a third state were allowed to pass through international waterways falling within Germany's jurisdiction. The Court began its judgment by construing the treaty. It ruled against the German argument for a number of reasons. Firstly, the letter and spirit of the treaty provision were categorical in allowing free access through the Canal. Secondly, the only condition attached to the operation of the provision was that the vessels must belong to States at peace with Germany; if other conditions existed, they would have been stated in the treaty, as was done in relation to Part XII of the treaty, which was categorical in its restriction of access through other German navigable waterways to the Allied and Associated Powers only. Thirdly, the clear aim of the authors of the treaty was to facilitate access to the Baltic Sea by establishing an international regime which would keep the canal open. The case thus really concerned the determination (if it was needed) of Germany's obligation as a matter of treaty law, rather than customary law.

The reason why the case may be considered relevant to this discussion is that the Court made some references to customary law later in the judgment. Germany's argument was that its neutrality would necessarily have been imperilled, and that its rights as a neutral power, being an essential part of its sovereignty, could not be renounced even if, by

¹⁴ PCIJ Reports, Series A (1923), No 1.

ratifying the treaty in question, Germany had so intended (it contended that it had not so intended). ¹⁵ The Court held that this argument (a) conflicted "with general considerations of the highest order", (b) was "gainsaid by consistent international practice". The German argument was "at the same time contrary to the wording of Article 380 which clearly contemplate(d) time of war and time of peace". ¹⁶ But the Court did not explain the normative bases of these "considerations" and the "consistent international practice".

The most relevant part of the judgment for customary law purposes, however, was the reference to the treaties governing the Suez and Panama canals.¹⁷ Continuing its response to the German contention on restriction of its sovereignty, the Court stated that although its treaty obligation under Article 380 amounted to such a restriction, the ability of Germany to limit its sovereignty by entering into international engagements was itself an attribute of that sovereignty; and after all, the sovereign acts of States, such as entering into a treaty obligations, must be taken seriously. It was in this context that the Court referred to the treaties governing the Suez and Panama canals, which, as it said, were "examples of international agreements placing upon the exercise of the sovereignty of certain States restrictions which, though partial, were intended to be perpetual". The point was to show that the assumption of treaty obligations of this kind was not

¹⁵ *Ibid.*, pp. 24-5.

¹⁶ Ibid. The Court, in subsequent cases, has treated the ratification of a treaty as being evidence, albeit not necessarily conclusive, of the recognition of a customary obligation. See the Asylum case (ICJ Reports (1950), p. 278) where a refusal to ratify a treaty was used to justify the non-opposability of a custom of identical content to the State in question); the North Sea Continental Shelf case ICJ Reports (1969), p. 4, where signature (without ratification) per se was held not to create a customary obligation on the State in question; and especially the Nicaragua case (ICJ Reports (1986)), in relation to which the Court has been criticized for deducing the content of customary law obligations from treaty (i.e. the Charters of the Organization of American States and the United Nations)-based practice. See Mendelson, "Customary International Law and the Nicaragua Case", 26 Coexistence (1989), p. 85; Thirlway, Law and Procedure, pp. 47-8, 75-81, 88-93; Czaplinski, "Sources of Law in the Nicaragua Case", 38 ICLQ (1989), pp. 151 ff).

¹⁷ *Ibid.*, pp. 25-8.

¹⁸ See *ibid.*, p. 25, where the Court stated; "But the right of entering into international engagements is an attribute of sovereignty."

necessarily incompatible with the sovereignty of a State, and not to establish the normative force of any rule of custom irrespective of Germany's consent.¹⁹ Is there anything startling in the proposition that a State which signs a treaty thereby exercises, and often limits, its sovereignty?

It has been said that the Court, by referring to these treaties, thereby established a custom by reference to practice which was anything but general²⁰ (a reading which would support the majoritarian theory). But as the Court said at the end of its consideration of the Suez and Panama treaties,

(these treaties) are *merely illustrations of a general opinion* according to which artificial waterways are assimilated to natural straits so that even the passage of a belligerent man-o'-war does not compromise the neutrality of the

law derived from the Suez and Panama treaties. In fact, Sir Cecil Hurst had specifically argued that the regime set up by the treaties was intended to be different from the general position concerning neutrality in customary law. His argument was that the intention of the framers of the Treaty of Versailles, as evidenced by the similarity in the language of Article 380 thereof and the analogous provisions in the Suez and Panama treaties, was to establish a regime analogous to that obtaining in the latter treaties. See *PCIJ Documents*, Series C, No. 3, Vol. 1, pp. 255-261, esp. pp. 258 and 260-61. See, similarly, the submissions of Basdevant, *ibid.*, pp. 208-10. The Court's finding is therefore best explained by saying that Germany had not shown why its argument that neutrality was necessarily imperilled was correct.

See also the Exchange of Greek and Turkish Populations case (PCIJ Reports), Series B, no. 10, p. 21), where the Court referred to the "precedent" afforded by the present case as to the view that the incurring of treaty obligations was not an abandonment of sovereignty.

²⁰ Kopelmanas, op. cit., p. 136, states that the Court in this case inferred, from the identity of the provisions of the documents by which the conditions of the Suez and Panama Canals were established, the existence of a custom by which neutrality is not imperilled if a State allows the passage, through an international waterway, of ships carrying munitions to a State which is at war with a third State. See also D'Amato, Concept, pp. 118-9.

Also, Brownlie, *Principles*, p. 6, treats the case as an example of 'reliance on the practice of a limited number of States'. But the purpose of this 'reliance' is not explained, and his statement does not seem to conflict with the view advanced here. It is possible that he was only stressing the flexibility of the requirement of generality in relation to practice as distinct from *opinio juris*, i.e. that a small amount of State practice would suffice if the other requirements, in particular *opinio juris*, are satisfied; presumably, *opinio juris* would still have to be at least widespread. See, in this regard, Kirgis, "Custom on a Sliding Scale", 81 *AJIL* (1987) p. 146-151.

sovereign State under whose jurisdiction the waters in question lie.²¹

These treaties illustrated, rather than created, the *general opinion*.²² The general opinion was reflected in the treaties, which were merely demonstrative.²³ To say that the Court deduced the existence of the custom from the treaties is too imprecise; it could be seen to suggest more than what the Court actually said, by equating the constitutive effect of these treaty provisions with their probative effect. It is, in fact, doubtful that the

See also Lord Alverstone's judgment in West Rand Gold Mining Co. v R [1905] 2 KB 391:

The reference which...writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempts not unknown to our courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

See also a similar ruling by the International Court in the Lotus case (PCIJ Reports (1927), Series A, No. 10, p. 27).

²¹ *Ibid.*, p. 28.

²² See Akehurst, *BYBIL* (1974-75), p. 42, n.7; "cases in which a treaty is interpreted by comparing its provisions with other treaties have nothing to do with customary law". See also pp. 44-45, where he argues that treaties cannot create obligations for non-parties unless the requirements of state practice and *opinio juris* are met. Cf. Article 38 of the Vienna Convention on the Law of Treaties. On this fundamental premise the treaties *per se* could not have created the customary law.

²³ See Lauterpacht, *Development*, p. 378, n. 18, who states that the Court "relied" on the practice interpreting the treaties "as evidence of international custom". This is contradicted by his statement, at the top of the same page, that the Court held that the frequency and identity of treaty provisions resulted in the "creation of international custom". The context in which these statements were made would suggest, however, that he is pointing out a fundamental difficulty with the concept of custom, which is referred in Article 38 of the Court's statute as both a source and as evidence of rules of law (@ p. 379, esp. n. 21). What he suggests is that the ambivalence of the Court's practice in this area can only be solved by "an analysis of the relevant practice in all its manifestations", with a view to finding out the precise relationship between treaty and custom, or more precisely, the precise value of treaties as an element of customary law. It is, of course, possible that the Court was wrong in its conclusions as to the existence of this general opinion, as was held by the dissenting judges (especially Judge Schücking, p. 46). See Lauterpacht, Development, p. 24, for the view that the "general opinion" was probably that of writers. Article 38 (1)(d) does, however, state that the opinions of writers are evidence of the law.

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treaty, or any treaty, could have constitutive effect on the customary law.²⁴ It is unlikely that the Court intended this.²⁵

The Wimbledon case does not, therefore, shed much light on the subject of the present

²⁴ The value of treaties as (a) practice creating customary law (b) evidence of customary international law is a well-known problem; see Schachter, *Entangled Treaty and Custom*, in Dinstein (ed.) *International Law at a Time of Perplexity* (1989), p. 717, especially n. 1. See also Lauterpacht, *Development*, pp. 377-9. For treatment of the International Court's handling of the relationship between treaties and custom, see Thirlway, *Law and Procedure*, pp. 86-102. The generally accepted view is that treaties may have three kinds of effect on customary law (See Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *Recueil des Cours* (1978) Vol. 1, pp. 14-15.)

⁽a) The treaty can *codify* customary law, in which case it is only probative, and not constitutive, of that law. If the relationship between customary law and the Suez and Panama treaties was of this kind, then the treaties did not create the custom.

⁽b) A treaty can progressively develop the customary law, in which case it is neither constitutive nor declaratory of that law; it is only the practice of States, coupled with opinio juris, which can transform a treaty rule into a customary rule (see the North Sea Continental Shelf cases, ICJ Reports (1969), paras. 71 ff.). Now the Court said that the Suez and Panama treaties were illustrative of custom; it can only also be said that they progressively developed custom if the State practice upon which the custom was based had itself been based on the treaty provisions, in which case, Germany's obligation was based on this custom.

⁽c) A treaty may aim to crystallize customary law, in the sense that, at the time of its conclusion, there is State practice which is almost, but not quite, sufficient to be described as custom; the treaty may then operate as the final stage in the development of the customary rule. In this case, it would not be appropriate to say that the treaty "illustrates" the custom, nor that the treaty "created" the custom. Both treaty and custom add up to create the rule. The treaty is just part of the practice leading to the conclusion of the customary rule. If this is the case with the Suez and Panama treaties, then Germany, being a party to the Treaty of Versailles (which supported the position obtaining in the earlier treaties), was now seeking exemption from an obligation which was binding on it on two bases, i.e. both treaty and custom.

²⁵ Such a conclusion would be inconsistent with the Court's pronouncement in the European Commission of the Danube case (PCIJ Reports (Series B, No. 14, p. 386), to the effect that a practice followed by the United States and the United Kingdom could not generate obligations for other States. The same is true of the Territorial Jurisdiction of the International Commission of the River Oder, PCIJ Reports (1929), Series A, No.23, pp. 26-27, where the customary rule was not, as Kopelmanas puts it, "deduced" from the treaty provisions. The Court merely referred to what the general principles of international river law were, by looking at the manner in which States had generally regarded the matter. There is nothing to suggest that the customary rules in question were created by the treaties in question per se. See also Chorzow Factory case, Series A, No.9, p. 21.

enquiry.²⁶ The real issue before the Court here was treaty interpretation; the Court stressed all the way through the judgment that the treaty provisions were categorical.²⁷ Given Germany's treaty obligations and the "general opinion", the German argument simply did not have any real foundations, as the Court itself expressly stated.²⁸

In the Advisory Opinion on the German Settlers in Poland²⁹, the Polish Government had taken, in the territories ceded by Germany to Poland by virtue of the Treaty of Versailles, measures designed to expel certain settlers of German origin from lands occupied by virtue of contracts (Rentengutsvertage) made by these settlers with the Prussian Government. Poland agreed with the general position that private property rights in the transferred territory were to be respected by a successor in title.³⁰ But it had argued that this rule only applied to those settlers who had already perfected their title before the transfer of sovereignty;³¹ in other words, that the Rentengutsvertage were merely contracts of sale conferring only a personal ius ad rem, as distinct from a proprietary ius

²⁶ Sørensen (Les sources du droit international (1946), p. 8) wrote that the case is authority for the relative nature of the requirement of generality, i.e. that universally applicable customary law can be created by a limited practice. But if the practice in question is confined to a limited number of States (in this case those with artificial waterways), how could it be a general practice? Would it not then become a particular custom applicable only to States with artificial waterways and perhaps those with interests therein, and which would require, in this case, consent on the part of Germany (see Chapter VI, Section A, below)? In this case, the fact that only two other regimes were established would suggest that, if the Court had general customary law in mind, it must have been the case that other States had an interest in the matter (cf. the North Sea Continental Shelf cases, p. 43, para. 74), and that their practice (including abstentions) suggested the existence of the rule. Ergo the treaties per se did not create the custom, without a general practice or general acquiescence.

²⁷ See pp. 24-5 of the *Report*, where the Court started referring to custom, and p. 30, where it stopped.

²⁸ @ pp. 24-5.

²⁹ PCIJ Reports (1923), Series B, No. 6.

³⁰ See the pleadings, *PCIJ Reports*, Series C, No. 3, Vol. 1, pp. 537-8, per Sir Ernest Pollock, on behalf of Poland.

³¹ *Ibid.*, p. 561 ff.

in re. But the Court found, after an examination of the nature and legal effects of the rentengutsvertage (laying particular emphasis on the fact that the rights conferred thereby entitled the holder to entry thereof on a public registry of title) that the rights thus conferred were proprietary and not merely personal.³² The Court responded to the contention that rights in private property acquired from a former sovereign were extinguished upon a change of sovereignty by saying that such a claim was "based on no principle and would be contrary to an almost universal opinion and practice", ³³ and that

Those who contest the existence in international law of a principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.³⁴

In sum, since Poland was not one of those States disputing the principle, the case is not very illuminating for present purposes. The issue of examining the position of Germany vis-a-vis the general practice did not arise; Germany's practice was the same as that of the generality of States. The converse question, i.e. whether Poland was bound by the practice of the generality, did not arise either, simply because Poland had expressly recognized the rule in question, but had argued (unconvincingly, in the Court's opinion) that rule did not cover the facts of the case.

In the *Lotus*³⁵ case, which was the first in which the Court had to scrutinize the conditions for the creation of customary law in a direct way, the question before the Court was whether Turkey, contrary to Article 15 of the Convention of Lausanne of 1923, not being the State whose flag was flown by the offending vessel, had breached its international obligations by instituting criminal proceedings in the Turkish courts against French nationals whose negligence had resulted in a collision on the high seas causing the death of eight Turkish nationals. France argued that the existence of a rule permitting this

³² @ pp. 29-34.

³³ *Ibid.*, p. 36.

³⁴ Ibid.

³⁵ *PCIJ Reports*, Series A (1927), No. 10.

exercise of jurisdiction had to be demonstrated, while Turkey argued that what had to be demonstrated was the existence of a rule prohibiting its exercise of jurisdiction.

In finding for Turkey, the Court made its often-quoted pronouncement:

The rules of law binding upon States...emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.³⁶

This passage suggests that a usage generally accepted, being expressive of the will of States, creates binding obligations in customary law, and is often cited in support of a voluntaristic conception of customary law. There are a number of reasons for this.³⁷

Firstly, there is the reference to the "will" of States. If the will of States is the source of customary law, it is possible to infer that the will of one State is as important as that of any other number of States. Thus the creation of obligations binding on that State must be demonstrated to be in accord with the "free will" of that State, as a restriction upon the independence of that State cannot be presumed. If what is meant is the will of the community of States, the position is the same, because one cannot really speak of the will of the community if one State, which is a part of that community, expresses a different will; 38 at best, one would only be able to speak of the will of the majority in that

³⁶ *Ibid.*, p. 18.

³⁷ Condorelli, "Custom", in *International Law: Achievements and Prospects* (1991, Bedjaoui, ed.), p. 202, suggests that the case does support a voluntaristic conception of customary law; he suggests that the passage quoted here is due to the influence of Judge Anzilotti, a well known voluntarist, on the Court as a whole. See also Watson, *ASIL Proceedings* (1992), pp. 108-109, and Arangio-Ruiz, *Change and Stability*, pp. 102 ff.

³⁸ This would be so unless, of course, one accepts Rousseau's argument that, by virtue of the social contract, each individual in a community is alienated, together with all her or his rights, to the community. For critical discussion, see Russell, *A History of Western Philosophy* (1946), p. 722. Rousseau's theory does not seem to be particularly helpful in the international context; the central role played by the "sovereign" (especially in relation to the natural rights of man) makes his theory difficult to apply directly to the international society. See Lobo de Souza, *EEZ*, p. 37 ff.

community.

Secondly, the Court appeared to postulate a high threshold for the creation of binding rules of general applicability. It began by construing Article 15 of the Convention of Lausanne, which stated that disputes concerning jurisdiction were to "be decided in accordance with the principles of international law." The Court held that this meant "international law as it is applied between all nations belonging to the community of States", "the principles which are in force between all independent nations and which therefore apply equally to all the contracting parties". 39 The Court later stated that, having regard to this construction of Article 15, the French contention, by requiring a permissive rule in all cases of the exercise of jurisdiction, would result in "paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction". 40 This could be taken to suggest that the universal acceptance of a rule is what was required to make the rule valid. Further on in the judgment, the Court cited an example (in an incident between the United States and Great Britain concerning the extradition of one John Anderson) to support the finding that the principle of the exclusive jurisdiction of the flag State "(wa)s not universally accepted".41

Thirdly, the pleadings, particularly the Turkish pleadings, suggested a voluntaristic conception of custom.⁴² In response to a French argument suggesting that a rule of customary law was binding on States which had not participated in the practice on which

³⁹ @, pp. 16-17 (emphasis added). The French agent had argued that the expression "principles of international law" in the Convention should have been given a restrictive meaning, to the effect that it should be sought in the positions adopted by the Parties to the Convention in the preparatory work leading to its conclusion.

⁴⁰ *Ibid.*, pp. 19-20.

⁴¹*Ibid.*, p. 27.

⁴² Marek, Répetoire des décisions et documents de la C.P.J.I. et de la C.I.J., Série 1, Vol. 2, p. 801 ff. supports this reading.

the rule was based, Turkey argued to the contrary, stating that "(c)'est là une consequence nécessaire et indiscutable du caractère volontaire qu'on attribue généralement au droit internationale". 43

However, it could be that this reads too much into the case, and the inference of a voluntaristic conception of custom has been challenged on a number of grounds. 44 The Court did not specify whether rules of customary law are binding on all States in the international community, or only on the generality who accept its normative status. The reason for this is that the Court was only saying that, in order to establish a restrictive rule, evidence of this rule must be demonstrated in the expressed will of States. The Court was not expressly concerned with our question, which relates to the scope *rationae* personae of such a general rule, firstly because there was no such rule, and secondly because France had not objected to what the Court found to be the correct position. The question was whether the rule existed, not which States were bound by it.

It is thus unclear how far the Court would have taken its voluntaristic conception of custom, as it did not have to deal with a general rule from which one of the parties in the case before it had dissented. It could be argued that the way the case proceeded would support the majoritarian theory because the Court did not simply focus on the position adopted by either party in relation to the customary rule in question. For example, the Court could simply have asked, in response to the specific pleadings of Turkey, whether Turkey had not consented to be bound by the rule alleged by France. Such an approach would clearly have shown the consensual theory in operation, but the Court appears not to have adopted it.⁴⁵

⁴³ M. Fedozzi quoted, on behalf of Turkey, from Anzilotti, *Il diritto internazionale* nei giudizi interni (1905), pp. 286-88, where custom and treaty were, in effect, equated.

⁴⁴ See, e.g., D'Amato, *Concept*, pp. 189-191, and Pellet (see Chapter I, *supra*, n. 6).

⁴⁵ Also, the Court stated that the French contention was "opposed to the generally accepted international law" (@ p. 19). It could be argued, against the voluntaristic thesis, that the implication is that generally accepted international law was universally applicable.

But the fact that the Court only looked at the general law does not necessarily mean that the Court adopted the majoritarian theory. As will be argued later, ⁴⁶ the Court *had* to consider the general law as made necessary by its construction of Article 15 of the Convention of Lausanne. ⁴⁷ Having found that no such law existed, there was no reason to go on to respond directly to Turkey's voluntaristic pleading, because there was no rule of general customary international law in relation to which Turkey's consent may or may not have been required. ⁴⁸

As far as the present enquiry is concerned, the issue is the role played by individual consent. As explained earlier, ⁴⁹ consent is the acceptance of a state of affairs (which includes the practice upon which a general rule is based). Applying that definition to this case, there was no general practice (i.e. there was no state of affairs to which consent

But at the same time it could be that all that was meant was that there was no (or less) support for the French contention, and that that was why it was inapplicable; the Court generally treated the French contention as being novel, and it would therefore require the consent of other States for it to be opposable to them.

⁴⁶ See the present Chapter, Section A, Subsection 4(i), below.

⁴⁷ See pp. 16-17 of the judgment.

⁴⁸ The Dissenting Opinions are also contradictory. For example, Judge Weiss stated that:

Whenever it appears that *all* nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law (@ pp. 43-44; italics added).

The "accumulation of opinions" and a "sum total of judgments" are only methods of discovering the custom; "the real source of international law is the *consensus omnium*". This would seem to support the consensual theory.

Judge Altamira's Opinion has already been discussed (@ n. 13 supra).

Other pertinent dicta can be found in the Dissenting Opinions of Judges Nyholm and Loder, who both consider that a "consensus of opinion" (@ n. 43, pp. 59-60) suffices to create customary rule. This would seem to support the view discussed above that the concern in this case was to see whether a general custom existed at all; since these judges found no customary law in favour of Turkey's exercise of jurisdiction, there was no need for reference to the individual consent of the party denying it.

⁴⁹ See *supra*, Chapter I, Section B.

could be expressed), so that the treatment of our question of consent thereto did not arise.⁵⁰

In the Corfu Channel⁵¹ case, the dealt with a number of claims, two of which may be pertinent.⁵² The first was the claim that Albania knew of the laying of mines in its territorial waters which had resulted in explosions causing damage to British warships and the death of members of their crews. For our purposes, this claim (and the ruling thereon) is irrelevant; it related to a question of fact. In any event, as the United Kingdom put it, "The Albanian Government...appears to be at one with the United Kingdom that the laying of mines in the Corfu Strait in time of peace and without notification contrary to the terms of the [Hague] Convention [No. VII of 1907] would be a breach of international law", ⁵³ and the Court agreed.⁵⁴

The other possibly relevant ruling was the one concerning the right of innocent passage. Albania had argued that the ships in question had violated its sovereignty on the basis that, while there was a general right of innocent passage, in exceptional cases a coastal State is empowered to regulate the exercise of this right. The dispute revolved around the

⁵⁰ In the Oscar Chinn case, (PCIJ Reports (1934), Series A/B, p. 63). the Court was called upon to rule on the legality or otherwise of certain actions taken by the Belgian Government which were alleged by the United Kingdom to have been prejudicial to the trading interests of one of its own subjects. In the course of its judgment, the Court applied the concept of free trade, as referred to in the Convention of Saint-Germain and in the Act of Berlin, "according to the conception universally accepted",(@ p. 81) noting that both parties agreed with that conception. It also found that the principle of respect for private rights was incumbent on all States, and that the applicability of this principle had not been denied by the parties (@ pp. 87-88). Again, this does not really shed much light.

⁵¹ ICJ Reports (1949), p. 4.

⁵² See Lobo de Souza, *EEZ*, p. 65, @ n. 88, who cites this case as an example of the fact that the Court does not bother to look for the consent of a State in looking for customary law. Our question is this: was the customary law applied to the parties without their consent?

⁵³ Pleadings, Vol. I, pp. 39-41.

⁵⁴ @ p. 22.

classification of the North Corfu Channel; Albania argued that the Channel did not belong to the class of international highways through which a general right of passage existed. The Court disagreed, on the basis that very many foreign ships did exercise the right of passage through the Channel.⁵⁵ There was thus no question of a rule being applied against Albania without its consent. It was a question of classifying the facts to see whether they fell within the scope of the rule alleged by the Parties.

In its advisory opinion in the Reservations to the Convention on Genocide case, 56 the Court was requested to consider whether a State which made a reservation to a treaty could still be regarded as being a party to that treaty if one or more of the other parties objected to that reservation. The Court held that customary international law permitted reservations to be made to multilateral treaties, as long as the reservations were compatible with the objects and purposes of that treaty. It held that, in the absence of express provision in the treaty in question, there was no obligatory rule of customary law requiring the unanimous consent of all the other signatories to a treaty to a reservation entered by a State wishing to become a party to that treaty (the so-called "unanimity" rule) in all cases. The Court, in the course of the judgment, stated that it was more desirable for States to subscribe to some of the rules in the treaty than for them not to participate in the treaty at all, which would be the consequence of insisting on the unanimity rule.⁵⁷ It has been suggested, mainly for this reason, that the Court's concern was to lay down general principles about reservations which went beyond this particular treaty. On this view, this Opinion is an example of judicial legislation;⁵⁸ a combination of policy and the practice of some States resulted in the Court's application of a rule of

⁵⁵ @ pp. 28-29.

⁵⁶ ICJ Reports (1951), p. 15.

⁵⁷ See Lauterpacht, *Development*, pp. 372-374; and *ICJ Reports* (1951) pp. 21, 22.

⁵⁸ *Ibid*.

customary law.⁵⁹ The dissenting judges were unable to find general support for the "objects and purposes" rule in the practice of States.⁶⁰ This reading would support either or both the intellectualist theory or the majoritarian theory.

But the difficulty with this view is that the Court did not have to deny the existence of the unanimity rule in order to arrive at its preferred decision.⁶¹ There were other possible means of achieving the same result. For example, upholding the unanimity rule

⁵⁹ See e.g. D'Amato, *Concept*, p. 194, and Sørensen, 101 *Recueil des Cours* (1960), p. 46, who both cite the *Reservations* case as authority for the proposition that individual consent has little significance in the customary law-creating process.

^{60 @} p. 31 et seq. Judge Alvarez (p. 49, @ 52), for his part, based his dissent on his conception of the "new" international law, under which "...conventions signed by a great majority of States ought to be binding upon the others, even though they have not expressly accepted them: such conventions establish a kind of binding custom, or rather principles which must be observed by all States by reason of their interdependence and of the existence of an international organization." This clearly a unique view. Neither the practice of States, judicial decisions, nor the opinions of writers provide authority for a "kind of binding custom" which is created by, and derives its authority solely from, the fact that there is a treaty signed under the auspices of the General Assembly, because that body "is tending to become an actual international legislative power". This view differs from the principle of "objective" treaty regimes (cf. International Status of S.W. Africa, ICJ Reports (1955), and the Reparations case (ICJ Reports (1949)), which refers to treaties setting up institutions that continue to exist and function irrespective of the continuing validity of the said treaties.

⁶¹ For a different view, see Lauterpacht, op. cit. supra. He states that "It may be doubted whether the method adopted by the Court was indicative of any deliberate tendency to insist, in deference to State sovereignty or for similar reasons, on exacting proof of a universal or quasi-universal adherence to a given rule as a condition of its recognition as a binding rule of international law. The more convincing explanation, he argued, is that the generally recognized rule in the matter of consent to reservations, based as it was on the principle of unanimity "...was unsatisfactory and ripe for revision in the light of changed circumstances". Treating this Opinion as an example of judicial legislation, he argues that in the light of the special circumstances surrounding the Genocide Convention, the Court chose to apply "general legal considerations as distinguished from a specific rule of law" (i.e. the unanimity rule) which would otherwise have been directly applicable. He argues that the Court thus placed emphasis on the "general legal consideration" that "the sovereignty of the contracting parties demands that they should not be deprived of the participation of a State making a reservation...by the refusal...of other States to consent to such reservation". But as he admits, the opinion is replete with statements actually denying the existence of the unanimity rule. The question he fails to answer is why the Court did deny the existence of what was considered to be the traditional rule when, as he rightly argues, such a denial was not necessary.

(and with it the possibility that the scope of the Convention *ratione personae* would be limited) would hardly have legalized genocide. Genocide was already unlawful in international law outside the treaty, so that even non-parties to the treaty regime would not be exempt from those non-conventional obligations.⁶² Similarly, the Court could have upheld the unanimity rule while expressly denying its application to the Genocide Convention, because of the special circumstances of this Convention.⁶³ If the Court could have avoided making such a controversial finding, and hence risk transgressing the limits of its functions, it surely would have done so.

A more convincing explanation for the Court's ruling, from the point of view of the position of the Court in the institutional framework of the international legal system, was that it had found that objections to, or deviations from, the alleged unanimity rule did not (or at least no longer did) support its status as an obligatory rule of customary international law,⁶⁴ pace D'Amato and Sørensen. The support for this conclusion was evident from the views of members of the United Nations submitted to the Court.⁶⁵

⁶² @ p. 23; the Court found that the principles underlying the Convention were '...principles *recognised* by civilised nations as binding on States even without any conventional obligation.'

⁶³ See pp. 22-25, for a discussion of various circumstances which would have made the unanimity rule inappropriate or inapplicable to the Convention.

⁶⁴ ICJ Reports (1950), pp. 24-26.

that, of all the States (plus the Secretary-General of the United Nations, and the International Labour Organization), only the United Kingdom found that the unanimity rule was required by customary international law (see *Pleadings*, pp. 48 ff., *per* Fitzmaurice). The Organization of American States (p. 15 ff.), the U.S.S.R. (p. 21 ff.), the United States (p. 23 ff.), Israel, the International Labour Organization (p. 234, para. 25), and Roumania (p. 290) all expressed views on the permissibility of reservations which clearly indicated either or both that (a) as a matter of customary law, the unanimity rule was not (or at least no longer) mandatory, and (b) the unanimity rule was inappropriate for the Genocide Convention. The submissions of the Secretary-General of the United Nations were more guarded on the question of the status of the unanimity rule in customary law; it consisted mainly of the attitude which States parties to the Convention had taken towards reservations to the Convention made by other States. In virtually all of these instruments of ratification, States expressly reserved their positions on the validity of such reservations (p. 77 ff). State practice therefore provided no

After a survey of the State practice, the Court concluded that

...it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the Fifth Session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.⁶⁶

The Court was thus hardly "legislating" by rejecting the unanimity rule.

Neither should it be said that the Court fabricated the so-called "objects and purposes" rule. The clear object and purpose of the treaty was to prohibit genocide. A reservation which violated this aim would surely not be permissible, because an assumption of obligation would be meaningless if the assuming party is allowed, in effect, to reject that obligation. The objects and purposes rule, by its very nature, was appropriate in relation to *any* treaty, as a matter of inexorable logic.

This case, therefore, does not support the intellectualist or majoritarian theories, and is largely irrelevant for present purposes.

In the *Nottebohm* case⁶⁷, the Court had to decide whether the conferment of nationality upon an individual (by naturalization) necessarily carried with it a right on the part of the State conferring it (in this case Liechtenstein) of diplomatic protection against (and a correlative duty on the part of) another State (Guatemala).⁶⁸ The Court described the

support for the unanimity rule.

⁶⁶ p. 26.

⁶⁷ ICJ Reports (1955), p. 4.

⁶⁸ The Court began by examining the position adopted by Guatemala in relation to Liechtenstein's conduct, but this was probably not for the purpose of establishing customary law *stricto sensu*. It was for the purpose of deciding whether Guatemala had adopted a practice different from the general customary rule, and whether Liechtenstein had in some way recognised the validity of this practice so that it (Liechtenstein) would be estopped from challenging the claim now being put forward by Guatemala. See MacGibbon, (1957) BYBIL, pp. 122-123.

issue before it in the following way

the Court must consider whether such an act granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise diplomatic protection.⁶⁹

On the basis of the practice of States, arbitral and judicial decisions and the opinions of writers, the Court held that the conferment of nationality could include a right of diplomatic protection only when the connection between the individual and the State conferring the nationality was genuine (or alternatively, if Guatemala had recognized the validity of the act of Liechtenstein (which it had not), it would be bound thereby).

It held that Liechtenstein was entitled to treat the naturalized person as its national for the purposes of its domestic law, but that this fact was not necessarily effective against other States at the international level in the context of diplomatic protection.⁷⁰ To put this in Hohfeldian terms, all that the case held was that the act of naturalization conferred a right on Liechtenstein, but Guatemala had, instead of a duty correlative to that right, a privilege or liberty (not to treat Nottebohm as a national of Liechtenstein), which is the (jural) opposite of a duty; a privilege is a negation of a duty.⁷¹

It may be argued that Liechtenstein was bound by what the Court found to be the prevailing practice even though it had not consented thereto; in other words, ruling that Liechtenstein's views were not opposable to Guatemala necessarily meant that Liechtenstein was therefore bound by something to which it had not consented.⁷² But

⁶⁹ @ p. 20. See also pp. 16-17.

⁷⁰ *Ibid.*, pp. 20-21.

⁷¹ Or one can describe Guatemala as having an immunity, which is the opposite of liability, in relation to Liechtenstein's power to confer nationality on Nottebohm. See, generally, Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. W. W. Cook, 1919), Chapter 1.

⁷² See Sur, *Change and Stability*, p. 127, where he argues that the *Nottebohm* case is the only one in which the Court refused to "give the palm to the consensualist solution".

this would be a *non sequitur*. The issue in this case did not involve a discussion of Liechtenstein's obligations; the Court was only concerned with its right (or power, in Hohfeld's terms), and with Guatemala's duty.⁷³ To refer to Hohfeld again, it was about Guatemala's privilege, and a privilege or liberty has no jural correlative.⁷⁴ To speak of a duty on the part of Liechtenstein, Guatemala must have had a right stricto sensu (i.e. a claim).⁷⁵ But it did not; it had only a privilege.⁷⁶ The case does not, therefore, tell us anything about the relationship between a State's (Liechtenstein's) position and that of other States, which is the issue under examination.

Above all, many have rightly questioned whether the Court was applying customary

The Court expressly stated that "...[W]hat is involved is not recognition for all purposes but recognition for the purposes of the admissibility of the Application, and secondly, not recognition by all States but only by Guatemala." (@ p. 17). The Court said nothing about Liechtenstein's obligations; they certainly were not, and could not have been in issue for the purposes of the admissibility of the Application. It is a distinct possibility that, if Liechtenstein's obligations had been in issue, the Court could have found that it did not accept the Guatemalan argument or the practice that it found to be the prevalent one. For the purposes of admissibility, there had to be a common legal position as to the effects of naturalization between Guatemala and Liechtenstein, whether on the basis of general or particular law (and the Court found that there was none). The fact that Liechtenstein did not argue that it was not bound by the rule which the Court found to be the general one or that it had dissented from it, as States often do when their obligations are in issue, is testimony to the fact that its obligations were not in question. The practice of Liechtenstein was irrelevant to the issue of admissibility, to which the Court had expressly limited itself.

⁷⁴ Hence Hohfeld (op. cit.) invents the term "no-right" as the correlative of a privilege or liberty ("there being no single term available to express [that] conception). Having a "no-right" certainly does not imply having a duty. Criticizing the case of Quinn v Leathem ([1901] AC 495), Hohfeld states that "It would...be a non sequitur to conclude from the mere existence of such liberties that "third parties" are under a duty not to interfere...".

⁷⁵ It may be true, as some writers have argued, that duties sometimes exist without correlative rights; but it is submitted that this case is not one of those that confirm their views.

⁷⁶ Guatemala's argument in its Counter-Memorial was that there was no restrictive rule imposing a duty on her to recognize Liechtenstein's conferment of nationality for the purposes of diplomatic protection (see *Pleadings*, Vol. I, p. 190); no duty equals privilege.

international law in this case.⁷⁷ This view is strengthened when one considers that a common basis for the dissenting Opinions in that case was that there was no rule of customary law on the question before them.⁷⁸ The relevance of the *Nottebohm* case would, all in all, seem doubtful.

In the North Sea Continental Shelf cases, 79 the question was whether, as Denmark and the Netherlands argued, the equidistance/special circumstances rule for the delimitation of the continental shelf, laid down in Article 6 of the 1958 Convention on the Continental Shelf, had become binding on the Federal Republic of Germany as a rule of general customary international law. The Court, in what is generally regarded as the *locus classicus* on the requirements for the creation of a rule of general custom, only went as far as stating the *minimum* requirements ("an indispensable requirement") for the creation of rules of custom; these were the *necessary*, as distinct from the *sufficient*, conditions for the creation of a rule of general customary international law. These were that the practice must (a) include that of States whose interests are specially affected, (b) be extensive and virtually uniform and (c) must be accompanied by *opinio juris*.80 The Court found that the rule in question had not become a rule of general customary international law, and it was therefore not binding on the Federal Republic of Germany, the latter not having recognized the applicability of the rule in any way. The case would thus seem to be ambiguous for present purposes.81 Writers have expressed conflicting

⁷⁷ Skubiszewski "Elements of Custom in the Hague Court", 31 Zaörv (1971), pp. 819-821; Haggenmacher, *Deux éléments*, pp. 91-93, showing that neither the pleadings nor the Court specified the nature of the rule applied in this case.

⁷⁸ See *ICJ Reports* (1955), p. 30 (Judge Klaestad), p. 40 (Judge Read), p. 60 (Judge Guggenheim).

⁷⁹ ICJ Reports (1969), p. 3.

⁸⁰ *Ibid.*, paras. 73 and 74, pp. 42-3.

⁸¹ See Koskenniemi, *Apology*, pp. 389 ff., for the view that the Court's approach seems as consistent with the majoritarian theory as it is with the consensual theory.

views on various aspects of the case concerning the role of consent⁸² but it may be

...Convention, or the regime of the Convention...by conduct, by public statements and proclamations, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime; or has recognized it as being generally applicable to the delimitation of the continental shelf areas. It has also been suggested that the Federal Republic had held itself out as so assuming, accepting or recognizing, in such a manner as to cause other States, and in particular Denmark and the Netherlands, to rely on the attitude thus taken up." (italics added)

Other writers, such as Unger (op. cit.) and Thirlway, (Law and Procedure, p. 107, @ n. 385), argue that the passage was concerned with the question whether Germany was estopped by conduct from denying the application of the equidistance rule. This latter argument is supported by the consideration that the Court only started dealing expressly with (general) customary law (p. 28, para. 37) after it had dismissed the contentions just referred to, with no reference to the Federal Republic's position; but there are some difficulties with this view. Firstly, the italicized words are as consistent with estoppel as they are with individual consent to customary law. The parties had certainly argued as to the position taken by the Federal Republic over and above the existence of the rule as one of general customary law, and not as a matter of estoppel or treaty; see ICJ Pleadings (1968, Vol. 1, p. 60, para. 59 (re regional custom), and p. 61, para. 60, and pp. 400 ff, p. 192, para. 99, and p. 345, para. 93, and Vol. II, pp. 99 and 106 (where Sir Humphrey Waldock argued on behalf of the two Kingdoms that "...the Federal Republic did by its conduct and by its formal acts commit itself to the recognition of the law in Article 6 as customary law (italics added)". See also ibid., Vol. I, pp. 504-505, and pp. 508-509 ff, where the German argument about its acceptance of the equidistance rule as customary law was dealt with (including a discussion of the persistent objector rule). Secondly, the use of the disjunctive "also" would suggest that the estoppel point was dealt with in the last sentence of the paragraph, so that the previous sentence could have been dealing with another source of obligation. This is confirmed by the fact that there was no mention of (detrimental) reliance, a definite requirement of estoppel, in the italicized statement, while this requirement was dealt with in the sentence following it. Thirdly, in the context of maritime delimitation, it is difficult to distinguish between practice relevant only to estoppel and practice which is also relevant to proof of objection to a rule's customary law status. If acceptance (or lack thereof) is the issue (see the Temple case (ICJ Reports (1961), p. 32), the Nuclear Tests cases (ICJ Reports (1974), pp. 267-68), and Judge Lachs' Separate Opinion in the Aegean Sea case (ICJ Reports (1978), p. 50), then a State saying "I reserve my position regarding your purported delimitation on an equidistance basis" (as Germany did; see p. 27, para. 33 of the judgment) could just as easily be taken to have said "I dissent from the equidistance rule

Writers who argue that the case was concerned with the individual consent (or lack thereof) of Germany (such as Brownlie (*Principles*, p.10), and Müller's *Vertraunsschutz im Völkerrecht* (quoted in Unger's Völkergewohnheitsrecht - objektives Recht oder Geflecht bilateraler Beziehungen: seine Bedeutung für einen 'persistent objector' (1978), p. 94) rely on the part of paragraph 27 of the judgment (italicized in the following quotation; see also para. 33), where the Court was considering the contentions of Denmark and the Netherlands that Germany had become bound by the

as a matter of general customary law". See Colson, "How Persistent Must the Persistent Objector Be?", 61 Washington Law Review (1986), p. 957. The mere fact that a statement is made in a bilateral context should not necessarily preclude the relevance of that statement for general customary law purposes. Fourthly, the individual Opinions also attach importance to the position taken by the Federal Republic. Judge Tanaka considered the acts' evidencing the attitude of the Federal Republic and found that while the Convention was not binding on it as a matter of treaty-law, it had recognized the validity of the equidistance rule as a matter of customary law. He stated that

These circumstances, operating as a whole, contribute to justification of the binding power of the equidistance principle...vis-a-vis the Federal Republic should she be bound by a ground other than contractual obligation, namely by the customary law character of the Convention (@ p. 173.

As he later put it (at p. 181), the Federal Republic "recognizes the applicability of the Convention vis-a-vis herself on a customary law basis"). He then considered the question of estoppel separately. (*ibid.*, p. 173-4). Judge Sørensen stated that

if the Federal Republic, in her relations with other North Sea States, had consistently denied the applicability of Article 6, paragraph 2, to the delimitation of her shelf area, the question might have arisen of whether the provisions of that paragraph were opposable to the Federal Republic, in spite of her objections (@ p. 255).

Thus the issue of persistent objection, and thus customary law, was being discussed here in relation to the Convention. Judge Lachs, while similarly considering the Proclamation made by the Government of the Federal Republic in 1964 referring to "the development of general international law, as expressed in recent State practice and the Geneva Convention on the Continental Shelf", opined that this statement

should...be viewed as *opinio juris*...if it may be claimed that the *opinio juris* of certain other States is in doubt or not fully proven, this is certainly not the case of the Federal Republic.(@ pp. 235-36).

Judge Ammoun considered the possibility of the existence of a regional custom; and seeing, as he did, that the consent of all States in the region was required, the specific position adopted by the Federal Republic was important for *customary* (albeit regional) law purposes (pp. 130-31, para. 31).

At best, para. 33 of the judgment is ambiguous for our purposes, but on balance, it would seem to be concerned with the German position.

seem inconclusive. The first is Court's apparent statement that the equidistance/special circumstances rule had become "...part of the corpus of general international law;- and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter...".(@ p. 28, para. 37). This would clearly support the majoritarian theory (see, e.g., Weil, 77 AJIL (1983), p. 437, para. 34, and Koskenniemi, Apology, p. 390; Villiger, Customary International Law and Treaties (1985, hereinafter Custom), p. 18). But the view expressed here is not attributable to the Court, which was merely stating a contention advanced by Denmark and the Netherlands; the paragraph begins "It is maintained by Denmark and the Netherlands that...", and the Court gave no indication of having ratified it (see Skubiszewski (31 ZAöRV (1971), p. 810 @ 849). In any event,

it is questionable whether the view expressed in the quoted paragraph is consistent with the previous jurisprudence of the Court, as laid down in the Asylum and Anglo-Norwegian Fisheries cases, considered below. Furthermore, the Court dismissed this contention, and given that the Court's preoccupation with the general law can be explained on other bases (see below), the view advanced by Skubizewski seems to be the better one.

The second statement is found further on in the judgement, where the Court stated that it was unlikely that Article 6 of the Convention (containing the equidistance principle) merely codified a pre-existing rule of customary law because of the ability of States party to the Convention to make reservations to it.

...for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour (@ pp. 38-9, para. 63).

This would seem to support the majoritarian theory (as argued by Marek (VI RBDI (1970), pp. 53-54). But as has been pointed out by a number of writers (e.g. Skubiszewski, op. cit..; Weil, 77 AJIL (1983), p. 437, and Akehurst, Custom, pp. 25-26 (who seems to contradict himself; compare the reference quoted here with ibid., p. 23, n. 3, where he seems to cite the same passage as authority for the view that "[t]here is no need to prove that the State is numbered among those whose practice has given rise to the rule"- this latter argument is questionable given the context of the statement and the point the Court was seeking to make), this statement was not concerned with the creation of universally binding rules of customary international law as such, but rather, with the avoidance of such rules after they had become established. All the Court was saying, rightly or wrongly (see, e.g., Brownlie, Principles, p. 13) was that it was unlikely that a treaty obligation to which reservations were permitted would be reflective of pre-existing customary law. The parties had specifically argued on this point. Dr. Jaenicke had argued on behalf of the Federal Republic that Article 6 was unlikely to be reflective of pre-existing customary law because of the faculty of making reservations. Sir Humphrey Waldock had argued on behalf of the Netherlands and Denmark that the Federal Republic, having recognized the equidistance principle as customary law, could not now seek to exempt itself from the operation of this rule. Sir Humphrey's point was to show that the question of the possibility of reservations to Article 6 was irrelevant in the determination of the Federal Republic's obligation in customary law. He actually demonstrates that there is no difference between custom and treaty in this respect; as he says, "...[n]or does the law of treaties admit that a State which has accepted a treaty without reservation may afterwards modify its acceptance by introducing a reservation" (ICJ Pleadings, pp. 106-7). Neither custom nor treaty permits subsequent unilateral exclusion, and this is the context in which the Court made the pronouncement under examination. The Court was concerned with a rule which is binding on a State which then seeks to deny the opposability of that rule to itself. It did not seek to show, in this context, how the customary rule came to be of universal applicability, which is what the present enquiry is about. The Court was underlining the difficulties facing the 'subsequent In the *Fisheries Jurisdiction* cases, ⁸⁴ the United Kingdom requested the Court to rule, *inter alia*, that (a) Iceland's unilateral establishment of a 50-mile exclusive fishery zone had no foundation in international law, and (b) that, as against the United Kingdom, Iceland was not entitled to assert exclusive fisheries jurisdiction beyond the limits laid down in the bilateral agreement between the two States. The Court declined to rule on the first of these claims; ⁸⁵ a pronouncement by the Court on the matter would also have been likely to prejudice the proceedings of the United Nations Conference on the Law of the Sea, which was then dealing with the matter. The judgement focused on the second claim, basing its decision on the question of opposability i.e. the Exchange of Notes in 1961 between the Parties providing for a 12-mile limit, the historic rights of the United Kingdom and the preferential rights of Iceland. Now, the Court stressed that all of these had been accepted both by the parties and in general State practice. ⁸⁶ There was thus no direct examination of a hierarchical relationship between the general and the particular in the judgment.

In the *Gulf of Maine* case, the Chamber of the Court was requested by Canada and the United States to decide, "in accordance with the principles and rules of international law applicable in the matter as between the parties", the course of the single maritime boundary dividing the continental shelf and fisheries zones of the two States.⁸⁷ The Chamber found that customary international law was incapable of providing any more than general "guidelines to be followed with the view to an essential objective" which

objector' (see Brownlie, Principles, pp. 10-11).

⁸⁴ ICJ Reports (1974), p. 3; the Federal Republic of Germany brought a similar claim, @ p. 175.

⁸⁵ *Ibid.*, p. 24, para. 53.

⁸⁶ @ p. 24, para. 54.

⁸⁷ ICJ Reports (1984), p. 246. See p. 253, Article II, for the statement of the request made of the Chamber. The relevant part of the judgment is to be found in Part IV, @ pp. 288-300.

⁸⁸ Ibid., p. 290, para. 81.

was the achievement of an equitable solution. The Chamber stated that the customary law in the area

in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.⁸⁹

Instead of looking to the law for ready-made rules on delimitation,

A more useful course is to seek a better formulation of the fundamental norm, on which the parties were fortunate enough to be agreed, and whose existence in the legal convictions not only of the Parties to the present dispute, but of all States, is apparent from an examination of the realities of international legal relations. ⁹⁰ (italics added)

The Chamber was therefore applying a universally recognized rule; or at least, to use its own words, important evidence in support of this rule had been "adopted without objection". Furthermore, the Court attached significance to the fact that the Parties had agreed on the rule in question; but the existence or otherwise of a hierarchical relationship between these views and the views of other States was not discussed. The case is thus inconclusive for our purposes. The Court insisted on stressing the fact that the Parties had accepted the rules it applied; whether it would applied those rules regardless of this fact remains unclear.

⁸⁹ Pace Judges Koretsky and Tanaka in the North Sea Continental Shelf cases, ICJ Reports (1969), pp. 154 ff. and 172 ff. respectively.

⁹⁰ *Ibid.*, p. 299, para. 111.

⁹¹ The Chamber had found, when considering the significance for customary law of the United Nations Convention on the Law of the Sea, that many parts of the Convention had been adopted "without any objections" (p. 294, para. 94). See p. 24, para. 54, where the Court noted that the "concordance of views (between the Parties) is worthy of note"; and p. 192, para. 46.

⁹² *Ibid.*, pp. 295-300, paras., 97-112.

⁹³ In the *Libya/Malta* case (*ICJ Reports* (1985), @ p. 33, para. 34), the Court similarly found that the institution of the exclusive economic zone was generally recognized as being part of customary law; but it did not apply it to Libya without stating that Libya had recognized it by a proposal during the negotiations for the Special Agreement conferring jurisdiction on the Court in this case.

In the *Nicaragua* case⁹⁴, the Court had to determine the applicable rules of customary international law relating to certain questions on the use of force. Both parties were bound by the provisions of certain multilateral treaties, including the United Nations Charter, but the United States' "Vandenberg reservation" prevented the Court from adjudicating on claims arising out of those treaties. Accordingly, much of the discussion of the sources of international law concerned the relationship between treaty-based rules and established rules of customary international law having more or less the same content. Nevertheless the Court did make a some pronouncements which are relevant to the present enquiry. 95

For example, the Court stated that

...there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the *content* of the customary international law relating to the non-use of force and non-intervention. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States...(in accordance with Article 38) the Court may not disregard the essential role played by general practice...the shared view of the parties as to what they regard as the rule is not enough. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.⁹⁶

In this passage the Court was saying that, since the case fell to be decided by reference to *general* customary law (as distinct from a regional or special custom), it also had to consider the general practice of States other than the parties to the case before it, as required by Article 38(1)(b) of its Statute. The Court was saying that the Parties had put forward what they believed the law to require, but that it was not necessarily the case that the law required what these two States believed it to require. The parties had not disputed

⁹⁴ ICJ Reports (1986), p. 4.

⁹⁵ Some of the following points have been made earlier; see the discussion of *opinio* juris at the end of Chapter II, supra.

⁹⁶ @ pp. 97-98.

the existence or content of the alleged rule; neither were they merely stating their own positions. They were describing what they believed were the views of the international community as a whole, by which they considered themselves to be bound. On the face of it, therefore, the Court did not require the consent or views of the parties; in fact it seemed to treat the general practice as normative and applicable *irrespective* of the views of the parties. The general *opinio juris* was what mattered, not the views of the parties to the case. ⁹⁷ This would thus seem to confirm the majoritarian theory.

But this reading must be qualified. The Court was dealing here with a rule of general customary law, in accordance with Article 38(1)(b) of its Statute. Now, as far as the Court was concerned, this rule existed already, and was clearly established before the present dispute arose. That this was the case is confirmed by the Court's statement, made in the same context and concerning the tenacity of an established rule of customary law:

...instances of State conduct inconsistent with that rule should generally be treated as breaches of that rule, not as indications of recognition of a new rule. If a State acts in a way *prima facie* inconsistent with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself...the significance of that attitude is to confirm rather than weaken the rule.⁹⁸

The point is that the Court was not dealing with the way in which the customary law rule was created. Rather, the Court was concerned with how the rule could be modified or terminated. Now established obligations cannot be revoked willy-nilly; if a rule is binding, what the parties to a case say about it subsequently is never conclusive after that rule has been established. The role of consent, as far as the formation of a rule is concerned, would have been served by this stage, particularly where, as in the present case, the customary law in question is as good a candidate as there could be for the category of peremptory norms (jus cogens). 99 The role of individual consent in revoking

⁹⁷ See Thirlway, Law and Procedure, p. 51.

⁹⁸ See p. 98, para. 186.

⁹⁹ See, in this regard, pp. 99-100, para. 188, and Judge Sette-Camara's Separate Opinion, @ pp. 199-200.

obligations is a different issue from its role in creating them. Now if we draw this distinction between the way in which a rule is created (with which the Court was not concerned here but with which we are concerned) and the question of the existence of that rule (with which the Court was concerned here but with which we are not), it is doubtful whether the passage under consideration is pertinent to the present enquiry; at any, rate, it is not inconsistent with either the majoritarian, persistent objector or consensual theories.

Secondly, the Court stated that

...apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" - the expression used by the Court in its 1969 Judgment in the North Sea Continental Shelf cases (I.C.J.Reports 1969, p. 44) - that the Court has to appraise the relevant practice. (italics added.)

It is not clear whose subjective element is relevant here; is it the Parties' alone (as suggested by the italicized words) or that of the international community (as might be suggested by the *North Sea Continental Shelf* case, to which the Court referred), or a combination of both (the meaning of "both" is also difficult to imagine; are relative proportions of each involved?)

These considerations would suggest that the passage under consideration does not really shed much light on the questions with which we are concerned in the present enquiry because, at the very least, we do not know whether the Court would have applied the custom irrespective of the views of the Parties.¹⁰⁰

What is clear, however, is that the Court only said that the views of two States were *not* enough, not that they were not important.¹⁰¹ It took pains to stress the fact that both

¹⁰⁰ On the purported distinction between treaties and customary law, see Chapter II, supra, pp. 20-23.

¹⁰¹ @ pp. 97-98. A "minimum requirement"?

parties had accepted what it eventually found to be the true position.¹⁰² It has been suggested, for this reason, that the Court endorsed a consensual conception.¹⁰³ It has also been suggested that the Court seemed to oscillate between the majoritarian, persistent objector and consensual theories in this case.¹⁰⁴

The majority of the decisions of the World Court does not, therefore, seem to shed light directly on the relationship between the existence of a rule of customary law and the applicability of that law to individual States.

3.(ii) the directly relevant cases

There is, however, a minority of cases which provide more direct instruction.

In the Asylum¹⁰⁵ case the International Court of Justice was faced with the question whether Colombia, as the state granting asylum, was entitled unilaterally to "qualify" the offence committed by the refugee (either as a political crime or as a common crime) in a manner binding on Peru, against whose laws the offence in question had been committed. The Court was unable to find that Colombia had proved the existence of a customary rule which created such a right, because the practice relied on was uncertain

¹⁰² See, e.g., paras. 203, 207 and 208 of the *Report*.

¹⁰³ See Akehurst, 27 Indian Journal of International Law (1987), p. 357 @ 360, n. 16; Charlesworth, 11 Australian Yearbook of International Law (1988), p. 1 @ p. 30-31. The latter suggests that the Court extended the operation of the persistent objector rule "by implying that a qualified, or negative vote on a resolution in an international forum can constitute a "persistent" objection" even after the rule is established. It is doubtful whether the Court implied this, given its comments regarding the tenacity of established obligations, discussed supra, pp. 95-96. But the Court did seek to establish the parties' consent. Even if this were so because of the non-appearance of the United States (so that the Court was only anticipating the arguments that could have been raised by the United States if it had participated in the proceedings), it goes to confirm the view that the parties need to have consented; after all, the Court also satisfied itself of Nicaragua's consent to the rules.

¹⁰⁴ See Charlesworth, *ibid*.

¹⁰⁵ ICJ Reports (1950), p. 266.

and contradictory. However, the Court also went on to hold that even if the alleged custom had been established, it should be established in "such a manner that it has become binding on the other Party". In this case, 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. 106 (italics added).

There were therefore two apparently equally valid approaches to the establishment of an obligation on Peru - one was to establish a general rule on asylum which would be binding on Peru because it was a general rule (which tends towards the majoritarian theory), and the other was to establish whether Peru had in some way accepted a customary obligation to be bound by the decision of the Colombian Government on the nature of the offence (which could accord with either or both the persistent objector theory or the consensual theory, as it focuses on the opposability of the alleged rule to Peru based on the particular position adopted by Peru in relation to the practice giving rise to the alleged rule). However, it would seem that the establishment of a customary obligation would turn on the latter inquiry, but not necessarily the former, as it is clear from what the Court said in the passage quoted that the establishment of a customary rule operative between some States would not necessarily have been enough to create obligations upon others. This would support either the persistent objector theory or the consensual theory.

As between these two theories, the further question, then, is whether Peru's consent stricto sensu was required, or whether it was its dissent that mattered. This is important because it could be that all that was required was a lack of dissent, as distinct from consent, on Peru's part. The distinction is important because, as was seen earlier, lack of dissent is a wider notion than consent¹⁰⁷; consent is only one of a number of possible

¹⁰⁶ *Ibid.*, @ 277-78.

¹⁰⁷ See *supra*, Chapter III, Section F, on the distinction between the persistent objector theory and the consensual theory.

illustrations of non-dissent. Conversely, non-dissent could be an illustration of consent, but it is not necessarily the same as consent. The Court, in explaining why Peru would not have been bound even if there had been a customary rule, mentioned both the fact that Peru had *not adhered* to the custom, (which can be described as lack of positive consent), on the one hand, and the fact that Peru had *repudiated* it (which suggests positive dissent) on the other. But it is unclear whether non-adherence (or lack of consent) alone would have been sufficient, or whether the repudiation (or positive dissent) was the crucial factor. If the former, then it could be said that consent is what was required; if the latter, then dissent (or lack of it) is what matters. Now, in this case, no choice was made by the Court. It could thus be that non-dissent is (a) distinct from consent and (b) in itself sufficient to bind a State regardless of consent. The use of the word "repudiation" would thus seem to be ambiguous.

But, leaving the linguistic problem to one side, an examination of the actual "repudiation" (dissent) in question might shed some light on the matter. It actually consisted of a failure to accept a treaty, i.e. lack of consent. The Court treated this as dissent. But to refrain or abstain from doing something (i.e. not consenting) does not necessarily mean that one is repudiating that thing (dissenting). One explanation of the Court's conflation of both ideas in this way could be that there was other evidence suggesting that Peru had positively dissented, but there was no mention of this in the judgment. One convincing explanation is that the Court saw the failure to ratify as being deliberate;

¹⁰⁸ The authoritative French text reads "...loin d'y avoir adhéré par son attitude, l'a au contraire répudiée en s'abstenant de ratifier les Conventions...". The infinitive "abstenir" can mean either to abstain or to refrain; in either case, a failure to act.

¹⁰⁹ Peru's arguments in the pleadings were to the effect that the alleged custom did not exist, or alternatively, that it had not recognized its existence, and not that it had dissented (see *ICJ Pleadings* (1950), Vol. I, pp. 118 ff). This is hardly surprising: perhaps Peru had not dissented because there was nothing from which to dissent, since as the Court (and Peru) said, there was no general consistent practice.

¹¹⁰ This would certainly reflect the pleadings. The Peruvian Counter-Memorial reads ...on peut imaginer qu'une objection spécieuse soit soulevée en se basant sur ce que la codification de la practique de l'asile a, depuis la Conférence de La Havane, donné lieu à de nouveaux efforts et que, notamment, la Conférence

Peru was aware of the new rule contained in the Montevideo Conventions, and by not ratifying, Peru had not accepted, rather than dissented from, that new rule. In this event, we can say for certain that Peru was not bound because it had refrained from consenting, but we cannot say for sure that Peru was not bound because it had positively dissented, as there is no evidence of positive dissent. If so, it appears that consent is what was required, and that the role of dissent (repudiation) here was to prove lack of consent. The case, then, supports the consensual theory rather than the persistent objector theory. There was certainly no mention of the peculiar requirements of the latter (i.e. timeliness and persistence) either in the pleadings or in the judgment.

A possible limitation on this reading of the case is the consideration that it is concerned with a regional, and not a general rule of customary law, and is therefore of little or no relevance to the present enquiry. In this case, however, the Court, while speaking of the "alleged regional or local custom peculiar to Latin-American States", stated that the onus on Colombia "followed from Article 38 of the Statute of the Court, which refers to 'international custom as evidence of a general practice accepted as law'". The Court was thus applying Article 38, which is clearly concerned with rules of general customary international law, to a regional rule. Whether one considers Article 38 to refer only to general customary law or to regional rules as well, the Court did not appear to have considered the difference to have been of importance in this case. ¹¹¹ If Article 38 refers

panaméricaine de Montevideo (décembre 1938) a adopté, contrairement à l'avis de l'Institut de Droit international américain, une convention supplémentaire, laquelle, d'après son préambule, avoir pour but de préciser les stipulations de La Havane. Le Gouvernement du Pérou estime que le droit de qualifier la nature des délits imputés à l'"asile" fut une innovation très grave que la Convention de 1933 a introduite. Il a donc finalement décidé de ne pas la ratifier, et par suite n'est pas tenu par elle (ICJ Pleadings (1950), Vol I, p. 133) (italics added in last two sentences).

The last sentence is virtually identical to the Court's pronouncement, stressing as it does the fact that Peru had not accepted the treaty and had not adhered to the rule in it.

¹¹¹ See Chapter VI, below, on the distinction, and the relationship between, general and particular customary law. Most judges and jurists regard the case as being authority for the creation of customary law generally. See, for example, the Dissenting Opinions of Judges Klaestad and Guggenheim in the *Nottebohm* case, ICJ Reports (1955), pp. 30

only to general customary law, then by applying that Article to a regional customary law, the Court treated both kinds of custom as being similar in this respect. If the Article is taken to refer to both kinds of custom, then this case is authority for the creation of both kinds of custom. The case thus seems to support the consensual theory of customary international law.

In the Anglo-Norwegian Fisheries case¹¹³, the general question was whether the Norwegian system of delimiting the baselines of its territorial sea was contrary to

Furthermore, Judges Azevedo and Caicedo Castilla (see pp. 369-70) both refer to opinio juris as being evidence of acceptance. Judge Azevedo describes opinio juris as a requirement not accepted by the opponents of the voluntary theory (@ p. 335). See Chapter II, supra.

and p. 55, para. 4, respectively; ICJ Pleadings (1966), Vol 10, p. 9 (oral arguments of Dr. Verloren van Themaat on behalf of the Republic of South Africa in the South-West Africa cases); the Dissenting Opinion of Judge Lachs in the North Sea Continental Shelf case, ICJ Reports (1969), pp. 231; (see also the interpretation of Judge Ammoun's judgment in that case, below); the submissions of the United Kingdom in the Fisheries Jurisdiction case (ICJ Pleadings (1975), p. 240), and the Separate Opinion of Judge de Castro (ICJ Reports (1974), pp. 91-92); Waldock, 106 Recueil des Cours (1962), pp. 49-50; Thirlway, International Customary Law and Codification, pp. 135-41; Akehurst, Custom as a Source of International Law, 1974-5 BYBIL, p. 1 @ 29-30; Briggs, The Columbian-Peruvian Asylum Case and Proof of Customary International Law, 45 AJIL (1951), p.728, esp. 730; Lauterpacht, Development, pp. 374-384; Verdross, Völkerrecht (5th edn. 1964), p. 141; Harris, Cases and Materials in International Law (4th. edn, 1990), pp. 25-27; Brownlie, Principles, p.6. For a contrary view, see D'Amato, Concept, pp. 246-264, and Judge Ammoun in the North Sea Continental Shelf case, op. cit. supra, pp. 130-31, para. 31.

¹¹² The dissenting opinions do not contradict this reading. For Judge Caicedo Castilla, Peru, like the majority of Latin-American States, had accepted the practice in question on several occasions (@ pp. 365-368). Judge Read examined the practice of both parties to the case. His opinion is of particular interest because he placed less emphasis on the practice of the other Latin-American States; a review of all their practice was a task which he considered to be "impossible", and he was content to examine the fact that Peru had accepted the practice in question (@ p. 324-325). Judge Azevedo's judgment likewise draws no distinction between the processes leading to the creation of both kinds of customary law (pp. 335-337). Judge Alvarez made certain general observations about the universality of international law. He stated that did not find any American customary international law on Asylum (@ p. 295).

¹¹³ ICJ Reports (1951), p. 116.

international law. In order to answer this question, the Court had to deal, *inter alia*, with certain rules which allegedly laid down contrary methods of delimitation.

The ruling which is pertinent to this study was made where the Court denied, on the basis of the lack of a sufficiently general and uniform practice, the existence of an alleged rule prohibiting the drawing of straight baselines exceeding ten miles in length across the mouth of bays. The Court went on to hold that even if this ten-mile rule "had acquired the authority of a general rule of international law", it would still "appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."

There is no explanation of the juridical basis of this *dictum*; the obvious inference is that it is based on some consensual explanation of customary law.¹¹⁶ It has been argued that

the Federal Republic of Germany, Belgium, Denmark, The Netherlands, the United States, Spain, Portugal, and Uruguay, and also the views of the majority of States at the 1930 Hague Conference, supported the ten-mile rule, but the Court rejected this (see *ICJ Pleadings* (1950), Vol. 1, pp. 68-71). The Rt. Hon. Samuel Silkin, representing the United Kingdom in the *Fisheries Jurisdiction* case (*ICJ Pleadings* (1975), p. 468, discussed below), surmised on this basis that it appeared that the practice of 37 States was not enough to provide the requisite general practice, while the practice of 10 States seemed to be sufficient to prevent it.

¹¹⁵ See p. 131 of the judgment. Judge McNair, dissenting, agreed with this part of the decision of the Court; see p. 164 "At any rate Norway is not bound by such a rule".

¹¹⁶ While the majority declined to give normative effect to a widespread practice, in their dissenting opinions, Judges Hsu Mo (p. 154), McNair (p. 158) and Read (p. 186) found not only that the rule was in existence, but that it was binding on Norway, which was in the position of a 'subsequent objector' (i.e. a State seeking exemption from a rule which was already binding on it). But it is the explanation of how Norway came to be bound by this rule that is important for our purposes. Both Judges Read and Hsu Mo seem to base this finding on the lack of dissent on Norway's part; there was no discussion of Norwegian practice in their consideration of the general practice. In the opinion of both judges, Norway knew of this general practice followed by other States but had not dissented. Judge McNair actually found that Norway had accepted the low-water mark rule (p. 162-3).

this finding was only an alternative and unnecessary basis for the Court's decision, ¹¹⁷ and therefore lacks authority. ¹¹⁸ But the Court specifically stated that it was going to deal with the ten-mile rule because the United Kingdom had not abandoned its claim as to the existence of such a rule as a matter of general customary law ¹¹⁹; to treat the passage as an obiter dictum would be inaccurate. ¹²⁰ Furthermore, the passage has been

Lobo de Souza (EEZ, @ pp. 97-98) argued that (a) the ruling did not form a part of the ratio of the case. This has been dealt with; see two footnotes above, and the earlier part

¹¹⁷ See, e.g., Charney, Persistent Objector, pp. 4 & 9.

But see Lauterpacht, *Development*, pp. 43-47, entitled "*The Necessity for Cumulation of rationes decidendi*". He states that, while it is not the case that the Court always responds to everything pleaded by the parties, to rule specifically on the ten-mile rule as general customary law over and above the question of historic title

^{...}was the only course which was open to the Court consistently with a broad and, it is believed, enlightened conception of its function...[I]t would have been inconsistent with the interests of international justice...if a dispute of some magnitude were to be allowed to hinge on the essentially formal issue of acquiescence. For there is only limited persuasive power in the suggestion that such a course might have been preferable to what critics believe to be the controversial manner of the treatment of the main substantive issue. It is only seldom that a particular ground of decision is so obvious and so uncontroversial as to permit a court to rely on it to the total exclusion of alternate grounds supporting the same conclusion.

¹¹⁹ Pace D'Amato, Concept, pp. 258-262, who argued that the whole case concerned a special custom. See p. 131, just before the ruling on the ten-mile rule: "...the United Kingdom concedes this only on the basis of historic title: it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law." See ICJ Pleadings (1951), Vol. III, pp. 295-6, for the Norwegian argument on this point. The failure to separate the various rulings in the case is a feature common to those challenging the authority of the ruling on the ten-mile rule.

¹²⁰ See Fitzmaurice, The Law and Procedure of the International Court of Justice, (1986) Vol.1., pp. 226, 241-242; to what extent can one speak of obiter dicta in the context of a legal system that is not based on the doctrine of stare decisis? Surely there is a difference between the operative part of the Court's judgments on the one hand and the ratio(nes), if that term is appropriate, on the other? Surely the Court dealt with the ten-mile rule because the parties requested it and because it was important for the determination of the parties' rights? And in ruling that the Norwegian practice was not contrary to "international law" (see the operative part), is it not the case that this "international law" is (a) the primary rule that there is no ten-mile limit, and (b) the secondary rule that a State which "has always opposed" a rule is not bound by it? The issues raised in the case concerned Norway's system of delimitation, which itself covered many sub-issues. See Akehurst, Custom, p. 25.

cited by several judges in subsequent cases, and in the pleadings of various States before the Court. 121

Now what is the significance of this ruling for this study? This is often cited as the clearest authority for the persistent objector rule/theory, and it therefore deserves detailed analysis. The Court's pronouncement is laconic to the extent that, while it is clearly based on the lack of consent on Norway's part (and may to that extent support the consensual theory), it does not expressly endorse the requirements of persistence and timeliness (i.e. the persistent objector theory). In a way, this is not surprising; the Court had found that there was no general rule, so that (even assuming that there was such a rule and that it could be said with precision it came into being at a definite date) these requirements could not be tested against the rule in question. Now for present purposes, it could prove instructive to consider exactly what the parties argued, as this could shed light on the Court's pronouncement.

of this footnote; and (b) that the Norwegian opposition was only one of the reasons for the Court's conclusions, which presumably would not necessarily have stood on its own without the other reasons. One of the other reasons to which he referred was the toleration of other States. But as mentioned above, this, like most critiques of the persistent objector rule as expressed in this case, simply fails to separate the different issues with which the Court was faced. Surely the ruling as to the ten-mile rule referred only to Norway's opposition to a rule of general customary law (@ p. 116 of the judgment). When the Court referred to the lack of opposition on the part of other States (@ pp. 137-139 of the judgment), it was dealing with historic title, and not the ten-mile rule. The Court was now considering whether the United Kingdom, rather than Norway, was bound. The other reason Lobo de Souza proffered was the consistency and longevity of Norway's practice; but, again, this was dealt with in relation to historic rights and not general custom. The operation of the persistent objector rule vis-à-vis the ten-mile rule did not require the toleration of other States. Judge McNair certainly agreed with the ruling on the ten-mile rule and Norway's dissent, but not with the rest of the judgment. and Judge Hackworth disagreed with the ruling on the ten-mile rule but not with the ruling on historic rights. This illustrates that even the individual Opinions appreciated the difference between the different issues in the case.

The arguments questioning the authority of the dictum on the position of Norway vis-à-vis the ten-mile rule is therefore unconvincing.

¹²¹ See, below, Subsection 3(iii).

The United Kingdom required that dissent be made known "at the time when the new rules came into operation", and that the dissent must be made known "openly and consistently". ¹²² Earlier, it had paraphrased the Norwegian contention that dissent was required "from the first" ¹²³. It would seem that the relevant time, then, is when the rule is created. This causes problems, as it may not always be possible to find an authoritative declaration as to when a rule comes into being, given that judicial declaration is the exception rather than the rule in the international system. ¹²⁴ Furthermore, there is no mention of a requirement of persistence (which includes a reference to duration of dissent) as distinct from openness and consistency (which do not; a single act or statement or omission could be (a) open and consistent, or (b) not public and ambiguous, but not persistent). The United Kingdom's formulation seems to cut the ground from under its own feet; if the rule exists, and, presumably, is therefore already binding, surely dissent would be effective only on a prescriptive/historic basis? ¹²⁵ Is this really the persistent objector rule as we know it today (whatever that may be)? Even assuming that the United Kingdom had something like the current conception of the persistent objector rule in

¹²² Pleadings, Vol. IV, pp. 98-99.

¹²³ *Ibid.*, Vol. II, 428-29.

¹²⁴ In any case, the problem is compounded if we consider that there are customary rules which are not of universal applicability. See Chapter VI, below.

¹²⁵ In fact, Sir Frank Soskice, in oral argument, goes on to state that dissent can only operate, after a rule is settled, by way of prescription or historic right. See Vol. IV, pp. 98-99.

It may be possible to rationalize the United Kingdom's formulation as one which would give the dissenting State(s) a reasonable period after the rule comes into existence, perhaps in order to allow the dissenting State to become aware of the new rule, so that where, for instance, its existing rights would be affected, failure to dissent would simply amount to acquiescence and therefore opposability. But this is exactly how prescription and acquiescence work.

This would suggest that the United Kingdom had not really abandoned its earlier argument that a State could only be exempt from an already established rule on the basis of historical title (@ Vol. II, pp. 428-29). In any event, Sir Eric Beckett stated that "...we do not understand the importance attached by the Norwegian Government to the principle that a State which persistently dissents from a customary rule is not bound by it. For the break in the chain of precedents would then prevent the customary rule arising at all" (Vol. IV, p. 40). The *veto* theory?!

mind, its views are different from the formulations proffered by current writers, which require dissent not when the rules are created, but before (i.e. while the rule is in the process of formation).¹²⁶

The Norwegian formulation is similarly not illuminating. In its own words, it stated that a rule is not opposable to a State "si l'attitude prise par l'État prouve son refus de se soumettre à la coutume résultant de la pratique d'autre États"; 127 there is no reference to a temporal requirement, either in relation to commencement, or in relation to duration, of dissent. It then quoted, as authority, five opinions, 128 three of which did not speak of any limitations, temporal or otherwise (a "subsequent objector" rule?). 129 The other two were from, respectively, de Visscher who required "la volonté persistante", and François, who would exempt a State "qui, d'une manière permanente et expresse, s'est toujours opposé son acceptation". Then a gloss was put on the rule to the effect that "...s'il a manifesté, soit expressément, soit par une attitude constante et non équivoque, la volonté de ne pas soumettre à la règle, alors que celle-ci n'avait pas encore pris à son égard le caractère d'une règle obligatoire", a State would not be bound. There are several

¹²⁶ Brownlie's formulation (*Principles*, p. 10), refers to dissent while the rule is "in the process of formation". Cassese refers to dissent from a rule "in statu nascendi (although he then seems to go on to explain this as meaning "at the moment of its creation") "(*International Law in a Divided World* (1985), p. 180, para. 97). Charney (*Persistent Objector*, p. 2), refers to dissent from an "evolving" rule of customary law. The *Restatement of the Foreign Relations Law of the United States (Revised)*, section 2, Comment. (d), refers to a rule which "is still in the process of development". Akehurst, *Custom*, p. 24, refers to "the early days of the rule's existence (or formation)". Thirlway speaks of maintaining dissent "from a time when the customary rule alleged had not yet crystallised", and later, "from the time when the rule begins to settle down" (*International Customary Law and Codification* (1972), @ pp. 110 and 116 respectively). And in all these works, unlike the United Kingdom's formulation, the burden regarding the persistence of dissent is highlighted (hence the name of the rule); but there is no absolute uniformity in this regard. One may very well ask whether there is a persistent objector rule *stricto sensu*.

¹²⁷ Vol. I, p. 381, para. 256.

¹²⁸ *ibid.*, p. 381, para. 257.

¹²⁹ Cf. in particular the fifth quotation (from the *Fishbach and Friedericy* cases, X *RIAA*, p. 357).

different things implied in these quotations. (a) The statements which do not refer to any limitation at all indicate that a state can dissent, but not on the basis of the persistent objector theory *stricto sensu*. (b) The gloss mentioned above would suggest that what is needed is evidence of the will of the State; and such evidence, it is stated, could be express or it could be a constant attitude. This is close to the persistent objector rule. (c) As for the two jurists who imposed limitations, they would seem to conform more closely to the current perception of the rule, but they do not specify *when* the dissent must begin. Now the problem is this; to which of all the formulations, British and/or Norwegian, described here, was the Court referring when it made its pronouncement concerning Norway and the ten-mile rule? The answer does not seem obvious.¹³⁰

On this view, while the case is authority for the exemption of a State that has *always* opposed a rule, it is not necessarily the authority for the persistent objector rule *stricto sensu*, primarily because "always opposed" does not stipulate the time when the dissent must commence. In addition, the case does not tell us whether anything less than the requirement of having "always opposed" the rule can suffice to exempt a State;¹³¹ the United Kingdom certainly thought that Norway was one of the initiators of the disputed rule.¹³²

¹³⁰ It is submitted that if the authority of this dictum is to be doubted, it should be on the grounds of ambiguity, rather than on the grounds of a distinction based on the distinction between *obiter dicta* and *ratio decidendi*, and still less on the distinction between general and special custom (cf. n. 119, *supra*).

Thirlway seems to require that the State is bound to make its position known only when the emerging rule is directly applied to its own interests (op. cit., p. 116). He does not state whether the State will (rather than "may") be bound by the rule followed between others where its own rights have not been affected, e.g where some States delimit their maritime boundaries on an equidistance basis). P. De Visscher requires that the dissent must bear the same notoriety and the same effectiveness as the conduct and practices against which they are directed (136 Recueil des Cours (1972), Vol. II, @ p. 74. Others have required the acquiescence of other States in the dissenting State's position (e.g. Cheng, Custom, pp. 547, 550; Rosenne, Practice and Methods of International Law (1984), p. 66). These would even suggest that dissent is, as the United Kingdom argued, valid only on something similar to a prescriptive basis.

¹³² See *Pleadings*, Vol. IV, pp. 99 ff.

However, the common denominator in all these formulations is the element of manifestation of will. The pleadings of the United Kingdom, as shown above, do not really seem to support the persistent objector theory as such; ¹³³ and in requiring dissent only after the rule is created, would suggest that prescription, and therefore acquiescence, on the part of the dissenting State, is what matters. And a State cannot acquiesce without (actual or constructive) knowledge of what it is acquiescing in. Norway, on the other hand, stressed repeatedly the view that its thesis was consistent with classical voluntarist theories and that dissent proved both a lack of consent to the practice in question¹³⁴ (and with it, positive consent to a different practice). ¹³⁵

En l'absence de protestations, la Cour est d'avis que celle-ci (i.e. third States)

¹³³ See, supra, nn. 122 ff., and accompanying text.

¹³⁴ See its Counter-Memorial, Vol. I, p. 381, where it refers to the presumption maintained by positivist writers, that where a rule has been so widely applied by many States, there is a presumption in favour of the acceptance of the validity of the norm for all States. It states that "Cette présomption toutefois n'est aucunement irréfrageable et elle tombe si l'attitude prise par l'État prouve son refus de se soumettre à la coutume résultant de la practique d'autres États, quelques nombreux qu'ils soient". It also spoke of "la volonté de ne pas se soumettre à la règle" (p. 382), and "qu'un État a le droit de refuser son consentement" (Vol. II, p. 291) (italics added in all cases). Consent/will is therefore the foundation of the right to dissent. Also, in all cases the element of awareness of the general rule is necessarily implied; if a State has the right to dissent, that right is meaningless if it does not know of what it has the right to dissent from (see Thirlway, op. cit., n. 126, supra). Norway speaks of the presumption of acceptance on the part of States "qui n'ont pas été amenés par les circonstances à préciser leur position dans un sens ou dans l'autre"; it specifically does not say that they are unaware of the practice. The requirement that the practice be general (Lord Alverstone, who said that the custom must have been "so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it", was quoted; Vol. I., p. 381) attests to some sort of notoriety element. See Subsections 4(ii)(a) and (b) of the present section, for a fuller discussion of this issue.

Considered as a whole, the Court's judgment is perfectly compatible with the consensualist theory. The Court found that Norway's methods of delimitation were not contrary to international law (@ pp. 131 ff.). But it did not leave it at that, perhaps because, as some have argued, the Court was in reality fashioning a new rule (i.e. the geographical/economic considerations stated on pp. 132-133 of the judgment). It therefore went ahead to satisfy itself that the international community, and in particular the United Kingdom, had consented to ("tolerated") the Norwegian practice (@ pp. 138-139). Of course this last finding was based on the doctrine of historic rights, which, it may be argued, are typologically different from customary law. But see Fitzmaurice, 30 BYBIL (1953), p. 1, @ pp. 68-69, for the view that such rights are but a species of customary law. See also Haggenmacher, Deux éléments, pp. 82-83:

3.(iii). Summary on the direct treatment of the majoritarian, persistent objector and consensual theories

The majoritarian theory has not been tested, since in many of the cases which might have provided the opportunity for its application, the Court found that there was no rule of customary law.¹³⁶ The persistent objector theory *stricto sensu*, it is submitted, may not have been sanctioned by the authority of the Court as such.¹³⁷ It is submitted, however,

On the fictional nature of consent, see Chapter VII, Section A, Subsection 6, below.

Some individual opinions support this theory. In the *Nuclear Tests* cases, (*ICJ Reports* (1974), pp. 253 and 457) Australia and New Zealand contended that a rule of customary law prohibiting atmospheric nuclear tests had come into being, and that France was bound by this rule, while France, on the facts of the case, had opposed this alleged rule. The Court, however, did not pronounce on the merits of the case. Judge *ad hoc* Barwick adopted the position that customary international law does not depend on universal acceptance, so that France would be bound by this alleged rule in spite of its dissent (*ibid.*, p. 435), and this clearly supports the majoritarian theory. Similarly, Judge Ammoun in the *North Sea Continental Shelf* cases (@ p. 130-131), makes a most cryptic, and it is submitted, inconsistent, statement, by which he clearly intends to make some sort of distinction between regional/local custom and general custom, on the basis that a State's consent is required for the former and not the latter. This view is discussed in Chapter VI, Section B, below, @ pp. 186-190.

Judge van Wyk, in his Separate Opinion in the South-West Africa cases (ICJ Reports 1966, p. 3, where South Africa invoked the Anglo-Norwegian Fisheries case and argued that its dissent prevented the applicability of a norm prohibiting racial discrimination against it, while the Applicants tried to limit the scope of this right to dissent to rules of law involving inter-state interests and not those, like racial discrimination, which do not; see ICJ Pleadings (1966), Vol. 9, pp. 347-352), stated (@ p. 170, para. 55) that "...since acquiescence is a prerequisite to the creation of a new norm, it is the Respondent's acquiescence that is required in so far as South-West Africa is concerned". He makes no explicit reference to the Anglo-Norwegian Fisheries case, and in any event, he refers not to an "objector" theory but to the consensual theory (the test is acquiescence); dissent is

y avait acquiescé et le considerait donc régulier. Il est fait appel en ce sens à une communis opinio juris...Quoi qu'il en soit, il ne saurait être question en tout cas de coutume bilatérale ou régionale. Non seulment la Cour n'a pas posé le probléme en ces termes-là, mais sa démarche effective ne laisse pas de place à une telle interprétation.

¹³⁶ The *Nottebohm* case (discussed @ nn. 67-78 (*supra*), and accompanying text) has been cited as an example of the theory in operation, but, as has been argued, this is most questionable.

¹³⁷ "As such" because some individual judges have purported to apply the persistent objector rule, (normally expressly) on the authority of the *Anglo-Norwegian Fisheries* case. Their views should be considered briefly.

that a theory, which is somewhere in between the persistent objector theory and the consensual theory, has support in one case.¹³⁸ The consensual theory has been recognized in at least one, and probably two, cases.¹³⁹ Taken as a whole, however, the Court's practice would not seem to answer our question conclusively.

4. Other Pertinent Aspects of the Court's Jurisprudence

There are, however, other aspects of the practice of the Court which shed some light, and

therefore the means, and consent is the end.

In the North Sea Continental Shelf cases, Judge Lachs referred to both the Asylum case and the Anglo-Norwegian Fisheries case (@ p. 238), as if to suggest that the relevant rulings in both cases meant the same thing (see the discussions above for the difficulties with this approach). That he could very well have had the consensual theory in mind is suggested by his statement that general practice should be recognized as prima facie evidence of universal acceptance, and therefore applicability (cf. the classic consensualists' presumption), but that such evidence can be controverted on the test of opinio juris with regard to "'the States in question' or the parties to the case"(@ p. 231). Acceptance is the key, and evidence thereof can be presumed and rebutted, and that is the aim of dissent.

Judge ad hoc Sørensen, for his part (@ p. 247), relied on the Anglo-Norwegian Fisheries case, holding that Germany would not be bound by the equidistance rule if she had "consistently refused to recognize it as an expression of generally accepted rules of international law and had objected to its applicability against her." This seems somewhat stricter than the authority upon which it is based; the requirement of refusal to recognize as generally accepted law is not the same thing as refusal to accept for her part only.

Judge De Castro in the Fisheries Jurisdiction case also quoted the dictum from the Anglo-Norwegian Fisheries case (ICJ Reports (1974), pp. 98-99), as does Judge Dillard (ibid. p. 58). But Judge Dillard held, perhaps strangely, that as a matter of customary law, Iceland had agreed to be bound by the 12-mile rule. As Iceland had not dissented, it is difficult to say what the requirements, if any, of dissent were, in his opinion.

Judge Gros, in his Separate Opinion in the *Nuclear Tests* cases (*ICJ Reports* (1974), p. 253), without expressly referring to it, seems to have held the same thing as the dictum in the *Anglo-Norwegian Fisheries* case, he stressed that France had "always" refused to recognize the rule in question (@ p. 287).

¹³⁸ i.e. the *Anglo-Norwegian Fisheries* case, nn. 107 ff. and accompanying text, above, where the distinction between the strict persistent objector theory and the "simple dissent" theory was highlighted.

¹³⁹ Ibid., and the Asylum case, above.

4.(i). The pregnant absence of a distinction between the majoritarian, persistent objector, and consensual theories.

It is a very distinctive feature of the Court's jurisprudence that it does not appear to have determined a hierarchical relationship between the general and the particular. Leaving aside those cases in which it did not find that there was a rule of customary law, it has been consistent in satisfying itself of the consent of the parties to the case before it to the rules of customary law which it has applied. It seems difficult to maintain that this is pure accident, or that it should be ignored. Now it may be asked whether the Court, in all these cases, needed to refer to the consent of the parties; it could be argued, as Koskenniemi puts it, that [t]he whole discussion about how extensive must a practice be to be valid as custom is meaningful only on the assumption that once that degree has been

¹⁴⁰ See Koskenniemi, From Apology to Utopia, pp. 389-392.

¹⁴¹ This is true of all the leading cases on customary law. Concerning the *Asylum* and *Anglo-Norwegian Fisheries* cases, nothing needs to be added to the discussion of these cases (*supra*, the present Section, subsection 3(iii), @ pp. 98-109.

In the North Sea Continental Shelf cases, the Court saw no difference between the question whether the equidistance rule was "a mandatory rule" on the one hand and the question whether the Federal Republic was under an obligation to accept the equidistance rule on the other (ICJ Reports (1969), p. 23, para. 21). Surely it is possible to have two different answers to both questions (e.g. yes to the first and no to the second, if, for example, Germany had persistently objected dissent). [Would this not suggest that the rule would be mandatory for the Federal Republic only if it had consented (or not dissented)?] But since the Court found a harmony between Germany's contentions (and therefore consent) and the general law, no hierarchy between the general and the particular was specified.

In the Fisheries Jurisdiction cases (see p. 92 supra), where the Court first stressed the crystallization of certain concepts as general law (@ p. 23, para. 52), and then satisfied itself of the consent of both parties thereto (p. 24, para. 54).

See also the *Tunisia-Libya Continental Shelf* case (*ICJ Reports* (1982), where the Court focused on the historic rights/*modus vivendi* between the parties (paras. 90, 92, 95 and 97-105. 68) and also the general law (paras. 43-49). See also the *Gulf of Maine* case, discussed @ p. 93 ff, above).

See also the *Nicaragua* case, where, as seen above (*supra*, p. 94 ff.), the Court took pains to stress the acceptance on the part of the parties of what it found to be the general law.

attained, the rule binds *all* States. ¹⁴² The view is thus that, by referring to general law at all, the Court is implying that individual consent is either (a) irrelevant, or (b) only one of a number of ways in which a State can become bound. This is an important view, for it is directly relevant to, and it seriously questions, the role of consent. This view, however, could mean a number of different things, which are now considered below (a-d).

a. A "political strategy" argument The view could mean that in satisfying itself of the parties' assent, the Court is trying to make its decision (which is actually based on the general law), acceptable to the losing State. Perhaps a stronger version of this view is that the Court is merely pandering to States' (and its own) interests and/or sovereignty, 143 since its (the Court's) jurisdiction is not compulsory. Both versions are unacceptable. In the first place, the Court does not limit proof of consent to the losing or non-appearing State in the cases under consideration. And it cannot be the case that, if the State(s) in question had not consented, the Court would manufacture their consent, as this would be unjust and would undermine the Court's integrity and authority. Rather, it is noteworthy that a third party, which is supposed to be impartial and objective, 145 feels

¹⁴² This has some (inconclusive) support in the consideration that in the *Gulf of Maine* and *Tunisia-Libya* cases, the Court started out with a discussion of general law and only after finding that that was non-existent did it look at the parties' consent. However, the process was reversed in the *North Sea Continental Shelf* cases and in the *Libya-Malta* case.

¹⁴³ See, e.g., Wehberg, *The Problem of an International Court of Justice* (English translation, 1919), pp. 12-29, who makes this criticism of the Permanent Court of Arbitration established by the First Hague Peace Conference.

¹⁴⁴ See Lauterpacht, *Development*, pp. 5-7.

¹⁴⁵ See Cheng, *Custom*, pp. 522-526, @ p. 524; "judicial" (as distinct from "auto-interpretive") international law as "international law of the highest grade, in the sense that it has been ascertained, interpreted and applied by third parties, free, as far as is humanly possible, from national self-interest and the operation of power politics." And Scelle, *Recueil des Cours* (1933), Vol. IV, p. 512, distinguishes between judicial settlement and other forms of dispute settlement on the basis that

le juge doit prendre des décisions *objectives*, sans jamais tenir compte de la situation personelles des plaideurs.

it necessary, consistently, to satisfy itself of the recognition by the parties of the substantive law it applies. States generally argue in their pleadings that they have or have not consented to the rules in question. The point is that the Court (or any other tribunal) is and will always be far more objective than States would be, as the Court has no personal interests to serve; yet it takes the trouble to satisfy itself of the Parties' consent. 146

Above all, is it really to be believed that a State which loses a case will really be happier just because the Court says it consented to the rule applied against it to its detriment? One is tempted to think that there must be other reasons for referring to the consent of the parties than the reasons offered by the "political strategy" argument.

b. An argument based on the Court's function It could be argued that the Court is required by Article 38(1)(b) of its Statute to apply general customary international law, regardless of individual consent, so that reference to the latter is merely cosmetic. But regional, and even bilateral, customary law has been applied by the Court, and this is not general. In any case, there are other (better) reasons for the Court's insistence on looking at the general law. Firstly, where the parties request the Court to determine the relevant rules and principles applicable to their case, and particularly where the parties dispute the existence of a rule of general customary law (as they did all the cases under consideration), the Court should, and does, look into, and pronounce upon, the status of the alleged rule, over and above, or irrespective of, the particular positions of the parties involved.¹⁴⁷

¹⁴⁶ Without meaning to prejudge the issue, which is examined in Chapter V below, it is difficult to see how a Court can be more voluntaristic than a State. Surely a State knows best how to state its own position? See Koskenniemi, *From Apology to Utopia*, pp. 377-378, on "knowing better".

¹⁴⁷ E.g., in particular, the *Nicaragua* case, @ pp. 97-98. The question put before the tribunal in its pleadings often (not always) determines the form of its pronouncements. This is only natural. If the pleading is that a particular rule of general custom exists and is binding on State A, then to find that there is no such rule is conclusive of the matter. If the pleading is that State A has "accepted" a particular rule or practice, to find that

Secondly, while it is true that the Court's decision is binding only on the parties to the case in question¹⁴⁸ (and that voluntarism might therefore be more important in a judicial context) it is not entirely true to say that the principles and rules of customary law applied in reaching that decision are also not of general effect.¹⁴⁹ Even if one subscribes to the narrowest conception of the authority of the judicial pronouncement as a source of international law, it is nevertheless the case that in most circumstances the law applied by the Court is the law irrespective of the Court's pronouncement. And in many cases, the judgment of the Court can have decisive influence on the development of the law involved.¹⁵⁰ Both the Court itself, and States in general, do rely on the Court's pronouncements (as warranted by Article 38(1)(d), and the Court is aware of its quasilegislative function in this sense.¹⁵¹ A combination of these factors would render an excursus into general customary law at least appropriate, and perhaps even necessary,

there is no such rule is not conclusive; the tribunal must go further and examine the position taken by that State. Most cases involved both kinds of pleading.

¹⁴⁸ This is stated in Article 59 of the Court's Statute, which reads; "The decision of the Court has no binding force except between the parties and in respect of that particular case."

¹⁴⁹ See Beckett, 39 *Recueil des Cours* (1932), Vol. 1, p. 141. See generally, Brownlie, *Principles*, pp. 19 ff., especially the authorities cited on p. 21.

¹⁵⁰ Witness the fate of the equidistance method in the subsequent cases on maritime delimitation (i.e. Tunisia/Libya Continental Shelf case, the Gulf of Maine case, and the Libya/Malta Continental Shelf case (discussed in Subsection 3(i) of the present Section), largely expressed to be a result of the finding in the present case. See also the impact of the Court's judgments in the Reparations case (ICJ Reports (1949), p. 174, the Anglo-Norwegian Fisheries case (ICJ Reports (1951), p. 116, and the Reservations case (ICJ Reports (1950) p. 15, (but see the discussion of this last case, supra, 56 ff, and accompanying text).

¹⁵¹ This is confirmed by the fact that other States frequently do request (pursuant to Article 53 (formerly Article 44 under the old Rules, revised in 1978) of the Rules of the Court) the pleadings and annexed documents in this case. In the *North Sea Continental Shelf* cases, for instance, fourteen other States representing a wide geographical spread requested the documents; see p. 8 of the judgment. The same considerations apply *mutatis mutandis* to other tribunals and not just the International Court, if for no reason other than Article 38(1)(d) of the Statute of the Court, which speaks of "judicial decisions" generally and not just the Court's own decisions. See generally Brownlie, *Principles*, pp. 19-24.

even if the parties had not specifically requested it; but such an excursus does not undermine any role consent may have to play.

c. A "Judicial Economy" argument It may seem that the Court, if it adopts the consensualist position, would not have to look at the general law at all; it could simply look for the consent of the parties to the customary law in question, and save itself the task of looking at general State practice. As Stein has put it,

It should be easier to demonstrate that one has persistently objected to a rule than to show that the rule does not exist. 152

The fact that it looks at the general law would suggest that consent is not important. In fact, in some cases, the Court has considered *only* the general law, ¹⁵³ and in others, it considered the individual positions only *after* a consideration of the general law (as an unnecessary afterthought?). ¹⁵⁴

But this is a somewhat simplistic view. It is submitted that it is just as sensible and economical, and in fact more so, for the Court to approach the question by first considering the general law than it is to begin the other way around. This is because even if a tribunal were to begin by examining the position adopted by the State denying the existence of a rule of customary law, that alone is hardly ever conclusive of the matter; one would usually have to ask two questions instead of one, the one relating to the general law and the other relating to that State's position vis-a-vis the general law. To explain this, one should consider a number of possible scenarios based on the premise, relatively uncontroversial at least in the Court's jurisprudence, that timely dissent prevents

¹⁵² Stein, Different Drummer, p. 459.

¹⁵³ E.g. the Lotus case, and the North Sea Continental Shelf case (arguably).

¹⁵⁴ E.g. the Asylum case, the Anglo-Norwegian Fisheries case, the Fisheries Jurisdiction case, the Tunisia-Libya case, the Nicaragua case.

- (i) One scenario is where a State has not dissented from the general law (question one). It would, of course, then be necessary to consider what the general law (which presumably would then be binding on that State), requires (question two).
- (ii) Another scenario is where the State has dissented (question one). That State's actions would still have to be considered in relation to the general law (question two). At the very least, this is because it must be determined whether the State's dissent comes after the alleged general rule is settled (in which case it is in the position of a subsequent objector, whose dissent requires the "toleration" of other States in order to be valid) or before the rule is settled (in which case the dissent may be effective). 158
- (iii) Another scenario is illustrated by the issues in the *North Sea Continental Shelf* cases, i.e. where a State may be said (as Denmark and the Netherlands argued, in relation to Germany) to have accepted a rule previously, but where the actual content of the rule is dispute. In the *North Sea* cases, for example, both the parties and the Court ¹⁵⁹ (and, in particular, Judges Tanaka and Morelli¹⁶⁰), dealt with the "meaning" of the concept of the continental shelf, i.e. whether the notion of equidistance inhered in the concept of the continental shelf as a matter of "juristic" or *a priori* logical necessity, or whether it

¹⁵⁵ This is assumed on the basis of the authority of the Court's decisions in the Asylum and Anglo-Norwegian Fisheries case, and the several individual opinions considered in Subsection 3(iii), above, @ n. 137.

¹⁵⁶ See Brownlie, *Principles*, pp. 10-11.

¹⁵⁷ Cf. the Anglo-Norwegian Fisheries case, @ pp. 137-139 of the judgment.

¹⁵⁸ See Brownlie, *Principles*, p. 10, and Fitzmaurice, 92 *Recueil des Cours*, Vol. II, p. 99. In the present case, both Judges Lachs and Sørensen (discussed below) who found that the ultimate question was whether the Federal Republic had dissented, had to consider the general practice first.

¹⁵⁹ See *ICJ Reports* (1969), paras. 37-58.

¹⁶⁰ Ibid, pp. 179 ff. (Judge Tanaka) and pp. 199-210 (Judge Morelli).

was not an essential part of the concept. If it had been found that the equidistance principle was part and parcel of the concept of the continental shelf (as it was by Judges Tanaka and Morelli), then the Federal Republic, having accepted, or at least not dissented from, the concept, would have had been bound by the equidistance principle because it was included in what was accepted by the Federal Republic. It may thus be necessary to have recourse to the general practice even if the State has "accepted" it, at least for the purposes of interpretation. ¹⁶¹

- (iv) Also, it is often the case that position of a State in relation to a rule is in doubt; if the position were clear there probably would be no need to seek a judicial pronouncement on it. This was probably the case in relation to the Federal Republic and the equidistance principle; witness the difference of opinion on the part of the majority of the Court (saying that the Federal Republic had not accepted the principle) and the dissenting judges (who found that the principle had been accepted by the Federal Republic). The generality of recognition accorded to a position is clearly of considerable value in assessing the effects of the otherwise equivocal position of an individual State.
- (v) But there is an even better reason than these. Where, as in this case, the Court is unable to find that the alleged rule of general customary law exists, there is no need to go further and examine the position taken by the State which now denies its application, because that State's assertions that it was not bound would have been vindicated. Therefore, to approach the question from the perspective of the general law (when the Court, in its deliberations, has found that no customary rule exists) is to have to answer one question only, instead of two.¹⁶² This would explain the why the Court looks at

¹⁶¹ See Lowe, General Rules, p. 209, 210.

¹⁶² It is submitted that to read the *Lotus* case as authority for a norm to the effect that the Court does not inquire into the conduct of a particular State when applying general customary law (see D'Amato, *Concept*, p. 190) is inaccurate for the above-mentioned reasons. (Perhaps the problem is that many of the cases under consideration had not been decided in 1971, when the book was written; but his treatment of the *Asylum* case and the *Anglo-Norwegian Fisheries* case, which had been decided at that time, as simply cases on "special" rather than general custom, are similarly problematic). The Permanent Court

All this shows that a reference to general law (whether exclusively or as a starting point) does not entail rejection of the consensualist theory. On the contrary, the consensualist theory also requires it to consider the general law.

d. A "belt and braces" argument It could be that the Court's practice is simply a means of securing its application of customary law to an individual State (i.e. on the basis of general law and individual acceptance) on as many legal grounds as possible. This could mean that a State could be bound on the basis of general law alone. On the basis of the preceding explanations, this argument, while having merit, is speculative, in the sense that it is not proven that consent is definitely not required.

In sum, what we have is the Court's practice in always ascertaining States' consent, and that this practice is based on sound *legal* and practical considerations which seem to require its adoption by the Court. As Brownlie has put it, (in a very similar context), "The fact is that general formulae concerning custom do not necessarily help in

did not have to respond to Turkey's voluntaristic arguments because it had found that there was no rule prohibiting its purported exercise of jurisdiction to begin with. The same response applies equally to Haggenmacher, who says that in many cases the Court simply applies general customary law with no reference to individual consent (*Deux éléments*, pp. 109-110, 115-116).

In any case, the fact that States only plead on the basis of the general law does not necessarily tell us much. It could be that the State denying the existence of a customary rule (as distinct from the applicability of that rule to itself) is doing so because it is better to argue that one's position is also shared by the majority of States, rather than to claim an exceptional position. See Mendelson, "Practice, Propaganda and Principle in International Law", *Current Legal Problems* (1989), pp. 8-9. To argue that a rule does not exist in no way necessarily implies that if it exists, it is binding; the whole point of arguing that a rule does not exist is to show that it is not binding.

¹⁶³ To put the same point differently, what we are concerned with here is consent; and as shown earlier, consent requires (a) some form of acceptance of (b) a certain state of affairs (including the legality of a practice). To ascertain the state of affairs before looking for evidence of consent thereto is flawless as a method.

4.(ii) Evidence of a presumption of universal acceptance of a general rule

The practice of the Court may seem to support the proposition that general acceptance is sufficient for the creation of a rule which binds all States; otherwise there would be no sense in construing the method of creation of a rule so carefully. This reading would support a system of majority rule, and thus the majoritarian theory. But the practice of the Court suggests also suggests that the general rule has, at the very best, only a *prima facie* validity vis-à-vis those States which have not positively participated in it, since there is always a right of dissent from such rules; if a State expresses a different will consistently, then it will not be bound by that rule. There is therefore no majority rule in the system of custom. To balance the apparent normative force of a general practice against the right to dissent is therefore to maintain that the normativity of the general practice is a rebuttable presumption.

Now what is this a presumption of? Is it a presumption of validity as distinct from a presumption of consent? Or are the two terms the same for this purpose? It would seem that the right to dissent confirms that they are the same, for what does dissent prove if not lack of consent?¹⁶⁷

¹⁶⁴ Principles, p. 9. Elsewhere, he stated that "when two States get down to the serious business of settling a particular dispute...the question of operational efficacy can only be dealt with on the basis of special relations" (see Cassese and Weiler, Change and Stability, pp. 109-110).

¹⁶⁵ See Koskenniemi, From Apology to Utopia, p. 393.

¹⁶⁶ Akehurst has demonstrated (unanswerably) that, even if majority rule was not rejected in the practice of the Court, majority rule is unworkable because, "it would be impossible to reach agreement about the size of the majority required, and whether (and if so how) the 'votes' of different States should be weighted" (see *Custom*, p. 26).

¹⁶⁷ See Chapter II, Section F, supra. See the Counter-Memorial of Norway in the Anglo-Norwegian Fisheries case, Vol. I, p. 381, para. 256, Villiger, Customary International Law and Treaties, p. 21 and Stern, "La coutume au coeur du droit

Based on the existence of this presumption, the roles of the requirements of (a) dissent and (b) generality will now be considered further, with a view to an examination of the role of consent. Then (c) there will be an examination of whether the role played by consent can be played by the (at times similar but nevertheless different) notion of expectations.

(a) the part of dissent

The purpose of this sub-subsection is to examine the relationship between the right to dissent and the consensual theory. It could be argued that support for the right to dissent is not support for the consensual theory; the only references in the judgements of the Court have been references to dissent (even in the *Asylum* case, the Court did not only speak of lack of adherence, but also "repudiation"). But the relevant pronouncement in the *Asylum* case, as argued above, can only be explained on the basis of a lack of consent on Peru's part, rather than on the basis of positive dissent. This would suggest that the Court was not preoccupied with a distinction between dissent and lack of consent; if anything, the former proved the latter. This is not a feature peculiar to the *Asylum* case. 169

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Charlesworth, Australian Yearbook of International Law (1988), p. 1, @ pp. 30-31,

international: Quelques rélexions", in Le Droit International: unité et diversité. Mélanges offert à Paul Reuter (1981), p. 497, who all argue that consensualists and others do not differ once this presumption is accepted, and it is accepted. See Koskenniemi, From Apology to Utopia, (citing Suy), p. 393: "Sovereign equality requires a State to have the right to protest against a norm or refrain from recognizing a situation which it finds non-acceptable" (emphasis added).

¹⁶⁸ All the instances of Peruvian (rather than general) conduct cited by Colombia were found by the Court to be inconsistent; Peru had simply not been positively dissenting from the rule in question. See section 3 (ii), *supra*.

¹⁶⁹ See the discussion of the Anglo-Norwegian Fisheries case, supra, and the discussion of the Opinions of Judges Lachs and Sørensen in the North Sea Continental Shelf cases, supra. Also, in the Western Sahara case (ICJ Reports (1975), p. 23, the Court stated that "In view of Spain's persistent objections to the questions formulated in Resolutions 3292 (XXIX), the fact that she abstained and did not vote against the resolution cannot be interpreted as implying its consent", and it was thus not bound by the contents of the resolution. It is consent that matters, and the dissent only illustrates the existence or otherwise of consent.

But there is still a difference between consent and dissent; it was noted that, while both the persistent objector theory and the consensual theory are both basically consensual, the difference between them is that the first requires some formalities, namely, actual dissent, timeliness and persistence.¹⁷⁰ So do these requirements undermine the consensual theory *stricto sensu*? Now let us compare consent and dissent, noting in particular these formal requirements. It will be argued that the right to dissent works only if it is subsumed under the consensual theory.

To begin with, there are <u>operational</u> problems with the persistent objector rule, which would not be faced by the consensual theory. These problems arise largely because the content of the persistent objector rule itself is not completely established.¹⁷¹ The formulation of the right to dissent requires that there must be in existence a general rule with *prima facie* normative force for the dissenting State; if there is no general rule, the obligations of States depend on estoppel, acquiescence, recognition, and the like, all of which are expressions denoting consent. But the requirement that there be a general rule highlights two problems. The first relates to the requirement of timeliness. It is submitted that the persistent objector rule is meaningful only if a State knows when to dissent; but under the persistent objector rule, it may not know when to dissent. Consider the possible times when dissent may be required: (a) if the practice is in its "early days", then it may not be general, and if it is not general, it is unlikely to be known, and if it is not known,

suggests that in the *Nicaragua* case, the Court extended the operation of the persistent objector rule by implying that a qualified or negative vote on a resolution can constitute a persistent objection. The Court simply did no such thing. The Court was not concerned with (persistent) dissent. It was concerned with consent. One vote can be sufficient to establish (lack of consent), but it is probably not enough to amount to persistent objection.

¹⁷⁰ See Chapter III, Section F, supra.

¹⁷¹ See the discussion of the *Anglo-Norwegian Fisheries* case, *supra*, pp. 102-109, esp. pp. 105-106.

it cannot be dissented from;¹⁷² (b) if the rule is nearly settled but not quite, then it is still not a general rule, so that dissent would still not be necessary to avoid obligation; (c) if it is an established rule, then it would already be binding, and dissent would be too late. We are then left with the time of formation. But is it really possible to identify a date on which a rule comes into being?¹⁷³ That is the first problem; a State may not know when to dissent. The second problem is linked to the first. It relates to the fact that custom is an ever-evolving process. Even in areas where there might be said to be settled general rules, these rules are constantly being added to and subtracted from. Now if a State's dissent has to be directed at a particular rule, which of the nuances of the rule is it dissenting from? That is the second problem. Now the consensual theory would not face these problems, since it is concerned primarily with the position of the State rather than the general rule.

The problems with the operation of the formal requirements of the persistent objector rule do not arise only to the nature of the general rule, but also to the dissenting practice of the State itself. There is lack of agreement in the definition of the requirements of consistency and persistence. But the difficulty is that the right to dissent according to the persistent objector rule is seriously weakened if no-one knows *how* it is to be exercised. Law does not only solve disputes; it is supposed to guide behaviour. Neither function is fulfilled if no-one knows what it says or requires. A State may not know how persistent and consistent its dissent needs to be. The consensual theory, in contrast, does not contain ill-defined formal requirements; it only imposes requirements of substance. For example,

in which the law is used to control, to guide, and to plan life out of court.

¹⁷² As stated earlier, there is no agreement as to when the dissent must begin; is it from the formative stages, at the time of creation, or soon thereafter? See the discussion of the *Anglo-Norwegian Fisheries* case, *ibid*.

¹⁷³ This problem is highlighted in the discussion of the United Kingdom's formulation of the right to dissent in the *Anglo-Norwegian Fisheries* case, *ibid*. If the rule is created, then it is binding; dissent would come too late.

¹⁷⁴ As Hart puts it (*The Concept of Law* (1961), p, 39: The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions...It is to be seen in the diverse ways

the Asylum case suggests that inconsistencies in the practice of a State would not make it bound by an established practice. All that was sought was that its practice was not consistent with the alleged rule, i.e. that it had not adhered to it. This would highlight a practical advantage which the consensual theory has over the persistent objector theory. It is easier, and more sensible in the light of the points made thus far, to identify lack of consent than it is to identify a timely, persistent and consistent course of conduct. Would the right to dissent, which is certainly a right to show lack of consent, not make much more sense if subsumed under the consensual theory?

Then there may be a <u>legal</u> difficulty with the persistent objector theory. It is sometimes said to be premised on a theory of vested or acquired rights or interests. ¹⁷⁶ Because it requires there to be a general rule, however, it goes against the (controversial) principle of intertemporal law, which requires, at least in some of its versions ¹⁷⁷ that the validity, not just of the acquisition of a right, but also of its continued existence, be conditioned

seemed to be equivocal, especially on the basis of its exposé des motifs of 1964 when compared with the position it adopted before the Court (see the Danish-Dutch contentions, para. 33 of the judgment). If the Court was looking for positive dissent, it would have been difficult to identify a consistent course of conduct, and on a persistent objector theory, it would have difficult for Germany to avoid being bound, as the Dissenting Opinions illustrate. But the Court seemed to ask for *positive consent*, as the Applicants had argued that allegation was that Germany had accepted the rule (i.e. consented). This was easily answered, because its practice would at best have been inconsistent, which meant that it had not consented. It could be argued, as some have, that the examination of German practice was only in relation to estoppel, and not customary law. But customary law and estoppel are identical as far as the requirement of actions of a State A are concerned; where they differ is that estoppel requires (detrimental?) reliance thereon on the part of State B.

Judge Dillard's Opinion in the Fisheries Jurisdiction case (@ p. 58 of the judgment); he said that unlike Norway in the Anglo-Norwegian Fisheries case, Iceland had, by signing the Exchange of Notes, stated an intention to be bound by the 12-mile rule. This was the only time Iceland had agreed to that rule, and one could say that the Exchange of Notes was not even a part of Iceland's position in relation to customary law, since she reserved the aspiration to work for an extension of fisheries limits.

¹⁷⁶ See, e.g, Stein, Different Drummer, pp. 477-78.

¹⁷⁷ See Elias, *The International Court of Justice and Some Contemporary Problems* (1983), Chapter 6.

by the evolution of law. If the general rule (a condition precedent for the operation of the persistent objector theory), which is binding on all States, means that the universal law on a given issue is changed, the continued existence of the persistent dissenter's acquired rights will become dependent on the new law, and it will be trying to seek exemption from the application of the general rule.¹⁷⁸ This problem would be much reduced for the consensual theory, since it does not depend on the existence of a general rule, but on individual positions adopted by States.

Then, apart from these operational and legal difficulties, there is a fundamental conceptual problem with the dissent theory, however formulated. It may be argued, for example, that dissent is what is required, so that consent can be eliminated from the process. The reference to consent would seem otiose in a process whereby non-dissent in the face of a general practice leads to opposability, especially where there may be reasons (other than lack of consent) for not dissenting; non-dissent, rather than consent, is all that matters. Certain writers denying the requirement of consent would argue, as would the Ross, that consent is a tü-tü concept - "a meaningless word - a word without any semantic reference whatever, serving solely as a tool of presentation". For example, consent is, for D'Amato, only of "psychological importance... in reinforcing the authoritativeness of custom". 180

However, the response to this is as follows: this argument overlooks the fact that consent, as distinct from non-dissent, is not an empty notion, because it plays a special role which non-dissent cannot play. To illustrate, we may take Akehurst's position as an illustration of the general conception of the right to dissent which seems to say that consent is not

¹⁷⁸ See Lobo de Souza, *EEZ*, pp. 105-107.

¹⁷⁹ Ross, 70 Harvard Law Review (1957), p. 812 ff.

¹⁸⁰ Concept, p. 198.

required, but which maintains the right to dissent. 181 Akehurst draws a distinction between a silent State and a dissenting State; the latter is bound by a general rule, but the former is not. The explanation for this is that if a dissenting State could be bound against its will, that would mean that there is a system of majority voting in customary international law, but he does not (absolutely correctly, it is submitted) accept that there is such a system; a system of majority rule would quite simply contradict the role of the persistent objector rule which he is trying to establish. If, therefore, a dissenting State is not bound by the will of the majority against its own, the difficulty with Akehurst's and similar views is this: he does not (and it is submitted, cannot) explain why a dissenting State should not be bound against its will but why a silent State should be bound against its will. If it is will that is relevant, then this must be the case in relation to both dissenting and silent States. If not, then the reason must be sought outside the position of the dissenting State. But reference to anything other than the position of the dissenting State takes us back to the position of other States or the international community as a whole, which cannot be the case for the simple reason that this would involve a return to the already rejected system of majority rule (or worse still, the intellectualist theory), and with it a contradiction of the right to dissent. It is therefore non-dissent that is the "meaningless concept devoid of semantic content", because it does not and cannot tell us what it is about non-dissent that gives it law-creating power. 182 But dissent cannot be excluded from the picture, for it plays a real role; we must therefore try to articulate that role. The natural articulation of the role seems to be this: dissent is an illustration of a lack of consent, i.e. that it serves to remove any inferences that can be drawn about the consent on the part of the silent State, and dissenting States, particularly if there is a presumption of acceptance of a general practice. We thus fall back to the consensual theory. The consensual theory, unlike (any version of) the theory of dissent, tells us that

¹⁸¹ See *Custom*, p. 24, and p. 26. See, similarly, some of the authorities who adopt the persistent objector theory, *supra*, Chapter 3, Section C, @ p. 60.

¹⁸² On the possibility that it could be the expectations of the international community as a whole that determine whether a State is bound, see subsection 4(ii)(c) below, @ pp. 136-138.

it is the toleration, which requires knowledge plus failure to dissent, ¹⁸³ and hence consent, which provides not only a psychological basis for, but also a logically and conceptually coherent description of the way in which law is created. ¹⁸⁴ In other words, while the consensual theory can stand without the persistent objector theory, the converse would seem impossible.

Finally, apart from problems of practice and problems of theory identified thus far, there is the plane of **policy**. It may be argued, in response to the practical and theoretical problems just discussed, that the persistent objector rule presents a sensible working compromise. In other words, there are two competing considerations which are balanced out by the persistent objector rule. On the one hand, requiring the consent of every State would mean that new rules would hardly ever be created. This is undesirable; and the *veto theory*, as we have seen, has no support. On the other hand, States which are definitely opposed to the new developments can at least prevent the opposability of the rule to themselves.

But let us examine the two competing considerations separately, to see whether persistent objector rule deals with each adequately. Firstly, in relation to the protection of interests of States who may be opposed to a rule/practice. The persistent objector rule, it is submitted, still does not answer the problem of majority rule. To say that a State is "definitely opposed" does not carry with it a necessary requirement that its dissent must be timely, open and consistent. If, as argued above, it is their will/consent that matters,

¹⁸³ See below, point 4(ii)(b), on the role of the requirement of generality.

¹⁸⁴ It may be interesting to compare the views of Weil (op. cit supra, Chapter II, Section C), and Akehurst. The former is careful not to state that silent States are bound; he states that rules of customary law may be formed even though not all States have participated in it. The latter expressly says that silent States are bound.

¹⁸⁵ See, e.g., Akehurst, *Custom*, p. 27; Weil, "Towards Relative Normativity", 77 AJIL (1983), p. 434.

¹⁸⁶ See *supra*, n. 13.

perhaps because of sovereign equality of States or some similar notion,¹⁸⁷ the very imposition of these restrictions on the operation of the role of the will/consent of States, contradicts the said will, upon which the right to dissent is based. In other words, we are back to majority rule.

Neither is the persistent objector rule needed to protect the competing interest on the other side of the balance, namely, the facilitation of law-creation. If the policy is not to prevent rules from operating because of some State's dissent, would the policy not be equally well protected, in the light of the points made in the previous paragraph, by saying that (a) the rule exists, but operates only between the States who consent to it, but (b) not in relation to those who do not, on the basis of their will/consent in both categories? And if a State is silent, especially where the interests of that State are affected by the practice of others, would its failure to object not amount to acquiescence? And if its interests are not affected, or at least not yet affected, that would denote a lack of interest, rather than acquiescence. But does lack of interest bind a State? Surely "the real problem is to determine the value of abstention from protest...Silence may denote either tacit agreement or a simple lack of interest on the issue";188 this would seem to be a "problem" because "tacit agreement" binds a State, and the "lack of interest" does not. 189 In sum, the persistent objector rule would not seem to be the best (or even a particularly good) way, when compared with the consensual theory, of striking the balance between the two competing interests identified above. In any event, it is not the

¹⁸⁷ Cheng, *Custom*, pp. 535 ff, is not very convincing on this point. He says that it refers only to equality before the law, but not to equality in making it. But this is arbitrary; compare Brownlie's statement that sovereign equality involves "the dependence of obligations arising from customary law and treaties on the consent of the obligor" (*Principles*, p. 287). Sovereign equality means that all States have the right to make the law. Cheng's interpretation would remove this right.

¹⁸⁸ Brownlie, *Principles*, p. 6.

¹⁸⁹ See also Judge Dillard, in the *Fisheries Jurisdiction* case (*ICJ Reports* 1974); "Logically, it does not follow that because "protest" shows lack of "acquiescence" that lack of protest shows acquiescence" (@ p. 58). Surely he would not have referred to this fact if acquiescence was not the ultimate probandum.

only way of achieving these desired results.

Without prejudging the issue of State practice, ¹⁹⁰ surely if States claim the right to dissent, it is because they do not want to be bound by rules which they find unacceptable, and they therefore do not wish to subscribe to majority rule. It surely cannot mean that States wish to be bound if they are silent or uninterested, or if they commence their dissent too late. As has been shown, it cannot be maintained, and no-one does, that the right to dissent is based on anything other than the will/consent of the dissenting States. Now, speaking of a right to dissent can only be meaningful if they know of the practice from which they have the right to dissent. If States are aware of (a) the strategic attractiveness of majoritarianism as an argument, and (b) the rule/practice by which they do not wish to be bound, then why do they not dissent for the avoidance of doubt?¹⁹¹

To say that the very existence of a persistent objector rule confirms the existence of a rule that States are bound otherwise is to take State practice too literally, a tendency which has been rejected by the Court. State practice must be interpreted; we have to know what it means, and whatever can be gleaned from all the relevant circumstances is important in this process. The fact that States claim a right to dissent does not necessarily imply that they normally mean to be bound without their consent. As Charney, an avowed non-consensualist, has put it, the reality is that

Government officials are jealous of their state's sovereignty and autonomy and are loath to adopt rules that bind dissenters. For they know that at some point their state may be on the dissenting side of the issue.¹⁹²

In the light of this, the view that "the 'persistent dissenter rule' is mostly advocated as

¹⁹⁰ This is considered in the next chapter, in Section B thereof. At this stage, we can say that there is no lack of notoriety as far as the right of dissent is concerned; the Court itself sanctions it.

¹⁹¹ See Meron's contribution in Cassese and Weiler, *Change and Stability*, Chapter I, on the "Classic Sources of International Law Revisited".

¹⁹² Universal Law, p. 550.

an exception or counter-balance to the majority rule, thus corroborating the latter "193 must be viewed with caution; one does not corroborate something by denying it. As seen above, the evidence would suggest that the States before the Court, and the Court itself, do not distinguish between not dissenting and consenting. In any event, could one not say, in response to the claim that the exception (persistent dissent) confirms the rule (majority rule), that the fact that States claim majority rule confirms that it is not the norm? It must be remembered that majoritarianism is a strategy of argument, and a long-established one at that. 194 It is not new a "newly acquired virus "195 in the twentieth century, by virtue of which one may be tempted to glorify it and argue that majority rule is now the accepted norm. 196 If it were accepted, the persistent objector rule (however formulated) would not be claimed by States and sanctioned by the Court and individual judges.

Above all, even if we were to argue that the persistent objector rule has appealed to States, then it would mean that States have accepted persistent objector rule, and that that is why they are bound by it. 197 And we would still then have to consider the position of those States which do not accept the persistent objector rule.

In conclusion, it seems that the part of dissent is to help in establishing or contradicting the ultimate probandum, namely, consent. The right to dissent is not "merely an annex

¹⁹³ Lobo de Souza, *EEZ*, p. 59; Brownlie, *Principles*, p. 256.

¹⁹⁴ See Brownlie's comment in Cassese and Weiler, *Change and Stability*, @ pp. 108-110.

¹⁹⁵ Ibid.

¹⁹⁶ And even if one accepts that States recognize the right to dissent only as a concession to majority rule, they *have* consented to a rule that says they are bound without their dissent, if such a rule exists. The expression of will to be bound may be based on all kinds of considerations, but as has been shown (Chapter I, Section B, nn. 7 ff, *supra*), it is still consent.

¹⁹⁷ Charney, *Persistent Objector*, and Stein, *Different Drummer*, both underline the paucity (or absence) of examples of the application of the persistent objector rule.

in the general theory of custom", ¹⁹⁸ and the consensual explanation gives it meaning, without which it is, at best, empty, and at worst, incoherent.

b. the part of the requirement of generality 199

It has been argued that there is no magic in numbers per se, as there is no majority rule in customary law. The generality of a practice can only mean that the *ipso facto* normative scope of the rule created thereby is also only general. As regards those States which have not participated in the general practice, there is a presumption of acceptance. Now a presumption is an inference from the facts; if it is a rebuttable presumption, then either the same facts must be presented in another aspect, or new facts must be produced to undermine that inference. Dissent is the best way to rebut this presumption of acceptance.

Generality, then, would seem to serve a twofold function. The first function is a legal one, which relates to law-creation; it creates prima facie evidence of general acceptance. The second function is a factual one; generality carries with it the characteristic of the notoriety of the alleged facts, i.e. knowledge (constructive or real). These two functions present a sensible practical system, for the presumption of acceptance would not be rebuttable²⁰¹ by dissent (however persistent) if a State did not know, or at least could not have known or cannot be expected to have known, of the practice which it is presumed to have accepted.

¹⁹⁸ Koskenniemi, From Apology to Utopia, p. 393.

¹⁹⁹ The role of generality is discussed further in Chapter VI, where particular customary law is compared with general customary law. There the issue of the relativity which is sometimes said to be a feature of generality will be discussed. Nothing in this section affects that issue.

²⁰⁰ See Waldock, "General Course on Public International Law", 106 Recueil des Cours (1962), Vol. II, p. 50; Brownlie, Principles, p. 10.

²⁰¹ An irrebuttable presumption is a contradiction in terms, for the presumption then is conclusive. The right to dissent would become meaningless. See Koskenniemi, *From Apology to Utopia* (1989), pp. 393-95.

The second function, i.e. the element that the practice be widely known, has not been controverted in the Court's jurisprudence.²⁰² When the existence of customary law rights and duties has been in dispute, nothing in the Court's practice has ever suggested that this question of knowledge can be elided.²⁰³ Now, in relation to silent States, the

Even those writers supporting the persistent objector theory stricto sensu stop short of denying the role of knowledge. See, e.g., Akehurst, Custom, p. 24; "a state whose practice neither supports nor rejects a rule of customary law is bound by that rule of customary law". Waldock (106 Recueil des Cours (1962), p. 50), states that the acceptance of a silent State will be presumed; ergo it knows of the practice, even if such knowledge is constructive (he expressly denies the existence of majority rule).

²⁰³ If anything, in those cases where a State is "interested" (see Ch. VI) in the practice in question, the Court seems to have adopted a test of constructive knowledge. In the *Corfu Channel* case, *ICJ Reports* (1949), p. 4 @ p. 22, and in the *Anglo-Norwegian Fisheries* (1951), p. 116 @ p. 139, the Court found, contrary to what Albania and the United Kingdom respectively argued, that these States *must have known* of the existence of a state of affairs which concerned them and which entailed legal consequences. In both cases, "(t)here was no point on which the contentions of the parties and the views of the Court and of the Dissenting Judges differed more diametrically, particularly as to the significance to be attributed to the facts" (Fitzmaurice, 30 *BYBIL* (1953), p. 34, n. 1.); so knowledge was considered to be important. On the result of the *Anglo-Norwegian Fisheries* case, Fitzmaurice cites Waldock (28 *BYBIL* (1951), p. 164), for the view that

...the Court...seems to have fixed States with a more stringent duty of alertness in scrutinizing the domestic legislation of other States and in objecting to claims - or even possible claims - than is acted upon in State practice.

Whatever the merits of this criticism, it is doubtful whether customary law can be created in any other way. Consider also Villiger's statement (*Customary International Law and Treaties* (1985), p. 20) that

The argument that a State is unaware of a matter can hardly be sustained in the context of the UN drafting process. The publication, and circulation among UN members, of the texts of drafting bodies, and the subsequent

Brownlie, *Principles*, p. 6) is the *Wimbledon* case. But this has already been dealt with, and it was demonstrated that such a reading of the case is riddled with problems. See *supra*, nn. 14-28, and accompanying text. See also Lauterpacht, *Development*, pp. 368 ff., who attempts to explain away the seemingly high threshold of generality often stipulated by the Court. But the frequency with which the Court took this stand militates against the persuasiveness of his view (he deals with the *Asylum, Reservations, Anglo-Norwegian Fisheries* cases). The Court said the practice in these cases was contradictory and insufficiently general. Cf. the Rt. Hon. Samuel Silkin, representing the United Kingdom in the *Fisheries Jurisdiction* case (*ICJ Pleadings* (1975), p. 468), who surmised, based on his analysis of the *Anglo-Norwegian Fisheries* case, that it appeared that the practice of thirty-seven States was not enough to provide the requisite general practice, while the practice of ten States seemed to be sufficient to prevent it.

question then becomes one of tacit consent, acquiescence, permission; as MacGibbon has put it, acquiescence is "silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection". Their silence, which is thus qualified, serves a constitutive function. Protest is there to remove any inferences that may be

debate in committees and at diplomatic conferences necessarily implies a State's enhanced awareness of the rules under discussion.

See also the contributions of Stein, Meron, and Jimenéz de Aréchaga in Cassese and Weiler, Change and Stability, Chapter 1.

This (necessary, it is submitted) correlation between generality and knowledge renders it unlikely that a State can, or will, plead ignorance of a general practice (pace Koskenniemi, From Apology to Utopia (1989), pp 394-5). There have been no cases in which this has been pleaded.

See also Judge van Wyk's Opinion in the South-West Africa cases (ICJ Reports (1966), p. 172, para. 61). See also Judge de Castro's Separate Opinion in the Fisheries Jurisdiction case, @ p. 89: "There should be no doubt as to the attitude of States. The practice must be generally known and accepted expressly or tacitly".

²⁰⁴ See "The Scope of Acquiescence in International Law", 31 BYBIL (1954), p. 143-186. This definition was accepted by the Court in the Temple case (ICJ Reports (1962), pp. 40, (per Judge Alfaro, who by referring to the Lotus case @ p. 47, suggests that the situation is not different in relation to customary law), 46 (per Judge Moreno Quintana) and 63 (per Judge Fitzmaurice). Arbitral practice also supports this view; see the Air Transport Agreement (38 ILR (1969), p. 249 ff, and the Beagle Channel arbitration, 17 ILM (1978), para. 72. Writers, even those who support the first conception, also testify to the fact that this is an unimpeachable definition. See Suy, Actes Juridiques Unilatéraux, p. 258; D'Amato, "On Consensus" 9 Canadian YBIL (1970), p. 104 ff, and Akehurst, Custom, p. 7, and p. 38 ff.; Villiger, Customary International Law and Treaties (1985), p. 19; Barale, "L'Acquiescement dans la jurisprudence internationale", Annuaire français de droit international (1965), pp. 401-404.

Bentz ("La silence comme manifestation de volonté" 67 Revue générale de droit international public (1963), p.44 @ pp. 77 ff.) seeks to show that silence does not in fact amount to consent, and he provides examples of States (mainly France) stating that their silence should not be taken as being indicative of consent. But this seems to miss the point; if a State expressly states that it is not consenting by being silent, that tells us nothing about whether the State in question is bound by the law contained in the text or practice in relation to which it reserves its position. If anything, is the reason for the State's clarification of its position not to avoid any inference that it has consented (thereby suggesting that those States seem to see silence in those circumstances as amounting consent, which would in turn suggest that the example he uses contradicts what he seeks to prove)?

²⁰⁵ See Villiger, Customary International Law and Treaties (1985), p. 19. See also Schachter, "Towards a Theory Of International Obligation", 8 Virginia Journal of International Law (1968), Vol. 2, p. 300, who requires, as one of the essential elements

drawn as to the consent of a State to a given practice. Consequently, in Akehurst's words.

It is always necessary to consider how States react to an act (or claim...) by another State. Consequently acts or claims by one State which other States could not have been expected to know about carry very little weight, and no conclusion can be drawn from failure to protest against such acts or claims.²⁰⁶

To restate the foregoing: if a practice is truly general, it becomes difficult for a State to argue that it was not aware of the practice. And presumably, if it is truly general, it would be one which affects the interests of many States (including, perhaps, the interests of silent States).²⁰⁷ In view of the general right to dissent, a State which is aware (and it is difficult to claim ignorance in view of the widespread nature of the practice) fails to dissent is presumed to have consented, and is thus bound, especially since the role of dissent has been consistently emphasized in the Court's practice. If the practice is not general, then there is no rule binding any State as a matter of general law anyway, and we fall back, in a direct way, on the process of claim and response identified in

for the creation of an obligatory legal norm, the requirement of communication to the "target audience". See also Fuller's idea of the procedural requirements, in *The Morality of Law* (1969), Chapter Two; law must be "publicly promulgated", "sufficiently constant through time so that people can order their relations accordingly" and especially relevant here, "not require the impossible" (e.g. a State being bound where it could not have been aware of the practice). Fuller, it is true, had municipal law in mind. But there is no reason why the position should be different in international law; where the community is so much smaller than domestic systems.

²⁰⁶ Custom, p. 37, and see also p. 40. See, similarly, Judge Dillard's Separate Opinion in the Fisheries Jurisdiction cases (ICJ Reports (1974), p. 58. Cf. the pleadings of the United Kingdom in the Anglo-Norwegian Fisheries case (Vol. IV, p. 38), stressing the importance of notoriety and publicity.

See also Hudson's draft on customary law in the International Commission in the 1950 sessions. In response to El-Khoury's question concerning the meaning of acquiescence, he replied that absence of protest was the criterion. This is meaningful only if an element of knowledge is postulated. The Chairman also expressed the same view. See *Yearbook of the International Law Commission* (1950), p. 5.

²⁰⁷ If it did not concern the interests of all States then it would not really be a general custom but a particular custom, limited only to a small number of States. See Chapter VI for a discussion of the view that the requirement of generality relates to the practice of States whose interests are specially affected only.

To put the roles of generality and dissent in the customary law process into relief, the following suggestion is proposed. There is a kind of sliding scale in operation here. At opposite ends of the spectrum are these two propositions. (i) The more the evidence that other States recognize the rule in question, the less the evidence that is needed to show that a particular State was bound by it, and the more the evidence needed to show that that State had not consented or had dissented. (ii) The less general the practice, the less the evidence required to show that a State had accepted it/dissented from it. In other words, in the absence of a general practice, positive consent is required, but when there is a general practice, then failure to dissent suffices to make the State bound, and actual (persistent?) dissent begins to play a more important role. Consent is what needs to be proved, and dissent helps in the process of proving consent especially where the presumption of acceptance is strong. 209 But it must be stressed that all of this is

²⁰⁸ "The Hydrogen Bomb Tests and the International Law of the Sea", 49 AJIL (1955), pp. 356-361. In the absence of a general practice, customary law becomes "a network of special relations based on opposability, acquiescence, and historic title" (Principles, p. 11). This is a well-established principle; see, e.g. Lobo de Souza, EEZ, pp. 153 ff; Judge Sir Humphrey Waldock's Separate Opinion in the Fisheries Jurisdiction Case, (ICJ Reports, (1974), p. 120, para. 35); Cassese, International Law in a Divided World (1986), pp. 346-347, 180-185, and Lowe, General Rules, pp. 209-211. See also Grieg, Australian Yearbook of International Law (1991), p. 145, and p. 173. Akehurst (Custom, p. 30-31), agrees with this view, but he concludes that as between two States who subscribe to different practices, a tribunal, in order to avoid a non-liquet, would (or should) go back in time to find and apply a rule which was once common to both States. The first point that comes to mind here is that the rule being applied is still one that was based on the mutual consent of the parties. However, the problem with this view is (as he admits) that it is highly artificial, as the practice applied in such a situation would be outdated; furthermore, particularly if the rule in question can no longer be described as valid, such a solution would conflict with the lex posterior derogat priori rule and the doctrine of intertemporal law. It is much simpler, rather, to look at what a State accepts, and hold it bound accordingly.

²⁰⁹ Cf. Judge Lachs' Dissenting Opinion in the *North Sea Continental Shelf* case (*ICJ Reports* (1969), @ pp. 231-32). See also Akehurst, *Custom*, p. 38 ff., stressing the relativity inherent in the determination of the existence of rules of customary law; "A small amount of inconsistency does not prevent a rule of customary law coming into existence, but a large amount does." (p. 39).

If there is such a sliding scale, the distinction between general and special custom seems

factual. It depends on what the evidence suggests about the practice of the given State in relation to the general rule.²¹⁰ There is no law on what constitutes acceptance, and if the task is left to a third party decision-maker, then it is up to that decision-maker.²¹¹

c. consent or expectations?

It is possible to characterize the requirement for the applicability of customary law against a State as the expectations upon which other States come to rely. Conduct by States A, B, C, and D could create an expectation that something is to be done in a given subject-matter or in a particular way; this will bind State Z irrespective of its consent.²¹²

There are a number of different connotations in such a view. Some have used the idea of expectation in a sense similar to estoppel. Clearly, expectation in this sense cannot

not to be one of type, but of them being situated at different points on the same continuum. The matter will be dealt with in Chapter VI.

Where the alleged customary law obligation originates in a treaty provision, the presumptions, it is submitted (with diffidence), may be different, based on an interpretation of the major cases where there has been a treaty rule (the Wimbledon case (PCIJ Reports, Series A (1923), pp. 24 ff.), the Asylum case (ICJ Reports (1950), p. 266), the North Sea Continental Shelf case (ICJ Reports (1969), p. 4, and the Nicaragua case (ICJ Reports (1986), p. 14). It could be that (a) whenever a treaty purports to crystallize or progressively develop customary law, e.g, the rule on qualification in the Montevideo Convention and Art. 6 of the Geneva Convention on the Continental Shelf, then silence, a failure to ratify that treaty, would suggest that the rule is not opposable to the State in question (the Asylum and the North Sea Continental Shelf cases) without its acceptance, and a stronger showing of consent will be required; (b) whenever there is a treaty with identical provisions to customary law, then acceptance of that treaty amounts to, or is at least weighty evidence of acceptance of the customary law, so a stronger showing of dissent will be needed (see the Wimbledon and Nicaragua cases).

As Brownlie has put it (in the context of acquisition of title to territory, "If acquiescence is the crux of the matter...one cannot dictate what its content is to be" (*Principles*, p. 157). It is quite simply a question of the interpretation of the evidence before whoever is charged with the making of decisions.

See Colson, "How Persistent Must the Persistent Objector Be", 61 Washington Law Review (1986), p. 946, for a description of the many and varied ways in which objection may be expressed.

²¹² See Villiger, Customary International Law and Treaties, (1985), p. 19.

mean the same as estoppel.²¹³ Estoppel requires factors which have not been required in the determination of customary law obligations. Estoppel requires (i) a clear and unambiguous *statement* (ii) which is voluntary, unconditional and authorized (iii) upon which there must have been reliance in good faith either to the detriment of the party relying on the statement or to the advantage of the party making it.²¹⁴ The first and third requirements listed are not requirements of customary law.

But even if the idea of expectation is not used to denote estoppel, there are other problems with it. For instance, the two kingdoms in the North Sea Continental Shelf case did argue that the Federal Republic had created expectations (upon which they had come to rely) regarding the applicability of the equidistance rule to their continental shelf. Perhaps even many States expected the equidistance rule to be part of customary law. But the Federal Republic, it seems, had done no such thing. In the Nottebohm case, clearly the whole point of the act of naturalization was that Liechtenstein expected that by its legal act, Guatemala would treat Nottebohm as its national? And Liechtenstein's expectation would seem to have been a legitimate one, as it was able to cite a considerable amount of practice in its favour. In the Asylum case, Colombia probably expected that the rule it alleged was applicable to Peru. And the United Kingdom expected that the Norwegian system of delimitation was contrary to international law; but that was not enough to make Norway bound.

Who, then, decides which expectations are to be protected? It could be a third-party decision-maker:²¹⁵ but, as we have seen, the *intellectualist* theory has been rejected.²¹⁶

²¹³ Pace Slouka (The Continental Shelf, 1968), and see also Villiger (*ibid*), who criticizes Müller for assimilating the two concepts (@ p. 31).

²¹⁴ See Bowett's authoritative paper "Estoppel Before International Tribunals and Its Relation to Acquiescence", 33 BYBIL (1957), 176 ff.

²¹⁵ This is particularly so if expectation is taken to have the meaning ascribed to it by the Yale School of International Law; i.e., "community expectations"; see, e.g., MacDougal and Reisman, "International Law in Policy-Oriented Perspective", in *The Structure and Processes of International Law* (1986), p. 112.

It would then seem that the idea of expectations is simply another way of asserting majority rule (i.e. because many States expect that x will be done in a particular situation, a single State will be bound to do it; expectations of many States create obligations on others). But there is no majority rule in customary law. If the idea of expectations was not a restatement of majority rule, it should tell us to look not just at the position of the majority, but also the position of the State who is to be bound by the expectations of others.

However, if brought within the requirement of consent, the place of expectations will appear in relief. It could be said that it is the lack of protest on the part of some States in the face of a consistent general practice which creates an expectation that the silent States have accepted the practice, and that they are therefore bound. On this view, this expectation is no more than the presumption of acceptance discussed in the preceding pages of the present subsection.²¹⁷ In other words, it is the position of the State which gives rise to the legitimacy of the expectations on the part of others.²¹⁸

5. Conclusion on the jurisprudence of the World Court

At best, even if it may be said that the Court has not said *expressly* that consent is a *conditio sine qua non* for the establishment of a customary law rule, the fact remains that the rules with which it has been concerned have not been applied against those States

²¹⁶ See Allott, "Language, Method and The Nature of International Law", 45 BYBIL (1971), p.79, esp. 105 ff, and Mendelson, BYBIL (1983), p. 257.

²¹⁷ The importance of the international organization cannot be overemphasized in this process. As Judge Tanaka said in the *South-West Africa* cases (*ICJ Reports* (1966), @ p. 291), "A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter". On the practice of States, even those between which there is no diplomatic intercourse, on sending Diplomatic Notes to the Secretary-General or the President of the Security Council containing claims and protests, see Lobo de Souza, *EEZ*, p. 176.

This is certainly Villiger's formulation of the position (op. cit., p. 19); "acquiescence" is what matters. See, similarly, Lobo de Souza, EEZ, pp. 161-163 (although he is primarily concerned with the initial stages of the formation of the rule).

which have not accepted it, and the alleged rules in disputes before it have been applied consistently with the consent of the parties to the case.²¹⁹ Sur correctly summed up the position thus:

There are cases where a custom is itself the object of dispute, where its applicability is directly at issue, where the parties do not agree as to the opposability of the rule. When the Court is faced with such a hypothesis, it indisputably gives the palm...to the consensualist solution.²²⁰ (emphasis added).

Charney, Universal Law, p. 537, n. 37, cites Brierly for the view that "the authority of the International Court to find the law is a non-consensual source of international law". Apart from the fact that one can hardly say that the Court's approach is non-consensual, its "authority" is itself based on consent. If a State consents to non-consensual means of determining its rights and obligations, and it is held to be bound, will it thus be bound without its consent? How does this amount to "playing with words to hide the reality"? (Charney, op. cit). Are the decisions of tribunals formal sources of law themselves? Is there a system of binding precedent in international law, especially in the case of ad hoc tribunals? Furthermore, consider this statement from the Handbook of the International Court, published by the Registry and with the authority of the President (3rd edn. 1986), but which is not an official document, @ p. 79:

The Court's decisions show that a State which relies on an alleged international custom practised by States must, generally speaking, demonstrate to the Court's satisfaction that this custom has become so established as to be legally binding on the other party. The attitude of judicial caution with respect to rules of international law is confirmed by the experience of the International Law Commission and of international legal conference and is consistent with another trend in the Court's decisions, viz., that the autonomy or sovereignty of a State should be duly respected unless the Court is duly satisfied that such autonomy is limited by rules that are binding on that State.

²¹⁹ This would explain e.g., the views of Akehurst, (*Custom*), p. 24, n. 1), citing Basdevant and Verdross to the effect that States tribunals have applied rules without citing the practice of the States involved in the dispute before it. Had the States challenged the rules in question, the position could have been different. And why should the lack of such a challenge not imply acceptance of the rules applied? See *ICJ Pleadings* (1951), Vol. III, p. 294, para. 351, where Norway had argued in the *Anglo-Norwegian Fisheries* case that [O]n chercherait vainement dans ses arrêts l'affirmation qu'un État peut être lié par une règle coutumière en vertu de la volonté concordante d'une majorité d'États et malgré son propre dissentiment.

²²⁰ Change and Stability, p. 127. He states however, that the Nottebohm case is an exception to this proposition. But as to the "consensualist solution" and the Nottebohm case, supra, the present Chapter, nn. 67-78 and accompanying text.

B. OTHER INTERNATIONAL TRIBUNALS

Some authorities seem support a consensualist conception of customary law, sometimes in a rather extreme way. One such example is the decision of the Umpire in the *Fishbach and Friedericy* cases¹, heard before the Germany-Venezuela Mixed Claims Commission. The Umpire, in assessing a claim put forward by Venezuela that it was not responsible for the acts of revolutionaries, discussed the nature of international law and the basis of international obligation. He put forward a strict voluntarist explanation; international law, conventional or customary, was based on agreement between states. He held that

"Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by other nations."²

In the *Tinoco* arbitration between the United Kingdom and Costa Rica³, the arbitrator, in considering the legal effects of (non-)recognition of governments, stated that

...however justified as a national policy non-recognition...may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.

The Nuremberg Military Tribunal⁴ stated that

The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition.

In Texaco v Libya⁵, the arbitrator effectively held that the old States were not bound by a new rule on the standard of compensation for expropriation as manifested in subsequent General Assembly resolutions. The developed countries had not accepted the "national" standard of compensation as subsequently developed, so that the law applied was that which the various sectors of the international community had all accepted.⁶

¹ X RIAA, p. 357, @ 369-402.

² He made no reference to a temporal requirement.

³ (1923), 1 *RIAA*, p. 375 @ 381.

⁴ 15 AD, p. 633 @ 635.

⁵ 53 ILR 389, 491.

⁶ See Akehurst, Custom, pp. 30-31.

There is plenty of authority supporting the proposition that a rule of customary law is applicable to a State even though the precedents supporting the rule did not involve the State in question.⁷ The real question, however, is whether the customary law was applied against a State (a) which had not accepted it, or (b) in spite of its objection thereto, whether previously or even during the pleadings.⁸ In any case,

...[I]n international law, States submit to adjudication only by their consent...If States consent to adjudication, do they not consent to the resolution of any indeterminacy in the law by the judges? And if that is so, is it correct to say that States have not consented to the principles on which judges rely to resolve hard cases?⁹

This consideration anticipates the proposition that international tribunals apply rules of

⁷ See, also, the INA v Iran case (Iran-US Claims Tribunal, 75 ILR, pp. 608 ff. But their the presiding judge (Lagergren), after concluding that the Hull and Calvo doctrines revealed a lack of agreement on the issue of compensation for expropriation, ruled that this required a creative function on the part of the decision-maker. Judge Holtzmann clearly adopted a non-consensualist theory, while Judge Ameli espoused the consensualist conception on the basis that General Assembly Resolution 1803, which was agreed to be a statement of the applicable law, does require reference to the practice of the expropriating State. It is submitted that the basis of this decision (Lagergren and Holtzmann for, Ameli against) was only really admitted by Judge Lagergren. If so, the question seems to be whether it is possible to equate the creative function of the decisionmaker (equity, fairness ex aequo et bono?) with customary law. This should be seen against the background of the State practice on compensation for expropriation, even among European states; Lillich and Weston wrote in 1982 that lump sum settlement practice since the war had eroded the principles of adequacy and promptness, while maintaining the pre-war standard of effectiveness (Lillich and Weston, International Claims: Contemporary European Practice (1982), p. 10). It should be remembered that the Rules of the Iran-US Claims Tribunal allow the judges to base their decisions on grounds other than customary international law.

⁸ Lobo de Souza, p. 65, n. 88, cites the case of Attilio Regolo and Other Vessels (XII RIAA (1945), pp. 8-9), but again, this is only to show that the specific consent of States may not be sought. But even then, it is not a good example. The case concerned the interpretation of Article 19 of the Hague Convention XIII of 1907. The parties to the arbitral agreement asked the tribunal for this interpretation, even though some of them were not parties to the Convention. On what basis is it possible to say that those parties had not accepted the relevant rule?

⁹ See Lowe, 17 Journal of Law and Society (1990), p. 388. See also Brownlie, in Cassese and Weiler, Change and Stability, pp. 109-110.

customary law against States which have not accepted the rule in question. 10

C. MUNICIPAL COURTS

The decisions of national courts are material sources of international law by virtue of Article 38(1)(d) of the Statute of the International Court of Justice. However, as Brownlie has written,

Some decisions provide direct evidence of the practice of the state of the forum on the question involved; others involve a free investigation of the point of law and consideration of available sources, and may result in a careful exposition of the law...However, the value of these decisions varies considerably, and many present a narrow national outlook or rest on a very inadequate use of the sources.¹

It is proposed to deal with domestic cases under a number of headings.

Paramountcy of domestic law considerations

The approach adopted by Italian Courts is shown clearly in the I.T.U.E.S.C. v United States.² In that case the court applied the doctrine of restrictive sovereign immunity and rejected the absolute immunity rule, because (inter alia)

the principle most commonly accepted by *Italian* courts is that of restricted immunity as opposed to that of broad or absolute immunity. (emphasis added)

This suggests that the application of customary international law was heavily conditioned

¹⁰ See Akehurst, *Custom*, p. 24, referring to the cases cited by Verdross ("Règles générales du droit international de la paix", 30 *Recueil des Cours* (1929), p. 295 ff. and Basdevant ("Règles générales du droit de la paix", 58 *Recueil des Cours* (1936), pp. 488 ff). But not a single one of the cases cited there involved the application of a rule of customary law which had been challenged by a State on the basis of non-acceptance. This hardly surprising in Basdevant's case when it is considered that what he was seeking to show was that there was *general* international law, and not only *particular* international law.

¹ Principles, p. 23.

² Court of Cassation (1981), 64 *ILR*, p. 339.

by the operation of Italian domestic law, and similar statements abound in many other Italian decisions.³ The decisions of the courts of other countries also reflect the same considerations.⁴

Judicial legislation

In Venne v The Democratic Republic of the Congo⁵, Mr. Justice Owen stated that In my opinion, it is time our courts repudiated the theory of absolute immunity.⁶

³ See, e.g., Italian Republic v Beta Holdings (64 ILR, p. 397); Campione v Hungarian Republic (Court of Cassation, 64 ILR p. 293), in which it was held that Article 10 of the Constitution of 1947, which states that "Italian law shall conform to the generally recognized rules of international law", did not affect the validity of legislation passed before the constitution was brought into force; Parraricini v Commercial Bureau of the Peoples' Republic of Bulgaria (same volume); Lagos v Baggianini, (1953), 22 ILR, 76.

⁴ Banque Centrale de la Republic de Turquie v. Weston Compagnie de Finance et D'Invetissement SA (Swiss Federal Tribunal, 1978), 65 ILR, p. 417; United Arab Republic v Madame X (Swiss Federal Tribunal 1960), 65 ILR p. 385 @ 389, where the rule applied was stated to be based on "the case law of the Federal Tribunal". See also the Preliminary Award in Case 1803 heard before an arbitral tribunal under the auspices of the International Chamber of Commerce in 1972, in which the applicable law was Swiss law; the tribunal based its decision on "the case of law of the Swiss Federal Tribunal in UAR v Madame X" (65 ILR, p. 445). The Togolese Higher Court of Appeal also based its decision in the case of France v Banque de l'Afrique d'Ouest in 1961 on the French position on the relevant international law as inherited by Togolese law upon achieving independence from France shortly before the decision. The approach adopted by the courts of the Federal Republic of Germany, in particular Courts other than the Federal Constitutional Court, is similar in some respects. The basic provision in domestic law is laid down in Article 25 of the Basic Law, which provides that "The general rules of public international law shall be an integral part of federal law". The operation of this provision, or any doubts as to the status of a rule of international law, are to be determined by the Federal Constitutional Court. See the Case Concerning Parking Privileges for Diplomats (Federal Administrative Court 1971, 70 ILR, p. 396 @ 401). In the Spanish State Tourist Office case (65 ILR (1984), p. 140 (Superior Provincial Court of Frankfurt, 1977), it was found that there was no applicable rule in international law; so the court applied the rule laid down by German appellate courts in favour of restrictive sovereign immunity. See also the decisions of the Austrian Supreme Court in X v Federal Republic of Germany (1984, 65 ILR, p. 10), and the Prince of Raad Accident case (1970, 65 ILR, p. 13), in which the rule of customary international law applicable was based on its own case law.

⁵ 64 *ILR*, p. 1.

⁶ *Ibid.*, p. 11.

In Trendtex Trading Corporation v Central Bank of Nigeria⁷, Lord Denning MR stated that

Seeing this great cloud of witnesses,⁸ I would ask: is there not sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognizes the change?...England should not be left behind on the bank - 'We must take the current when it serves, or lose our ventures' - *Julius Caesar*, Act IV, Sc III.⁹

This is express law-creation.

Other problems¹⁰

It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law...the international law sought to be applied must...like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it.

On this view, if there is a general rule from which the State in question has dissented,

⁷ [1977] QB, p. 529.

⁸ This "great cloud of witnesses" consisted of an overwhelming preponderance of English cases.

⁹ *Ibid*, p. 556.

¹⁰ In this context mention should be made of some (domestic, especially British and South African) cases involving the status of customary international law in domestic law. See, on the English cases, Brownlie, *Principles*, pp. 43-47, and Collier, 38 *ICLQ* (1989), p. 924), and on the South African cases, Devine, SAYIL (1987-88), pp. 119 ff. In many of these cases the authorities are not unanimous or unambiguous, chiefly for the reason that the courts are not usually explicit about the criteria upon which the existence and/or applicability of a rule of customary law is based because it is not necessary for the determination of the case, so that the statements are generally obiter dicta. The courts are largely concerned with the question whether international law is part of their municipal law, not so much with the process of creation of the relevant international law. The courts are more concerned with fashioning a rule of domestic public law, and not so much with the substantive rule of international law. Taken as a whole, it appears that Lord Alverstone's dictum in West Rand Gold Mining Co. v R [1905] 2 K.B. 391 (identical to the holding of the South African Appellate Division in Nduli v Minister of Justice (1978) 1 SA 893(A) @ 906) still represents the position followed in both iurisdictions:

In the *Philippine Embassy Bank Account*¹¹ case, the Court held, after a survey of general State practice, that there was no generally accepted rule precluding the levying of execution against State-owned property, and proceeded to apply it against the defendant State. ¹² In *Interscience Research and Development Services v Republic Populaire de Moçambique*¹³, the Supreme Court in the Transvaal Provincial Division of South Africa stated that

However...it is to be inferred from the statements of O'Connell that today only Russian law reflects to any extent the traditional doctrine of absolute immunity, and that the restrictive doctrine has become established as the general rule. On that basis the restrictive doctrine qualifies for recognition as part of our law.¹⁴

This approach is problematic inasmuch as it bases the vitality of a rule on inferences from the opinion of a jurist, and not even the opinion itself as such but an inference therefrom. There are numerous examples of other jurists who hold a different point of view, based on more comprehensive surveys of state practice.¹⁵ In *Trendtex Trading Corporation v*

that rule will not form part of its domestic law applicable in its courts. It highlights the point that when domestic courts apply a less stringent test for determining the existence of customary law obligations on the part of other States (usually regarding sovereign immunity), it does not follow that they would apply the same test if the acts of their own governments were the subject of scrutiny. But see Lauritzen v Government of Chile, below, the present section, @ n. 27.

^{11 (}Federal Constitutional Court, 1977), 65 ILR (1984), @ p. 146.

¹² The District Court of Amsterdam held in *ICC Handel Maatschappij v USSR* (65 *ILR*, p. 368) that "There is no rule of international law to the effect that a foreign State can never be subjected to the jurisdiction of another State against its will...", and therefore applied the restrictive doctrine against the Soviet Union, in spite of he fact that the Soviet Union consistently refused to accept the doctrine.

¹³ 64 *ILR*, p. 689.

¹⁴ @ p. 705.

¹⁵ See, e.g., Brownlie, *Principles*, who only goes as far as stating that the restrictive approach "has been adopted by the courts of at least twenty countries" (@ p. 327 ff), stating that at least sixteen States still accept the principle of absolute immunity. He criticizes Schreuer who states that "From a general perspective it can be said that the doctrine of restrictive immunity has been strengthened to a point where practically all countries from which any substantive material is available have embraced it", on the basis that such a conclusion does not reflect the evidence.

Central Bank of Nigeria¹⁶, which is (one of) the leading cases on the relationship between customary international law and English law, Lord Denning, in the English Court of Appeal, stated that

The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. There is no consensus whatever...this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what the rule is.¹⁷

so that

It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice...¹⁸

But later on in his judgment, he seems to have forgotten this absence of consensus. He said

Many countries have now departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity.¹⁹

and this was applied in the case. This is a classic example of the failure of a domestic court to make explicit the fact that whatever it is that they are applying, it is not a mandatory rule of general customary international law as such. As one writer has said,

...the mistake is perpetuated by a constant reference to international law, instead of acknowledging frankly that the court is merely applying or fashioning the law of its own country.²⁰

This charge seems particularly accurate in the context of the law determining a State's own competence, such as the rules on state immunity. The evidence relied on consisted

¹⁶ [1977] QB, p. 529.

¹⁷ *Ibid.*, p. 552.

¹⁸ Ibid.

¹⁹ *Ibid.*, p. 555.

²⁰ Dunbar, "The Myth of Customary International Law", Australian YBIL 8 (1978-80), p. 1.

of the practice of "many countries", but he only referred to the practice of the United Kingdom and the United States in any detail. Similarly, in *Qureshi v USSR*²², the principle of restrictive sovereign immunity was applied against the Soviet Union in the Supreme Court of Pakistan. The Court held that the principle of absolute immunity "had never been a rigid rule" and the tenor of the judgment was to the effect that "...under customary international law or general law, a suit of the present kind (i.e. one based on restrictive immunity) is not barred". But the fact that there is no generally accepted rule against something does not mean that that thing is applicable as law. The normal course would be to fall back on what each State had accepted; and it is perhaps not unimportant that the Court in this case had found that Pakistani law was the proper law of the contract. 4

However, there are many cases which can only be explained on the basis of a non-

²¹ See Johnson, 6 Australian YBIL (1978), p 1, @ pp. 29-30, for comment on the obvious lack of circumspection as regards the conditions of international custom in this case. All three judgments in the case relied on thirty-two decisions, twenty-eight of which were English. Johnson states that the judges "seem disinclined to enter into disputation about the theoretical aspects" of the formation of a rule of customary law.

²² 64 *ILR* (1983), p. 585.

²³ *Ibid.*, p. 597. It should be noted that the Court did mention two other significant considerations. Firstly, it was found that the proper law of the transaction was Pakistani law, which favoured restrictive immunity. Secondly, the Court devoted some time to the position taken by the Soviet Union in its dealings with other countries (@ p. 595), finding that the Soviet Union itself had not actually adhered rigorously to the restrictive principle. It had only argued that the principle could not operate in relation to centralized State-run economies/socialist States; see Stein, 26 *Harvard JIL* (1985), p. 457, @ 461, n. 14. The weight the Court attached to these considerations is not clear from the text of the judgment.

²⁴ See the Dissenting Opinions in the *Lotus* case (*PCIJ Reports*, Series A (1927), No. 10), especially Judge Altamira. Surely the establishment of a rule and the establishment of the contrary rule can only be ascertained on the same evidence? If there is insufficient practice for the one, the position must be the same for the other. The Supreme Court of Pakistan, it is submitted, would have been more convincing if it had simply said that in the absence of a restrictive rule of custom, it had the right to exercise jurisdiction within its own territory.

consensual theory. It was held in the National Iranian Oil Pipeline Contracts²⁵ case that, to be applicable in the German courts, rules of public international law must be "recognized by the vast majority of States - not necessarily also by the Federal Republic of Germany", and no reference was made to the practice of the defendant State. The Chilean case of Lauritzen v Government of Chile²⁷ (concerning the status of angary in customary international law) provides express support for the majoritarian theory. The plaintiff was a Danish company, and the Danish government argued that it had never accepted the existence of a right of angary, and that it had always maintained that it could not be exercised by neutral States. The Government of Chile appeared to agree with this point, arguing that the case was not one of angary. The Supreme Court of Chile, however, held that there was wide support for the exercise of angary, and rejected the Danish contentions on the basis that

...the Danish Government is not a party to this litigation, and that its right to express an opinion in the matter has no more weight than that of tradition, when one bears in mind the fact that Denmark has never accepted angary.²⁸

Whatever conclusions one might wish to draw concerning the argument based on the lack of *locus standi*, it seems clear that the Supreme Court was not interested in the views of either government involved (including Chile itself!), and the existence of a sufficiently

²⁵ 65 ILR, p. 1984, (Superior Provincial Court of Frankfurt am Maim, 1982) p. 212 @ 213, quoting from the Federal Constitutional Court's dictum in the *Claim Against the Empire of Iran* (45 ILR (1972) p. 61.

²⁶ This raises the question of what the position would be if the rule in question were one against which the Federal Republic of Germany has persistently protested.

²⁷ 23 *ILR* (1936), p. 708.

²⁸ Ibid., p. 729. The treatment of the views of the Danish Government may be seriously questioned. The Court did not ignore these views only because Denmark was not a party, but rather, because, it would seem, it did not approve of the views. Is this precedented in international jurisprudence? It is one thing to say that individual practice is irrelevant in the face of majority rule. It is quite another to say that it is irrelevant and inadmissible because of the particular position it happens to express. As for the other reason for ignoring the practice (i.e. lack of locus standi), this is why it is considered that the cases on jurisdiction, especially immunities from jurisdiction, are more useful for this study, because, if for no other reason, the positions of the defendant States will be considered, if not expressly, at least implicitly, as part of the pleadings.

general practice prevailed over any dissent.

Taken as a whole, the value of municipal decisions illustrating the operation of customary law *qua* judicial decisions under Article 38(1)(d) of the Statute of the International Court of Justice is questionable for the reasons given above.²⁹ In any event, examples of municipal decisions supporting the consensual theory abound;³⁰ but for the same reasons, such cases are probably of limited value as direct description of prescriptive

²⁹ Writers generally treat (or at least debate the status of) municipal decisions as state practice; see, e.g., Akehurst, *Custom*, pp. 8-10.

³⁰ See, e.g., Ware v Hylton, (Dall.) 3 U.S. 199 (1796), where Mr. Justice Chase distinguished between universal law, which was binding by the common consent of mankind, and customary law, which was based on tacit consent and was binding only on those States which had accepted it; Thirty Hogsheads of Sugar v Boyle 9 Cranch 191, @ 198, per Marshall C.J.; The Antelope, 23 U.S., (10 Wheaton), p. 66 (1825), concerning the legality of the slave trade, where Marshall C.J. stated that "No-one can rightfully impose a rule on another... As no nation can prescribe a rule for others, none can make a rule for others...this traffic remains lawful for those who have not forbidden it"; The Scotia, 81 U.S. (14 Wallace) p. 170 (1871), where Mr. Justice Strong stated that "...no Statute of one or two nations can create obligations for the rest of the world. Like all the laws of nations, it rests upon the common consent of civilized nations..." (quoted with approval in the Paquete Habana, 175 U.S., p. 677 (1900); Lübeck v Mecklenburg-Schwerin (Hackworth's Digest, Vol. 1 (1940), p. 15 @ 16), where it was held that usage can generate customary law "only between those countries in the intercourse between which it has become customary"; Decision of October 1 1947 (Österreichische Juristen-Zeitung, Reports, no. 790/1947 (see Seidl-Hohenveldern, 49 AJIL pp. 451-3); Tokyo Suikosha v Tokyo Masonic Association (53 ILR p. 4), decided in 1966, where the Tokyo District Court held that "In the international society...notwithstanding its systematization as can be observed in the case of the League of Nations and the United Nations, it is not approved as yet that the general (or universal) laws are established by the majorities, or that they shall bind all the nations. Under such an order...laws...apply only among those nations which have given their consent"; Re F.E. Steiner (64 ILR,@ pp. 481-2). These appear to be free of any domestic law considerations.

Some Courts are even more extreme in that they pay no attention to general State practice, and base their decisions only on their own domestic public law. See Oppenlander De Soska v Embassy of Ecuador (Supreme Court of Argentina, 1951, 65 ILR, p. 2); Senerman Rapaport v Republic of Cuba and X v Government of China (Supreme Court of Chile, 65 ILR p. 29), in which domestic law was paramount. The courts of India appear to have been concerned with the particular position taken by India as to the existence of any customary law rule. See United Arab Republic v Mirza Akbar Kashani (Supreme Court, 1965, affirming the decision of the High Court, 64 ILR p. 489 (cf. p. 394)), and German Democratic Republic v Dynamic Industrial Undertaking (64 ILR, p. 504), and Bahadir v Punjab Commissioner of Income Tax (ibid., p. 523).

universal law as distinct from the particular practice of the State of which the Court in question constitutes an organ.³¹

It is submitted that, as a general proposition, decisions of municipal courts are better seen as (in some cases not very good)³² examples of State practice on the part of the forum State. In any event, the cases examined here reveal nothing like a consensus, and they do not provide conclusive support for any one of our conceptions of customary international law. If we view these decisions as state practice, it suggests that the position taken by States is far from consistent, and that no secondary rule relating to the creation of customary law obligations can legitimately be inferred.

³¹ There are also many cases which do not fall neatly under one or the other of the different theories. In *La Jeune Eugenie* (2 Mason 409), Judge Story stated that the recognition of all States was not required for the creation of a rule of public international law. To illustrate this point, he stated that many principles accepted by the United Kingdom and the United States were enforced by these States against other States, even though these principles had met "the decided hostility of other European States, enlightened as well as powerful". But while this could be taken to support a non-consensual theory of customary law in requiring only the practice of two States even in the face of dissent, it could also be taken to support the consensual theory, and even the veto theory in that it shows that the views of two States prevail, in the face of protest on the part of other States. Surely the courts of other States would apply a different rule from the courts of the United Kingdom and the United States.

In the *Philippine Embassy Bank Account* case (German Federal Constitutional Court, 1977, 65 *ILR*, p. 146) that there had been "no radical objections" to the distinction drawn between property earmarked for the sovereign purposes of the State and its other property, in consequence of which the distinction was applied. In *Ndhlovu v Minister of Justice* (68 *ILR*, p.7) it was stated that

The authorities...tend towards international accord that the State has jurisdiction to punish a person who has been arrested in violation of public international law for an offence committed against the laws of that state.

There certainly does not seem to be international accord to the contrary.

In Banco Nacional de Cuba v Chase Manhattan Bank (United States, Court of Appeals, Second Circuit, 66 ILR, p. 421), it was held that there was no inconsistency between the favoured "Hull formula" and the more recent standard of appropriate compensation.

³² See Brownlie, *Principles*, p. 56, concerning the "reserved" attitude of English courts in having free recourse to the sources upon which it bases the rules of international law that it applies. Also, bearing in mind the disagreement between the judiciary and the executive in Chile on the question of angary as discussed in *Lauritzen v Chile* (supra, p. 148), what would be the position of Chile on angary when it comes to customary law?

CHAPTER V

THE ROLE OF CONSENT IN THE PRACTICE OF STATES¹

In this Chapter, the practice of States will be examined to see whether States consider customary law to be applicable to a State which has not consented to it. Reference will be made to the different theories identified in Chapter III. Many of the (tentative) conclusions arrived at in Chapter IV will be examined in relation to the actual practice of States.

A. THE RIGHT TO PARTICIPATE

At the opening of the Vienna Conference on the Law of Treaties,² the delegates lamented the absence of Chinese representation. The Egyptian delegate stated that

...participation in the formulation of general norms of international law was an inherent right of the independent statehood of sovereign members of the community of nations.³

Another delegate stated that "if States were to assume legal obligations, they must take part in defining them".⁴ At the Geneva Conference on the Law of the Sea in 1958, the delegate of Peru stated that "the principle of equality required that all States should play their part in the formation of international law".⁵ The delegate of Mexico stated that the international community "could not accept a situation...when a small number of Powers claimed the right to formulate international rules. The United Nations was based on the

¹ See the last footnote in Chapter I, *supra*, for the meaning of the phrase "State practice" as used in this study.

² United Nations Conference on the Law of Treaties, First and Second Sessions (1968 and 1969), Official Records, UN Doc. A/Conf. 39/11.

³ Official Records, Vol. 1 (1968), p. 3.

⁴ Mr. Alvarez Fabio, ibid., p. 5.

⁵ See UN. Doc. A/Conf. 13/39, Summary Records, Vol. III (March 1958), p. 7, para. 13.

principle of the sovereign equality of all its members". This was not disputed by any of the delegates, including the "small number of Powers". It is difficult to see how this view can be challenged, particularly in the context of (a) the international conference and (b) the principle of the sovereign equality of States. It would seem difficult, in the light of these statements, to make out an argument that a State is bound by a rule of customary law about which it was ignorant (as distinct from being silent).

However, D'Amato does just that, and even more. He has written that

no example from state practice has been found of protests by one or more states operating to prove the illegality of an act...most States clearly do not issue notes of protest to the actions of other States that they regard as illegal under international law. Foreign offices that did so would have little time for anything else...[protest] might only serve to worsen relations between the acting state and the protesting State.⁹

This claim is simply indefensible. It completely ignores the practice of the International Court and the consequences it attaches to the requirements of generality and uniformity of practice.¹⁰ States do (and indeed must) regularly protest against the actions of other States in fact.¹¹ In Judge Gros' words,

⁶ *Ibid.*, p. 50, para. 7.

⁷ See, UN Doc. A/Conf. 13/39, generally.

⁸ See the conclusions on the World Court, *supra*.

⁹ Concept, p. 99-100.

¹⁰ See, e.g., the Asylum case, the Reservations case, the Anglo-Norwegian Fisheries case, the North Sea Continental Shelf case (including Judge Ammoun's Separate Opinion, @ p. 107-9), and the Fisheries Jurisdiction case, all considered in Chapter IV, supra.

¹¹ Japanese practice at the time of claims to the extension of coastal state jurisdiction is illuminating. When the United States promulgated the Act to Prohibit Fishing by Foreign Vessels in the Territorial Waters of the United States (see 58 AJIL (1964), p. 1090), Japan protested, on the grounds that the Act sought to implement the Geneva Convention of 1958, to which Japan was not a party (10 Japanese Annual in International Law (1966, pp. 67-72). The United States agreed to "consult with the Japanese Government, and that in such consultations, full consideration will be given to the views of the Japanese Government and to Japan's long-established king crab fishery" (50 United States Department of State Bulletin (1303), p. 936 (1964). Similar recognition was given to Japanese protest by New Zealand, (11 Japanese AIL (1967), p. 87), Mexico (ibid., p. 215), Korea (13 Japanese AIL (1969), p. 81), Australia (17 Japanese AIL (1973), p. 134), and Indonesia (ibid., p. 136). See also the

What could a claim which was disputed by all the States concerned in a given legal situation be, if it were not unlawful?...if the States which oppose (a given practice) cannot do so on the basis of a rule of international law, their opposition is ineffective...but if they can base their opposition on such a rule, it is equally necessary not to hesitate to say that.¹²

It is similarly difficult to agree with D'Amato's view about the (potentially) antagonistic nature of protest. As Colson has illustrated, various techniques are used in diplomatic correspondence, such as the "diplomatic shift from protest to non-acceptance"; and seldom is the word "protest" ever used. 13 He shows that the term "protest" cannot be taken literally. What matters is the manifestations of a State's *opinio juris*; there are no prescribed formalities as to how this is to be expressed, and protest, taken literally, is an articulate expression of this *opinio juris*.

Implicit in D'Amato's views is the argument that States do not interfere in disputes between other States, as these would be "matters that do not concern them". But it is difficult to sustain the view that there are matters which do not concern certain States.

reaction of States to claims to more extensive coastal State jurisdiction by the Latin American States cited by Judge Ammoun (*ICJ Reports* (1969), pp. 107 ff) in the *North Sea Continental Shelf* case, including the United States Protest Notes of 2 July 1948 to Peru, Chile and Argentina, of 12 December 1950 to El Salvador, and 7 June to Ecuador; the United Kingdom Protest Notes of 6 February 1948 to Peru and Chile, of 9 February 1950 to Costa Rica, of 12 February 1950 to El Salvador, of 23 April 1951 to Honduras and of 14 September to Ecuador, and the French support for these claims. These are only a microscopic view of the whole customary law-creating process. Protests are essential where custom is concerned, and if the views of the law-creating agents are to be ignored, we can hardly speak of "customary" law in any sense of the word.

¹² ICJ Reports (1974), p. 136-7.

[&]quot;How Persistent Must The Persistent Objector Be?", 61 Washington Law Review (1986), p. 961 ff. He cites the numerous communications between the United States and Canada just before the Gulf of Maine case as examples of assertions of conflicting perceptions of the law without mention of the word "protest". Also, parliamentary debates are evidence of opinio juris, and while they manifest a State's views, they are not even communicated to other States, if at all, in an antagonistic manner. For examples, see Japanese Annual of International law, Vol. 9, p. 127, Vol. 13, p. 78, 81, and Vol. 19, p. 126, and ILM (1970), p. 600 ff., re Canadian practice regarding its Arctic Waters Pollution legislation. Similarly, the fact that "other States follow a different limit" prevented the ten-mile rule on the closure of bays from acquiring the authority of a general rule of international law in the Anglo-Norwegian Fisheries case (ICJ Reports (1951), p. 131).

What is important for the purposes of customary law-formation is the interest of States in the law which may be applicable to them, and not their concern with the specific subject-matter of a dispute between other States. Thus viewed, this issue of concern is posed in a misleading way. Furthermore, if the law requires the participation of interested States, ¹⁴ and a State (or a group of States) does have an interest in a particular area of law, then no rule will arise to bind that State if it refuses to accept the normativity of the practice of other States. And if such a State is silent, then it *may* be considered to have acquiesced, especially since, given its interest in the area, it refuses to challenge the emerging norm.

B. THE REQUIREMENT OF CONSENT

The international conference provides a useful forum for States to express their views on the international law in general and the subject-matter of this study in particular.

The nature of customary international law was considered in the proceedings of the Hague Codification Conference of 1930. In relation to a proposition forming a basis of discussion on the issue of State responsibility, which provided that a State should be responsible for breach of its "international obligations", the delegates discussed the nature of the "obligations" involved, including those derived from customary international law. The French delegate described international custom as

that mass of rules, principles and moral and judicial laws admitted by all civilised nations in their mutual relations.¹⁵

The Portuguese delegate (more cautiously) stated that

Customary law exists, but I think it will be more exact to say "custom indisputably recognized by the contracting States". 16

¹⁴ See *ICJ Reports* (1969), p. 43, para. 77. On the notion of "interested States", see Chapter VI, below.

¹⁵ League of Nations, Acts of the Conference for the Codification of International Law, vol. IV / C. 351 (c). M. 145 (c). 1930.V., p. 37.

¹⁶ *Ibid.*, p. 42.

The Greek delegate stated that

...if a custom were not accepted by all the contracting States, it would not be a custom. No practice which is claimed to be a custom could, within the meaning of Article 38...be a rule of law unless it were accepted by all the States. By its very definition, custom is a rule accepted by all the States. ¹⁷

The Roumanian delegate stated that

these obligations may arise...not only from treaties but from customary law which is indisputably established and recognised by all the contracting States...¹⁸

and later that

there is no international custom recognized by the whole world. Each State reserves to itself the right to recognize or not to recognize the whole or part of international custom.¹⁹

He went further to draw a distinction between customary law on the one hand and "the evolution of legal doctrine" and the "tradition of the Courts" on the other; while the former could not be imposed upon a party irrespective of its recognition, the latter could be a basis for doing so.²⁰

However, the Swiss delegate stated that

I cannot accept this formal statement that custom has the force of law only when the principle in question is recognized by all countries without exception.²¹

The Egyptian delegate considered the view that the applicability of customary law

¹⁷ *Ibid.*, p. 43.

¹⁸ *Ibid.*, p. 41.

¹⁹ *Ibid.*, p. 50.

²⁰ *Ibid.*, p. 52.

²¹ *Ibid.*, p. 44. Strictly speaking, this in no way affects the consensual theory, which would not deny that there is a custom between those States which have in some way accepted it. It seems that he missed the point made by the other delegates concerning the *scope* of rules of customary law; he seems to have thought that these delegates were subscribing to the *veto* theory. Alternatively, it appears that he assumed that customary law could only apply universally.

depended on individual consent to be a "new legal construction"²². However, the issue was not voted on. The value of this debate lies in the irreconcilability of the statements made by the delegates. And no conception of custom holds that one can speak of a rule without uniformity.

A unique and modern opportunity for States to discuss the issue in question at some length was provided by the Vienna Conference on the Law of Treaties.²³ The most significant part of the conference in this respect was the debate concerning draft Article 34, which dealt with "Rules in a treaty becoming binding through custom". It is of particular interest because, like the subject-matter of the present enquiry, it was concerned with the applicability of customary law vis-à-vis individual States. The delegates of the States represented at the Conference expressed various opinions as to the status of rules of customary international law vis-à-vis individual States.

Central to the discussion was the Syrian proposal of an amendment to the draft article

²² *Ibid.*, p. 43, and see p. 54: "This individualistic tendency is quite new. However worthy of respect it might be, it is nonetheless a new idea".

It seems that the reasons upon which he based his view are most questionable. For example (see p. 43), like D'Amato (Concept, p. 190), he could not see how disputes could be resolved in the case of conflict or difference as to the existence of any custom (as if uniformity is not a prerequisite of customary law), nor what would happen in the case of a State which had not participated in the formation of a custom (surely the questions are (a) whether acquiescence amounts to participation (see ICJ conclusions, supra) and (b) whether the State in question can be said to have acquiesced?). Neither could he see how an explicit act of recognition (upon which the applicability of a custom was said to be dependent) could be of any utility, since "(A)s every dispute with regard to custom arises only at the time of litigation, it is at that very moment when it is in the interest of a State to dispute custom that the State would claim that the custom is not recognised". But firstly, it is simply inaccurate to state that disputes only arise at the time of litigation, as if litigation was even close to being the central mode of dispute resolution in the international system which has no system of compulsory judicial settlement of disputes. Secondly, what the State says at the time of litigation is hardly likely to be final. Customary law is not made up only of what States say in their pleadings; it is primarily their practice that counts, and a State cannot deny its previous practice/statements if the contradict its pleadings. For these reasons, the only value that can be attached to the Egyptian delegate's views are to be found only in the statement of the views, not in their justification or explanation.

²³ United Nations Conference on the Law of Treaties, First and Second Sessions (1968 and 1969), Official Records, UN Doc. A/Conf. 39/11.

which would have the effect of making it clear that

...for a rule [originating in a treaty] to become binding on a third State, that State must recognize it as a rule of customary international law...their obligatory character must be recognized by the States in question.²⁴ (emphasis added)

Similarly, the records stated that in the view of one delegate from Venezuela

Great caution had been exercised in the matter by the International Court of Justice in the *Asylum* case. The application and practice of Article 34 might involve the imposition on third parties of obligations to which they had not consented, and he could only accept such a provision in cases of *jus cogens*.²⁵

Another Venezuelan delegate took this quite a way further, saying that "Venezuela would not assume any obligations it had not formally accepted, still less obligations it had expressly rejected". 26 The (delegation of the) Democratic Republic of the Congo

declared itself hostile to any idea likely to impose an obligation upon third States in the name of international custom alone, without recognition and acceptance of that custom by the State concerned.²⁷

The Romanian delegate stated that

Relations between States were based on the free expression of their will, which was the material source of the law of nations. It was the tacit agreement of States, which consented to observe certain norms as customary rules in their practice, that the compulsory force of those norms resided.²⁸

The delegate of Iraq stated that even if the Syrian proposal was not accepted the process of formulating customary rules would not be affected and the general principle that custom always had a specific scope would still apply.²⁹

²⁴ United Nations Conference on the Law of Treaties, Official Records, First Session, Thirty-fifth Meeting (23 April 1968), p. 197.

²⁵ Ibid.

²⁶ *Ibid.*, p. 444.

²⁷ *Ibid.*, p. 199.

²⁸ *Ibid.*, p. 197. This statement may be confusing the process of law-creation with the reason for the binding force of law; see Chapter 1, Part A, and Chapter 6.

²⁹ *Ibid.*, p. 200.

The Syrian proposal was challenged by a number of States (and interestingly, the States in question were mainly "new" States). The Trinidadian delegate could not accept the proposal not only because it was superfluous (since customary law would always retain its own mode of creation in spite of a treaty), but that the proposal would call "into question the precepts underlying customary law". The delegate from Ghana abstained from voting for the Syrian proposal on the ground that the suggested addition of the words "recognized as such" (without being prefixed by the word "generally") "might open the door to abuse". The delegate from El Salvador disagreed with the Syrian proposal on the grounds that

...under present customary international law, a general customary law rule was binding on a State even if that State had not accepted it...³²

In the event, the Syrian proposal as explained by the delegate was adopted by 59 votes to 15, with 17 abstentions, which would seem to suggest that according to the opinions expressed by their delegates at this conference, most States require consent as a condition for the applicability of a rule to a particular State.³³

³⁰ See the opinions of the delegates of the United Arab Republic (*ibid.* p. 199), the Union of Soviet Socialist Republics (p. 201, and *Official Records*, Second Session (1969), p. 71, with whose the views the delegate from the Cameroons associated himself (*ibid.*), stressing "the necessity of acceptance by the...State concerned) and Colombia (First Session, p. 200).

³¹ *Ibid.*, p. 199; presumably those precepts were those underlying non-consensual theories. It is, however, possible that he was merely referring to the possibility of revoking *established* obligations, in which case, his statement would be compatible with the consensual theory.

³² Ibid. Second Session, p. 64. The views of the delegate from Guatemala (*ibid.*, pp. 67-68) do not support the majoritarian theory (and neither are they ambiguous) but rather the consensual theory, pace Villiger, Customary International Law and Treaties (1985),. n. 166. The delegate stated that "States had always been careful to restrict their acceptance of customary law where such fundamental matters as sovereignty over national territory was concerned". The delegate was probably referring to the rules on expropriation.

³³ Akehurst's dismissal of the evidence furnished by the debates just considered (*Custom*, p. 24, n. 1) is unconvincing. He argues that these statements are "obviously insufficient to undermine what was a well-established rule before the conference".

⁽i) Was this rule really "well-established"? We have just seen the way the representatives of

Another setting for discussing the role of consent arose, in a heated way, in the Third United Nations Conference on the Law of the Sea, particularly in the context of debates concerning what became Part XI of the Convention of 1982 (on the deep sea bed). Most of the debates were concerned with the applicability of the rules in question on all States before the Convention came into force; there was (and probably is) no rule of customary law on the matter. But they are significant, like all the debates considered so far, precisely for that reason, as they illustrate the conceptions of States as to the role of consent in the customary law process.

In view of the reluctance of developed States to accept the rules in the Convention, the Group of 77 wrote to the President of the Conference, and the following passage comes from that letter:

It is a function of international law to avoid the possibility that, through relationships of strength, a State might endeavour to settle by force what cannot be settled by means of the law. This can happen in cases where a claim is made subsequently to repudiate a rule that was accepted when it was formulated...

States perceived the issue at the Hague Codification Conference in 1930. And before that, the classical writers certainly viewed consent as being essential. Grotius wrote "...the law of nations...is the law which has received its obligatory force from the will of all nations, or of many nations. I added 'of many nations' for the reason that, outside the sphere of the law of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations." (De Jure Belli ac Pacis, Prolegomena, para. 24) Book One, Ch. 1, para. XIV). Wolff wrote that "the customary law of nations rests upon the tacit consent of the nations...and it is evident that it is not universal, but a particular law..." (Jus Gentium Methodo Scientifica Petractatum, Prolegomena, para. 24). Vattel wrote that international custom "is founded upon tacit consent, or rather upon a tacit agreement of the nations which observe it. Hence evidently it binds only those nations which have adopted it and it is no more universal than the conventional law" (le Droit des Gens, Introduction, para. 25). These were the considerations that Mr Justice Chase had in mind in Ware v Hylton (Dall.) 3 U.S. 199 (1796). It seems difficult, then, to argue that there was a rule (denying the need for consent) which was well-established before the Conference.

⁽ii) On the contrary, if the rule in question (that individual consent is needed) has as much support as was seen in the statement of the representatives, would the existence of the rule not requiring consent (if it ever existed) alleged by Akehurst not seriously be called into question? (iii) Akehurst's statement that some delegates "may" have failed to distinguish between the silent State and the dissenting State is suspect; the views discussed above clearly include those of the silent State. There is hardly any mention of dissent in the statements at the Conference; rather the delegates seemed to require consent, acceptance, recognition etc. This bears out the view advanced in Chapter IV, Subsection 4 (ii)(a) about the relationship between dissent and the consensual theory.

More than 119 States have re-affirmed their constant support for the respect of customary international law as the basis for the general principles of law that fundamentally apply in the Area declared as the common heritage of mankind, and their support for the principles and rules referred to above. This largely representative body of mankind should not be ignored by any one State or by a small number of States purporting to claim a <u>de facto</u> authority over all humanity...

Special emphasis should be given to the duty to perform fully and in good faith the obligations entered into by States in virtue of the generally recognized principles and rules of international law.³⁴ (emphasis added)

This may be viewed as evidence of the fact that the majority of States consider majority rule to be the way in which rules of general customary international law are created.³⁵ But while this is a plausible inference, it is submitted that it is a questionable one, because of the following considerations.

The emphasized sentences contain a clear reference to the fact that the Group of 77 regarded the United States and its allies in this matter (i.e. the "small number of States" referred to in the letter) as *subsequent*, rather than *persistent* objectors. The part of the letter preceding the passage quoted establishes the legal basis of the customary law character of the "common heritage" principle. This legal basis was identified as General Assembly Resolution 2749 (XXV) (the Declaration of Principles). But the letter also stated, given the objections which might be raised concerning the law-creating power of General Assembly resolutions, that

It should be added that a number of the few States (14) which abstained on that occasion, although without formulating any objection, subsequently expressed, either explicitly or implicitly, their support for those principles, as did other States members of the international community, thus recognizing by their attitude the force of international custom as expressed in resolution 2749.³⁶

³⁴ United Nations Third Conference on the Law of the Sea, Eighth Session, Geneva, Letter Dated 24 April 1979 from the Chairman of the Group of 77 Addressed to the President of the Conference, UN. Doc. A/Conf. 62/77, p. 59, @ pp. 63-64.

³⁵ See Lobo de Souza, *EEZ*, p. 64; "...this group of States seems to be maintaining that the consent of a majority of States is sufficient to bring about a customary rule and this rule applies even against a 'small number' of States which may be opposing it".

³⁶ *Ibid.*, p. 62.

The United States did actually vote for this resolution.³⁷ The first argument contained in the letter is thus that the United States had accepted the rule it was now denying. In other words, the United States and its allies were attempting to impose a new rule on the 119 States who had repeatedly protested against the new rule. Is there anything startling in the proposition that the practice of a minority is not binding on the majority without their consent, particularly where the majority base their objections on their established legal rights?

But we may compare this *legalistic* argument in the letter of 24 April 1979 with another (typical) one. The President of the Conference stated, in 1974, that

...[T]here could be no justice if *entrenched rights* acquired by the major maritime nations *merely through custom and usage*, without the overwhelming majority of the international community, were perpetuated.³⁸ (emphasis added)

This seems to be of a wholly different tone to the arguments advanced in the letter of 24 April 1979. In that letter, the "small number" was trying to change the existing position. Here, the rights of the "small number" are being conceded, and it was now the "overwhelming majority" that was seeking to change the *status quo*. One may speculate whether this change of legal argument was deliberate. The Group of 77 may have refined its strategy by 1979; they may have realized that framing their claims in terms of an existing right, thereby making the "small number" appear as the ones who were disturbing the *status quo*, would be more persuasive. ³⁹ The 1974 statement may, however, also be taken to mean that the majority in the international community did not recognize the aforementioned entrenched rights based on customary international law, and were therefore not bound by it; but even this is compatible with the consensual view.

Such inconsistencies in legal formulation are, however, probably better seen as a

³⁷ See the statement of Ambassador Elliott Richardson to this effect in the *Official Records*, Vol. IX, pp. 103-104.

³⁸ Official Records, Vol. II, p. 218.

³⁹ See the unchallengeable proposition put forward by Mendelson in "Practice, Propaganda and Principle in International Law", *Current Legal Problems* (1989), pp. 8-9.

reflection of the reality that the emphasis in these debates was, however, primarily political, economic and ideological,⁴⁰ while the *legal* arguments received less care. The majoritarian tendency in the whole attitude of the Group of 77, it is submitted, lies in the realm of political pressure, legal rhetoric and argumentative strategy. The "small number of States" could simply have responded to the Group of 77 in the same way, i.e. that the Group of 77 were trying to use numerical might to strengthen their claims and ignore the rights of the minority.

The upshot is that it is difficult to say definitely whether majority rule was the *legal* view supported by the States at this Conference, rather than a mere strategy of argument. 41 When the arguments were put into legal terms, they are perfectly compatible with the consensual theory. When they were merely rhetorical, they supported the majoritarian theory but in a programmatic, forward looking way, and not really in relation to *existing legal* (as distinct from social) rights and obligations. In any case, it is doubtful whether the strategy of argument paid off in reality, because it can hardly be said that there is a rule, binding on the "small number of States" today, to which they have not consented. This would suggest that majority rule is but a step in (a) the formation of a rule of customary law, and (b) a step towards making a customary rule applicable to (i.e. accepted by) non-consenting States. It is not in itself the *legal machinery* for creating law or rights and obligations, but a tactic which may or may not succeed in making the

⁴⁰ See the views of the delegates of Tanzania (Official Records, Vol. I, p. 20) speaking of the way the developed countries had "terrorized" the world and destroyed the marine environment, and that any attempts to exploit unilaterally would "disinherit" mankind. See, similarly, the views of the representatives of Peru (ibid., p. 157), the Organization for African Unity (@ p. 95), India (@ p. 70), Kenya (@ p. 73). One may compare such uncompromising views with those of the delegate of Pakistan "...the interests of the developed countries could no longer be isolated from those of the developing countries and that there was a close interrelationship between the prosperity of the former and the development of the latter...it was in this spirit that this delegation approached the concept of the common heritage of mankind" (@ p. 34).

⁴¹ Consider the view of the Chairman of the First Committee, Paul Engo (from Cameroun): "[T]here was nothing in contemporary trends which justified the conclusion that the young nations merely wished to bring down those privileged few and establish a new dictatorship of their own" (Official Records, Vol. II, pp. 90-91).

required consent (which is certainly sufficient even if it is not required) forthcoming.

There is also evidence of the way States view the requirement of consent outside the setting of the diplomatic conference. The pleadings of States before international tribunals, especially the World Courts, and diplomatic correspondence, are examples of this.

In the *Lotus* case, Turkey referred to "une consequence nécessaire et indiscutable du caractère volontaire qu'on attribue généralement au droit internationale". ⁴² In the *Asylum* case, both Peru and Colombia spend a considerable amount of time trying to establish Peru's consent to the disputed rule. ⁴³ In the *Anglo-Norwegian Fisheries* case, apart from the considerations discussed in the previous chapter, Norway gave two relevant examples. One was the statement by the American Secretary of State concerning statements of law in the award of the Permanent Court of Arbitration in the case concerning the Norwegian

⁴² M. Fedozzi quoted, on behalf of Turkey, from Anzilotti, *Il diritto internazionale nei giudizi interni* (1905), pp. 286-88;

^{...}on n'a aucune raison de considérer une coutume comme obligatoire à la créer ou qui n'y ont pas adhéré, de même qu'on ne peut pas regarder comme obligatoire un traité réglementaire par rapport aux Etats qui n'y ont pas pris part ou n'y ont pas adhéré dans la suite.

See *PCIJ* Series C, No 13 (II), pp. 337-8, and p. 244 (p. 179 for the French argument; it should be noted, though, that even the French agent stressed the fact that Turkey had accepted the rules in question).

Earlier M. Mahmout Essat Bey (@ pp. 225-6) had argued on behalf of Turkey that ...toute règle déterminant les rapports entre Etats et la situation juridique des faits et questions résultant de ces relations doit, pour qu'elle puisse acquerir l'autorité et aussi la portée d'un principe admis et reconnu par le droit international, obtenir l'adhésion unanime des membres de la communaute internationale. C'est-a-dire qu'un principe de droit internationale positif ne s'établit que par des traités internationaux ou des coutumes internationales.

⁴³ See, e.g., the Peruvian Counter-Memorial, *Pleadings*, Vol. I, pp. 118 ff, entitled "Y a-t-il là, pour le Pérou, une obligation juridique de nature coutumière en matière d'asile interne?". The Colombian Memorial stressed the fact that Peru had accepted the disputed rule on many occasions (*ibid.*, pp. 34 ff; at p. 37, "Le Pérou a du reste proclamé officiellement en termes non équivoques, notamment à l'occasion de l'asile obtenu à Lima par diverses personnalités...".

Shipowner' claims.44 He stated that

My Government finds itself compelled to say that it cannot accept certain apparent bases of the award as being declaratory of that law [international law] or as hereafter binding on this Government as a precedent.⁴⁵

The other example was the note of protest sent by the British Foreign Secretary to the Dutch government concerning immunity from merchant ships:

As the Netherlands Government is well aware, the claim that immunity from search is conferred on neutral merchant vessels by the fact of their sailing under the convoy of a man-of-war flying the national flag, has never been conceded in this country.⁴⁶

The United Kingdom, for its part, devoted a fair amount of time to consideration of the part played by Norway in the creation of the rules alleged by the United Kingdom.⁴⁷ In the South-West Africa cases, both Parties had argued as to the existence of the disputed

The United Kingdom's view, in the Anglo-Norwegian Fisheries case, as argued earlier (Chapter IV, nn. 129-133 and accompanying text) was really concerned with the subsequent objector. It stated that the right of a State to dissent was limited by the rights of the international community. This is reflected in its objection to the precedent cited by Norway discussed above; it implicitly stated that the United States' did not mean to abandon existing obligations.

⁴⁴ I *RIAA* (1948), pp. 344-346.

⁴⁵ See *ICJ Pleadings*, Vol. I, p. 383, para. 259. The letter containing the statement quoted above then proceeded to mention the rules applied in the award against which the Government "feels obliged to protest and under which it must deny any obligation hereafter to be bound". The United Kingdom challenged the relevance (*ibid.*, p. 428, para. 162) of this statement as a precedent for the right to dissent, but its reasoning is unconvincing. It argued that the statement "was directed not to excepting the United States from observing the rules accepted by other States but to questioning the tribunal's understanding of the rules that were accepted by States". It is submitted that this is a distinction without a difference; as far as the United States was concerned, the rules that were applied against her were not the rules it recognized as the applicable ones. The tribunal had applied "generally accepted" rules regardless of the views of the United Kingdom.

⁴⁶ ICJ Pleadings, Vol. III, p. 295, para. 352. Norway also cited Pearce Higgins' statement on the issue to the effect that while the rule in question may have been regarded by some as a rule of international law, the United Kingdom had never considered it to be of such a character (*ibid*.). The United Kingdom did not challenge this particular precedent in the pleadings.

⁴⁷ See the oral argument of Sir Frank Soskice, *Pleadings*, p. 99: "I shall seek to demonstrate that Norway not only adhered to but was one of the creators of the modern customary system".

rule, and in particular, as to its applicability vis-à-vis South Africa.⁴⁸ In the *North Sea Continental Shelf* cases, both parties argued at length about whether the Federal Republic.

...on the plane of customary law...did by its conduct and by its formal acts commit itself to the recognition of the law in Article 6 as customary law.⁴⁹

But the much more normal way in which States deal with the issue is to cite evidence of general acceptance of a rule, and in many cases, they leave it at that, and do not refer to the consent of the State against which it is to be applied.⁵⁰ As has been pointed out,⁵¹ it can be argued that the whole reason why so much time is spent on trying to establish the generality of the practice would seem to be the fact that if it is established, the rule having that attribute will be binding on all. The normal way in which arguments are formulated before the International Court is by one party arguing that a practice is sufficiently general, and therefore custom exists, and therefore binds the other State, who has in fact consented to it; the other party will normally argue that the rule is not sufficiently general, and therefore does not exist, and is therefore not binding on it, and that in any case it has not consented to the rule, and has even dissented therefrom. This

⁴⁸ See *ICJ Pleadings*, Vol. V, pp. 140-141; Vol. IX, pp. 347-352; Vol. X, pp. 1-11. Gross, on behalf of the Applicants, had argued that the right to dissent must be confined to rules which dealt with inter-State interests, and should not exist where the rule concerned, say, the rights of individuals. It is doubtful whether this argument itself can be sustained. Surely one could say that the disputed rules in the *Anglo-Norwegian Fisheries* case involved both (a) the interests of the individual Norwegian and British fishermen, as well as those nationals of either State who would benefit from reduced cost if the resources in the disputed areas were domestically produced rather than imported, on the one hand, and (b) the interests of the States in question in a larger macro-economic sense on the other. Similarly, the question of qualification in the *Asylum* case is as important to the security of the offended State as it is to the civil liberties and/or human rights of the offender.

⁴⁹ See (*ICJ Pleadings* (1968), Vol. 1, p. 60, para. 59 (in relation to regional custom only), and p. 61, para. 60, and pp. 400 ff, p. 513 para. 98, p. 517, para. 103, p. 192, para. 99, and p. 345, para. 93, and Vol. II, p. 99 (where Sir Humphrey Waldock, on behalf of the two Kingdoms, drew a distinction between the status of Article 6 as the generally accepted law on the one hand, and the establishment of that law in such a manner as to have become binding on the Federal Republic on the other), and p. 106.

⁵⁰ It is not proposed (or considered necessary) to cite examples where States base their claims and protests on generally accepted law. It is incontestable that they do.

⁵¹ See Chapter IV, Section A, Subsection 4(ii)(a), above.

has happened in every case before the International Court in which the requirements of customary law, general or particular, were scrutinized. In addition, this is not a feature only of the pleadings before international tribunals; diplomatic correspondence normally refers to "generally accepted rules", or even "established international law", and domestic legislation purports to be based on rights conferred by international law.⁵² What are the implications of this form of argumentation for the consensual theory? These will be considered under a number of headings, as follows; (i) the *opinio juris* argument (ii) the individual consistency argument (iii) the uniformity argument (iv) the ambiguity argument.

1. The "Opinio Juris" argument Firstly, let us look at the issue from the point of view of the State denying the application of a rule to itself. Such a State, in theory, normally has two (incompatible?) options. The first is that it may concede that there is a rule, but maintain that that rule is not binding on it. The second is that it may deny the existence of the rule itself, rather than its applicability. Now as far as that State is concerned, it is not (or at least it seeks to show that it is not) under an obligation, whether this is so on the basis of the absence of a rule or on the basis of the non-applicability of the rule to itself. In the light of the foregoing, it would seem to be a legitimate inference to conclude that the State denying the existence/applicability of a custom has not consented to that custom; it is not contested that consent is sufficient (even if not necessary) to bind a State.

If that is the case, then we fall back into the question of argumentative strategy. It is more convincing to show that a rule does not exist, as a means of avoiding obligations imposed by that rule. It is less convincing to concede that the rule exists but that for some reason (in our case because of lack of consent), that that rule is not applicable. That is why States in recent times actually do not argue on the basis of exemption from a rule, but argue rather on the basis of the non-existence of the rule in the first place, with all

⁵² For examples, see the present Chapter, Section C, on Rights and Liberties, below.

possible consequences for the persistent objector theory.⁵³ The United States, for example, is not denying a customary law obligation to refrain from unilateral exploitation of the ocean floor on the basis of its persistent objection. It is arguing that there is no such customary law.⁵⁴

This is why it would seem strange to suggest that arguing on the basis of the persistent objector rule should be seen as a concession to majority rule.⁵⁵ A State is merely seeking to avoid an obligation, and the lack of precision as to what amounts to a general custom, or a perceived high standard of proof for the establishment of a restrictive rule, would seem to be attractive avenues to achieving this end. The persistent objector rule is less attractive. As Koskenniemi puts it,

Even if the State is hard pressed so as not to be able to deny the *inter alios* existence of the norm, it will still have the possibility of qualifying itself as a persistent objector as it may argue that it learned about the norm (or that the norm was intended to apply in respect of it, too) only now and thus voice its "objection" at the moment of application.⁵⁶

In sum, it is doubtful whether the practice of a State denying the existence of a general rule is really manifesting an *opinio juris* to the effect that all rules supported by general practice are binding. Arguing that a rule does not exist in no way implies that if that rule did exist, it would be binding. In fact, the whole point of arguing in that way is to show the State involved does not (a) recognize the obligations flowing from that rule, or (b) has not accepted the rule. If it had already consented in some way in the past, the other party would raise that fact in order to show that the first State had accepted the disputed rule,

⁵³ See Koskenniemi, From Apology to Utopia, p. 394.

⁵⁴ See the statements by Ambassador Richardson (Official Records, Vol. IX, pp. 103-104): "But the United States could not accept the suggestion that, without its consent, other States would be able, by resolutions or statements, to deny or alter its rights under international law". He also stated, concerning resolution 2749, that it was apparent from the text, and from statements made at the time of its adoption, that "the intention had not been to impose it as an interim deep-sea bed mining régime, rather it had been intended as a general basis for further negotiation of an internationally agreed régime".

⁵⁵ See Chapter IV, Section B, Subsection 4(ii)(a), above.

⁵⁶ From Apology to Utopia, p. 395.

whether as custom or as estoppel. Consent is *sufficient*, even if it is not *necessary*. To quote Charney again,

Government officials are jealous of their state's sovereignty and autonomy and are loath to adopt rules that bind dissenters. For they know that at some point their state may be on the dissenting side of the issue.⁵⁷

Arguments between States about customary law is a not a disinterested dialogue. States often adopt positions not because they really have an *opinio juris* in relation to what they say, but as a bargaining ploy. Witness the following statement by the Brazilian Foreign Minister in defence of Brazil's "territorialist position" (which involved particularly extensive claims) in the Third United Nations Conference on the Law of the Sea:

...while it is true that we isolated ourselves by taking a more radical position, we also isolated as radical the position of a larger number of countries - great maritime powers, land-locked countries, and so forth - which had a very conservative stand...The course taken by negotiations has proved that if it were not for this extreme territorialist group, the position which advocated the exclusive economic zone would be regarded as extreme.⁵⁸

It could then be argued that, more than the inference of *opinio juris* being doubtful, it would be illegitimate.⁵⁹

2. The "individual consistency" argument Secondly (and this is related to the first point), it is a fact that States often shift their arguments, depending on their position in a dispute, so that the problem of the element of individual consistency which is required for a (secondary) rule of customary law will have to be faced. For example, it is well known that Soviet doctrine on customary law is based on consent.⁶⁰ But one finds Tunkin, no less, speaking of "generally accepted rules" and the like, at the Geneva Conventions of

⁵⁷ Universal Law, p. 550.

⁵⁸ The translation of this statement into English is in Lobo de Souza, *EEZ*, p. 228, n. 95.

⁵⁹ See Charney, *Universal Law*, p. 548, n. 79, who, agreeing with the critical legal scholars, points out that those who analyze the doctrine of sources of customary international law are often unable to avoid the twin pitfalls of describing a system that either merely reflects the will of States or the wishes of the individual analyst.

⁶⁰ See, generally, Tunkin, Theory, pp. 118-124.

1958.⁶¹ Similarly, Colombia argued in the *Asylum* case that there was a rule of general custom (quite separately from Peru's acceptance of that rule),⁶² which, presumably would have been binding on Peru *because* it was a rule of general custom. But as seen above,⁶³ it later based the applicability of customary law to States on their consent. Similarly, as pointed out in Chapter IV, the position of Chile on the right of angary, as expressed in *Lauritzen v Chile*,⁶⁴ is, at the one point in time, internally inconsistent; the Supreme Court favoured the "general practice", while the Executive expressed a different position from that practice. What, then, is Chile's position on this secondary rule? Also, The United Kingdom seemed to view the requirement of generality in a fairly flexible way in the 1950's.⁶⁵ But by the 1970's it had subscribed to a higher threshold.⁶⁶ This is because, of course, in the 1950's, it was seeking to defend a position which it felt was being threatened, and it sought to show that such rights were based on existing customary law. In the later instance, it was in a minority in the face of increasingly extensive claims made by coastal States to jurisdiction over the waters adjacent to their coast; it therefore

⁶¹ UN Doc. A/Conf. 13/39 (1958), Official Records, Vol. III, para. 8, p. 32, and para. 5, p. 31. It is possible, however, that he did not necessarily use these terms in a context which meant the generally accepted rules would necessarily bind all States. But this would only confirm the point that many instances of the use of the phrase "generally accepted" does not really tell us anything about the requirement of consent.

⁶² See *Pleadings*, Vol. I, from the beginning up until p. 34, where it expressly began dealing with Peru's position vis-a-vis the general rule.

⁶³ See pp. supra, n. 29-30. Cf. the Official Records of the Vienna Conference on the Law of Treaties, Vol. I (1968), p. 200, para. 35.

⁶⁴ See Chapter IV, Section C, p. @ n.

⁶⁵ See the discussion of the *Reservations* case, Chapter IV, Subsection A(3)(i), *supra*. See also the pleadings in the *Anglo-Norwegian Fisheries* case (see Vol. II, pp. 427-428, and Vol. IV, p. 39).

⁶⁶ In the Fisheries Jurisdiction case, see *Pleadings* (1975), Vol. 1, p. 469: "What is clear, however, is that the Court *rightly* [emphasis added] demands a very high degree of generality before it will accept that some practice has constituted a new rule of international law"; and @ p. 470, "The consent of States is the basis of international law").

laid much greater emphasis on consent to the rules in question.⁶⁷ To re-iterate, if we are to speak of a general secondary rule which does not require individual consent, we have to face the question of uniformity. But given that the way the issue is presented is based on argumentative strategy, it is hard to find the requisite individual consistency in the *opinio juris* of States.

(A related observation is that a State, in claiming the normativity of a general practice, without bringing in the element of individual consent, may be saying two different things. On the one hand, the State is implicitly consenting to the primary rule it alleges; at any rate, it recognizes that rule as valid. On the other hand, it is also implicitly saying that it regards the rule in question to have been validly created, i.e. by general acceptance, so that it impliedly agrees that the rule governing the creation of customary rules is one that does not require individual consent. This way of putting things could backfire; a third-party decision-maker seised of the case, for example, would be justified in accepting one of these two implicit statements without the other. It could, for example, hold that the State in question is wrong as far as the primary substantive rule is concerned, but it would be justified in holding the State bound by what it finds to be the general law on the basis that the State has consented to the secondary rule which holds that general practice is universally binding.⁶⁸ But third-party decision-making is not the norm in

on the part of the United Kingdom in relation to the Concert of Europe in 1820-1822. The Czar of Russia, the Emperor of Austria and the King of Naples met at Troppeau in 1820 and at Laibach in 1822 and agreed to take measures designed to deal (with the use of force) with the current struggles for national liberation in Europe. Great Britain dissented from such a wide interpretation of the responsibilities of the European system, and put forward arguments based on the principle of non-intervention. It abandoned the deliberations of the Concert, which went on to carry out its decisions. See Wolfke, *Great and Small Powers in International Law from 1814-1920* (1961), pp. 20-22. See also the example cited by Norway in the *Anglo-Norwegian Fisheries* case, discussed above, @ n. 47.

⁶⁸ Without meaning to suggest that this is what actually happened, the following speculations may be proffered. In the *Nottebohm* case (*ICJ Reports* (1955), p. 4), where Liechtenstein had argued that x was the general practice, the Court found that the general practice was something different. As seen above, it did not hold that Liechtenstein was bound by the particular practice in question, but it could have done so, given that Liechtenstein had implicitly accepted that rules of customary law were binding on all when they were supported by a general practice. Also, in the *Nicaragua* case (*ICJ Reports* (1986), p. 14, pp. 97-98),

international law, and in any case it is totally voluntary. Nevertheless, the point stands. It is not in a State's interests to base its arguments simply on the generality of a practice (unless it is absolutely sure on that point) without anchoring it in individual consent. This may explain why, at least before international tribunals, States usually resort to such an anchoring tactic. The minimum of discretion on the part of the person trying to deduce a rule of customary law, be it a tribunal or a State, would warrant this tactic.⁶⁹)

- 3. The "uniformity" argument The evidence considered earlier in this section would seem to suggest that it would be difficult to speak of uniformity in the attitude of States concerning the requirement of consent.⁷⁰
- 4. The "ambiguity" argument There is another difficulty with inferring a general rule on the role of consent from the way States act and make claims. There is a difference between duties and liberties in the law. The point is this: are States under a duty, or do they have a liberty, to accept either or both the content of the primary rules accepted by the generality of States and the secondary rule stipulating that this process (i.e. whereby generality creates binding obligations for all) is the way in which customary law is created? This difference between duties and liberties (which are jural opposites in Hohfeld's scheme), it is submitted, seems difficult to prove on the basis of the way States argue, in the light of all the evidence and the considerations discussed thus far in this chapter. But it is precisely this difference which State practice must be able to establish if it is to provide an answer to this enquiry. Some States say consent is needed. Others say it is not. Others say dissent alone can exempt a State. Others stress the flexibility of

the Court found that the Parties could not speak for the rest of the world. If they were arguing on the basis of Article 38(1)(b) of the Court's Statute, then the precedents required for a rule of customary law must be reflected in the practice of States other than Nicaragua and the United States. As it happened, the Court was only making a statement of principle, since it found that the general law was in accordance with what the Parties had alleged. But it could have found otherwise, and it could have held either State bound accordingly regardless of that State's consent.

⁶⁹ See Haggenmacher, *Deux éléments*, esp. pp. 115-116.

⁷⁰ See nn. 15 ff, and accompanying text.

the requirement of generality. Others say universality is what is required. The existence of a *duty to be bound* by the general consent (if this is not tautologous) is thus not established. This "duties and liberties" argument is taken up again in the next subheading.

Before that, we may conclude with the following observation. These four arguments just made out (especially *i-iii* above) show that it is difficult to satisfy the requirements for the establishment of a secondary rule on the role of consent, but a problem exists at a deeper level. This problem concerns the actual meaning of the criteria stipulated in each of the arguments. With regard to (*i*) the concept of *opinio juris*, especially proof thereof (assuming we know what it is that we are trying to prove) are only too well-known.⁷¹ With regard to (*ii*) and (*iii*) the meaning of the requirements of consistency and uniformity (especially the standard required of each) is not (or cannot be?) settled.⁷² Unless a third-

As to individual consistency, Lobo de Souza states (@ p. 94) that if the individual practices are required to be only generally consistent, and if the

⁷¹ See Chapter Two, *supra*, especially Section B, and see Haggenmacher, *Deux éléments*, generally.

⁷² See, on this, the excellent treatment of the qualities which State practice must display in Lobo de Souza, EEZ, pp. 91-94. As to uniformity, he points out that in the North Sea Continental Shelf cases, Judge Padilla Nervo stated that "...nor does that practice show a uniform, strict and total application of the equidistance line in such cases", and the majority stated that the practice should be "...virtually uniform"; in the Anglo-Norwegian Fisheries case, it stated that "...although the ten-mile rule has been adopted by certain States...other States have adopted a different limit'. Judge de Castro's dictum in the Fisheries Jurisdiction cases may also be added: he stated that the practice must be "virtually or practically uniform", such that "there must be no doubt as to the attitude of States" (ICJ Reports (1974), pp. 89-90. Lobo de Souza contrasts these with the Court's statement in the Nicaragua where the Court seemed to require a less strict standard of proof, and he concludes that "minor inconsistencies should not negate a custom". Perhaps the reason for this different attitude on the part of the Court may be found by linking the Court's different rulings in these cases to its eventual decisions on the existence (or otherwise) of customary law. In the North Sea Continental Shelf cases and the Anglo-Norwegian Fisheries case, the Court found that there was no rule of custom, so that it may not have been surprising that it appears to have phrased the requirement strictly. In the Nicaragua case, on the other hand, the Court seemed to adopt a less strict approach, perhaps because it found that there were rules of customary law on the matter (perhaps because it did not want to hold that there were no customary rules prohibiting the use of force). Either way, we do not know how strict the requirement is. And it does not help to say "it depends on the circumstances" or something similar; the point is that subjects of the law need to be able to plan their actions in accordance with law outside the courtroom, and the demands of precision which this makes on the law are not satisfied.

party decision-maker had the power to rule on the matter in a way which would bind all States, any inference of the existence of a secondary rule would in any case seem difficult to make in any ex cathedra fashion. Very serious questions about the very nature of, and about what we mean by, "customary law" come to mind.

C. DUTIES AND LIBERTIES

The practice of States generally seems to furnish examples of States claiming to have rights and liberties, and of States claiming that other States have duties correlative to those rights. They seldom claim that they themselves have duties; and this is hardly surprising. Even when there might seem to be no clear *legal* basis for such claims, States seem to make them and still claim that they are permitted to do so by "international law". We may take the classic example of the Truman Proclamation of 1945, in which the United States asserted that international law allowed a coastal State to appropriate title to the natural resources of the continental shelf. It may be doubted whether, in 1945, international law really did grant such rights. In a note sent to Japan in 1958, the Government of Mexico in 1958 stated that it maintained the validity of (a) claims contained in its own legislation establishing a 9 mile territorial sea, and (b) the corresponding obligations *erga omnes*. Such claims, however, are, in the views of some States, contrary to established rights and obligations. These States normally claim the opposite, that the other States do not have a right or a liberty, but a duty, established

international practice is required to be only generally uniform, then one may question the extent to which the resulting customary rule really reflects the common features present in each practice.

⁷³ It may be asked whether such references to "international law" refer to the concordance of the claim being made with an existing *primary* rule or to a secondary rule which permits a State to make a such a claim.

⁷⁴ Whiteman, Digest of International Law, Vol. IV, p. 756.

⁷⁵ Ibid., Vol. IV, p. 114. For a similar claim by Chile, see Szekeley, Latin America and the Development of the Law of the Sea (1986), Vol. I, pp. 13-16.

under "international law".⁷⁶ However, the claims of these objecting States themselves may be similarly questionable.⁷⁷ States seem to be particularly forthcoming when they are claiming their rights and liberties even when these are not clearly established; they are not so keen to pronounce on their own duties, as distinct from the duties of other States.⁷⁸

Conclusions

To conclude, it would seem, as both consensualists and non-consensualists alike acknowledge, that State practice does not, or cannot, provide an answer to the question.⁷⁹ It would also seem that majority rule does not have a *legally* ordained

⁷⁶ The United States, in response to Canada's purported extension of her territorial sea to twelve miles in 1970, wrote that "International law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction"; see 9 *ILM* (1970), p. 605.

⁷⁷ For example, many of the older maritime States maintained for a long time that the rule of international law on the breadth of the territorial sea imposed a limit of three miles. See e.g. Gros, representing France in the 1958 Geneva Conventions on the law of the Sea, A/Conf. 13/39 Official Records, Vol. III, p. 19, paras. 21 and 25. See also the Japanese practice discussed at n. 11, supra. Most of the delegates at the Geneva Convention of 1958, however, disagreed (see *ibid.*, Vol. III), generally, and no agreement was reached on the question at that Conference.

⁷⁸ See, e.g., Churchill, Nordquist and Lay, New Directions in the Law of the Sea (1977), Vol. VII, p. 363, where the Republic of Cape Verde claimed an exclusive economic zone on the basis of "the changes in the Law of the Sea". Tunisia argued in the Tunisia/Libya Continental Shelf case (Pleadings), vol. IV, p. 431, that "Some of the solutions formulated in the Conference [i.e. UNCLOS III] are already followed in practice and command a wide measure of consensus, thus serving as a catalyst for the creation of new rules of customary law...". The United States and Poland signed an agreement in 1945 "Taking into account anticipated legal and jurisdictional changes in the regime of Fisheries management based upon the consensus emerging from the Third United Nations Conference" (see Oda, The International Law of Ocean Development (1979), Vol. II, VI.B.vii.6, p. 1.

⁷⁹ See, e.g., Lobo de Souza, *EEZ*, p. 64 ("On this issue [i.e. whether a customary rule could be created *and* applied against the will of a particular State or a group of States], there is no conclusive evidence."), and p. 65 ("The first conclusion one could formulate is that there is no rule which prescribes that the consent of all States is a necessary condition to the formation of a general customary rule. The second conclusion is that there is no universally recognized rule which would replace the "all consent" rule.")

See also Suganami, "A.V. Lowe on General Rules of International Law", 10 Review of International Studies (1984), p. 175: "It seems somewhat doubtful that an investigation into State practice can reveal conclusively whether...according to the secondary rule, a generally

function, but only one that relates to political strategy and to tactics which do have weight in the law-creating process. In many ways, State practice is doomed to fail to answer our question. Unless we are to be caught up in a vicious circle, we would have to look for the consent of all States on whatever secondary rule we seek on this matter. To look at the practice of some States alone to establish any universally applicable rule on the role of consent itself presumes, rather than proves, the point, by assuming that the practice of some States is sufficient to establish a rule binding on all. But even the microcosmic survey conducted in this chapter reveals that it is difficult to speak with precision about the role of consent as a/the source of rights and obligations under customary international law.

accepted rule of customary law is binding on a state unless it persistently objects, or whether a state, unless it is a persistent objector, is presumed to have consented to it, and is therefore bound by it". On the presumption of consent, see Chapter IV, Section A, Subsection 4(ii)(b), supra.

See also Villiger, Customary International Law and Treaties (1985), p. 21.

CHAPTER VI

THE RELATIONSHIP BETWEEN GENERAL CUSTOMARY LAW AND PARTICULAR CUSTOMARY LAW

This chapter will examine the relationship between particular customary law and general customary law. In particular, it will compare critically the conditions for the creation of rights and obligations under the former with those that obtain under the latter, as well as the implications of the co-existence of the two kinds of customary law, particularly as concerns the role of consent.

Traditional doctrine recognizes, alongside general rules of customary international law which can apply to all States, other rules of customary law which only apply to a particular group of States, whether on the basis of geographical proximity or other connexion. The latter apply only "to a definitely limited though indeterminate class of persons", and they will be referred to hereinafter as "particular custom". The purpose of the present chapter is to examine the differences between the way in which both kinds of customary law, general and particular, are created. It is widely accepted that there are such differences. The differences will be discussed under a number of headings.

A. THE SCOPE OF PARTICULAR CUSTOMARY LAW

How does one determine the scope of a custom? This is crucial, because it is what tells us whether we are dealing with a particular or general custom; only when we know which kind of customary law is in issue can we know how to test its existence, and with it, the issue of the consent of States to it.

D'Amato has written that

...special customary law deals with non-generalizable topics such as title to or rights in specific portions of world real estate (e.g. acquisitive prescription, boundary

¹ D'Amato, Concept, p. 235. This law includes regional, bilateral or local customary law.

disputes, "international servitudes") or with rules expressly limited to countries of a certain region.²

Thirlway has similarly written that

If the only link between a number of States is that they agree in preferring a particular rule, which they have developed by application in practice, to a different (general) rule governing the same point..., can this identity or similarity of practice, possibly in widely separated areas of the world, be regarded as custom at all, even a "local" or "special" custom?³ (emphasis added).

In the view of these writers (especially D'Amato), the essence of particular custom is, to a greater or lesser extent, *geographical*⁴; either the States involved are grouped together geographically, or the rights and obligations involved relate to a particular area.

But while it is true that there has been some geographical connection in the cases in which the International Court has considered particular customary law, ⁵ and that geography can be the basis of particular custom, it has never stated that this is the (or *an*) essential feature of particular customary law. In the first place, even if we take this geographical criterion as the touchstone, that criterion itself embraces at least two distinct ideas which have nothing in common. For example, there is no necessary conceptual nexus between "title to or rights in specific portions of world real estate", on the one hand, and "rules expressly limited to countries of a certain region" on the other; the latter category can contain rules which have nothing to do with title to or rights in territory (examples being diplomatic asylum, as in the *Asylum* case, and the "Brezhnev doctrine" of socialist intervention⁶). This alleged "geographical" characteristic is thus one that has

² *Ibid.*, p. 235.

³ Codification, p. 140.

⁴ This is implicit in the leading work of Cohen-Jonathan (*Annuaire français* (1961), p.119), entitled "La coutume *locale*".

⁵ See the European Commission of the Danube case, PCIJ Reports, Series B, No. 14 (1927), @ p. 17; the Asylum case, ICJ Reports (1950), p. 266; the case concerning the Rights of US Nationals in Morocco, ICJ Reports (1952), p. 176; the Right of Passage case, ICJ Reports (1960), p. 4, all discussed in the next section of the present Chapter.

⁶ See Tunkin, Theory, p. 444, and 433.

no essence in itself.

Furthermore, considering the examples of diplomatic asylum and the "Brezhnev doctrine", it is difficult to see how it is essential that the States in question have any geographical relationship. Neither the practice of diplomatic asylum nor intervention in the affairs of other socialist States, for example, *requires* any precondition of physical proximity. In the *Barcelona Traction* case, Judge Gros spoke of the applicability of a custom between "two States whose economic and legal conceptions are the same", and that "the principle asserted must therefore be demonstrated to form a veritable rule for States with a liberal economic system, one accepted by them as a rule of regional international law". It is thus difficult to sustain the claim that there must be a geographical connection between States for a rule of particular customary law to arise between them. It seems more accurate to suggest that the States need nothing more in common than interest in a particular subject-matter, and that the reasons for such interest may or may not be geographical.

It could be, then, that the touchstone of the distinction is the question of "interest" in the subject matter of the custom. Perhaps, for example, in the case of the law of the sea, only coastal States can have an interest, so that only their practice would matter when looking to see whether there is a relevant rule. ¹⁰ The International Court of Justice in the *North*

⁷ ICJ Reports (1970), p. 4, pp. 273, 277.

⁸ Cf. Virally, in Søresen (ed.), Manual of Public International Law (1968), p. 133.

⁹ See Akehurst, *Custom*, p. 28, and Villiger, *op. cit.*, p. 33. A different approach is taken by Sinha (XII *Canadian Yearbook of International Law* (1973), pp. 112-116. He argues that while customary international law can be general or local, it cannot be regional. From what has been said thus far, his view is tenable if he means that geography alone cannot be the basis for the distinction between general and particular law. If he means that geography is never relevant, then his view seems difficult to sustain, as borne out by the *European Commission of the Danube* case (*PCIJ Reports*, Series B, No. 14, p. 17), where a custom existed between parties concerned with issues of jurisdiction of the Commission; the only nexus there was a common interest in the administration of the Danube river.

¹⁰ See, e.g., de Visscher, "La Codification du droit international", 6 Recueil des Cours (1925), Vol. I, pp. 361-362.

Sea Continental Shelf cases stated that "an indispensable requirement" for the formation of general customary law was that States "whose interests are specially affected" must support the rule.¹¹ It would seem, then, that the distinction between general and particular custom could be based on the interest in the subject-matter of the rule in question. But can this requirement of interest be sustained?

It would seem not. There are many areas of law in relation to which it is not possible to distinguish between particularly interested States and other States. To consider the example used above, it is not true to say that landlocked countries do not have an interest in the law of the sea. Even if their nationals do not eat fish, they will be concerned with the limits of coastal State jurisdiction since they may be interested in navigation and overflight over areas within the jurisdiction of coastal States. And the high seas are free to all. Another area in which this issue of interest was mentioned by the Court was in the *Nicaragua* case, where the Court referred to its earlier pronouncement in the *North Sea Continental Shelf* cases. That case concerned the law on the use of force. But which State is not concerned about the regulation of the use of force in international relations? If the minimum requirement for the creation of a rule of international law in this area is that the interests of States whose interests are specially affected must be included in any survey of State practice on the question, would it not be a valid deduction to require the concurrent practice of all States? The same can be said of the law relating to the moon

¹¹ ICJ Reports (1969), p. 43, para. 74, and p. 44, para. 77. As a speculation, it could have been that one of the things the Court had in mind was the consideration that the views of land-locked States alone should not be considered as conclusive evidence of a rule on maritime delimitation.

¹² See Vascianne, Landlocked and Geographically Disadvantaged States (1989), for the part played by such States in the proceedings of UNCLOS III.

¹³ This might be put forward in defence of the Court's somewhat cursory examination of State practice in the *Nicaragua* case. It will be remembered that the Court seemed to place a great deal of emphasis on (the position adopted by the parties, sometimes only on the basis of a single vote in the context of) General Assembly resolutions. This approach has been criticized by some writers (e.g. Mendelson, "Customary International Law and the *Nicaragua* Case", 26 *Coexistence* (1989), p. 85, and see also D'Amato, "Trashing Custmary Law", 81 *AJIL* (1983)). But it might not be such a surprising course for the Court if one considers that (a) it would be easier to look at the practice of Parties to the dispute than it would be to look

and other celestial bodies, sovereignty over natural resources, diplomatic relations, air and space law, ¹⁴ and most areas governed by customary law. The "special interest" test would seem particularly inappropriate in the context of the United Nations drafting process. ¹⁵

To restrict the requisite practice to States who have had the opportunity to engage in it, ¹⁶ i.e. to distinguish between the active, the less active and the inactive, does not solve the problem. A State whose interests are specially affected may not have had the opportunity to engage in the practice, even though other States might have done so. ¹⁷ If it is an indispensable requirement that the practice must include those of interested States, it would seem, logically, that the scope of the custom thus created must be restricted to those who have participated in it. ¹⁸ (Of course, such "participation" includes

at the practice of every single State (b) the use of force being *ius cogens*, States may not have been expected to practice it physically, so that statements, rather than actions, would become very important. As seen above, the practice of States which had actually engaged in the use of force in recent years were considered by the Court to be breaches of the rule where such practice differed from the assertions made in international fora. The same could be said of the law on torture.

¹⁴ The Bogota Declaration of 1978 (*ITU Broadcasting Satellite Conference*, Doc. No. 81-E, Annex 4 (Jan. 17, 1977) or 6 *Journal of Space Law* (1978), p. 193, in which some equatorial States claimed sovereignty over segments of the geostationary orbit, testifies to the fact that even States which may not have the resources to exercise their rights still (claim to) have interests to protect.

¹⁵ See Villiger, Customary International Law and Treaties (1985), pp. 13-15.

¹⁶ See, e.g., Sørensen, 101 Recueil des Cours (1960), Vol. III, p. 40; Verdross, 29 ZaöRV (1969), p. 650; D'Amato, Concept, Ch. 4.

¹⁷ D'Amato (*ibid*.) appears to define a non-interested State as one which does not have an interest in the specific subject-matter of a particular dispute, i.e. one which is not party to the dispute. This is simply too narrow; States which are not parties to a dispute still have an interest in the outcome of the dispute, as it may be relevant as a precedent against which their future actions will be judged. For instance, the Governments of Argentina, Australia, Ecuador, the Federal Republic of Germany, India, New Zealand and Senegal requested that the pleadings and documents in the *Fisheries Jurisdiction* case be made available to them, in accordance with Article 44 (now Article 53) of the Rules of Court (see *ICJ Reports* (1974), p. 6). If these States were not interested, why would they wish to have the pleadings? And if they are interested, their practice, or at least acquiescence, is required.

¹⁸ See supra, Chapter IV, pp. 145-6.

The problem is compounded by the consideration that in practice, discourse does not always distinguish between practice relevant to the formation of a general rule and practice relevant for a particular custom.²⁰ As Mendelson has put it.

State practice often operates in this multi-level fashion, helping to affirm, deny or modify rights, not only on the particular, but also on the general level.²¹ (emphasis

further observation may be made here. States may even use the general/regional/bilateral/local problem to strategic advantage, particularly in the courtroom. For example, Germany in the North Sea cases denied the existence of a regional custom by stressing, inter alia, that such a custom could not exist without the consent of France. Knowing that France had not accepted the rule in question, it spoke of a regional (i.e. the North Sea), rather than bilateral (i.e. between itself and either or both the two kingdoms). It is thus not surprising that the two kingdoms did not argue on the basis of a regional custom, but only on the vaguer and more malleable notion of general custom, and on the individual consent of Germany (whether relevant to general custom and persistent dissent, or to estoppel and quasi-ratification of the Convention).

¹⁹ See, *supra*, pp. 131 ff.

²⁰ In the Asylum case, the Court looked at State practice generally, and when that was inconclusive, it looked at the practice of Latin American States. Surely the practice of Latin American States would have been part of the practice creating the general rule. In the Anglo-Norwegian Fisheries case, Norway stated (Pleadings, Vol. III, p. 291, para. 394), concerning the requirement of generality, that if a rule "...n'a pas cette ampleur, elle pourra peut-être lier, dans leur rapports réciproques, les États qui s'y conforment et servir ainsi de base à une coutume particulière..."; in other words, practice which could form general custom forms particular custom before or unless it is becomes general. In the North Sea Continental Shelf cases, the Court was careful to phrase the question before it as being whether the equidistance rule was mandatory for the delimitation of the continental shelf in the North Sea (@ p. 23. para. 21), and whether the equidistance rule was binding for all the Parties in this case (p. 24, para. 25), and in answering that question, it looked at the practice of States generally. Also, Germany had argued as to the existence of a regional custom; see Pleadings, Vol. I., p. 60, para. 59). Perhaps the Court did not respond to this because it had already found that Germany had not accepted the equidistance rule, and it is not denied that consent is a precondition for a particular custom (see the next section).

²¹ Hohfeld, p. 379. To take an example, the Governments of Chile, Peru and Ecuador issued a Joint Declaration in 1952 proclaiming that each of them possesses sole sovereignty and juridiction over the are of sea adjacent to the coast of its own country and extending no less than 200 nautical miles from the said coast. See Platzöder and Vizthum, Seerecht (1984), pp. 479-480. While this involved the establishment of a particular regime between the States in question (particular law), it was also a claim regarding all other States not party to the agreement (general law). See also the similar agreement signed by Colombia and Ecuador in 1975 (see Churchill, Nordquist and Lay, New Directions in the Law of the Sea (1927), Vol. V, pp. 12-13). Even D'Amato states that "Dissatisfied with the underlying customary law,

added)

For example, evidence of dissent in relation to a particular custom is as relevant to exception from the general law as it is to particular law, and even to estoppel.²² If a State, for example, allows the warships of two other States to enter its ports without permit or notification, is this evidence of a general rule allowing such entry or only a particular rule?²³ Unless States expressly state that a given practice is intended to be relevant only to one kind of custom and not the other,²⁴ it seems impossible to identify a fixed criterion for distinguishing between the two kinds of custom.²⁵

two or more States enter into a treaty which changes the law for them and which becomes a factor in changing the law for all" (*Concept*, p. 165).

But while this cannot be faulted, it is also true that a statement about the general law is also implicit in the trade embardgo example. State A could be claiming a right (in casu a power coupled with a liberty) based on the general law on diplomatic relations. Certainly, if, some time after the incident between States A and B, in a case between States J and K, one is looking for precedents upon which to base a general rule on the seizure of embassies, State A's response will be evidence confirming the existence of the rule. As shown above, the distinction between practice relevant to general law and practice relevant to particular law is not precisely identifiable.

²² Cf the discussion of the *North Sea Continental Shelf* cases, *supra*. See, for discussion of the various forms that protest may take, Colson, 61 *Washington Law Review* (1986), p. 946.

²³ This is an example used by Koskenniemi in another context (*From Apology to Utopia*, p. 386).

Even when they do so state, qualification is needed. Reference may be made to Hohfeld's distinction between multital and paucital rights; the former are similar to so-called rights in rem, while the latter are more akin to legal relations in personam. Mendelson (Hohfeld, p. 377) illustrates this distinction in the following way. If State A asserts a right of exclusive access to fisheries within x miles of its baselines, it is asserting a multital right (implicitly, at least, making a statement about the rights and duties of all States). But if it imposes a trade embargo on B in response to the latter's wrongful seizure of its embassy, it is only a paucital right which is being invoked. Lobo de Souza (EEZ, pp. 154, 158-9) also suggests that the "States whose interests are specially affected" may be identified by looking to the addressees of a given legal claim; these would be the States whose interests are specially affected.

²⁵ Fitzmaurice gives two examples; a customary rule deviating from general custom but which is recognized generally as a matter of historic right, and a customary practice whereby States grant some privileges to each other but not to the community at large (30 BYBIL (1953), pp. 68-69. However, in some circumstances, such practices could become generalizable. Take for instances the references to the Suez and Panama Canals in the Wimbledon case. The regimes governing these two canals, it has been argued by some

The difficulty in distinguishing between general and particular customary law points to a difficulty in knowing which States are expected to be bound by it. It would seem that the position is that identified earlier, ²⁶ namely, the existence of a sliding scale to the effect that the more widespread the practice, the greater the presumption of its normative scope, and the less easy it will be for a State to exempt itself from its scope of application. There seems to be no *a priori* way of making a distinction between the two kinds of customary law. One is naturally reminded of the view that custom is always of limited scope. ²⁷ This does not augur well for any distinction as to the requirements for the creation of both kinds of custom.

B. THE SUBSTANCE OF THE PROBANDUM

Some jurists have treated the two kinds of custom as being distinct on the basis that what is required for the establishment of each kind, apart from the question of scope, is different from what is required for the other. That is to say, the view of these jurists is that the applicability of a rule of general customary law does not depend on individual consent, whereas the applicability of a particular rule does. For particular customary law, consent must be proved (i.e. a consensual explanation), but there are other (more important?) factors to be taken into account where a general rule is concerned (a non-

⁽unconvincingly, it is submitted; see *supra*, Chapter IV, pp. 70-74), created a *general* custom which was binding on Germany. One may have thought that such regimes were particular regimes, based as they were on treaties relating to particular areas. The point is that even in the circumstances identified here by Fitzmaurice, several instances of particular law generate general law. Customary international law is the generalization of the particular practice of States. General law is particular multiplied.

²⁶ See *supra*, Chapter IV, Section B, Subsection 4(2)(b).

²⁷ See the statement by the Iranian delegate at the Vienna Conference on the Law of Treaties concerning "the general principle that custom always had a specific scope" (Official Records, Vol. 1, 1968, p. 200). See also El-Khoury's question to Hudson in the International Law Commission (Yearbook of the International Law Commission (1950), p. 5).

The practice of the International Court, however, tells a different story. In the Asylum²⁹ case, the leading case involving particular customary law, the Court, while speaking of the "alleged regional or local custom peculiar to Latin-American States", as distinct from a universally applicable rule, stated that the onus on Colombia to prove the existence of an obligation on Peru's part "followed from Article 38 of the Statute of the Court, which refers to 'international custom as evidence of a general practice accepted as law'". The Court was thus applying Article 38, which is clearly concerned with rules of general customary international law, to particular customary law. Whether one considers Article 38 to refer only to general customary law or to regional rules as well, the Court did not appear to have considered the difference to have been of importance in this case. If Article 38 refers only to general customary law, then by applying that Article to regional customary law, the Court treated both kinds of custom as being similar in this respect. If the Article is taken to refer to both kinds of customary law, then this case is authority for the creation of both kinds of custom.

In subsequent cases, the Court has maintained the same position of referring to Article 38(1)(b). In the Rights of American Nationals in Morocco³⁰ case, the Court quoted the passage from the Asylum case just discussed as authority for what needed to be proved for the establishment of a particular customary law obligation on Morocco's part. This view is also consistent with the Right of Passage case³¹ where the Court stated that

...the Court is, in view of all the circumstances of the case, satisfied that practice was accepted as law by the Parties and has given rise to a right and a correlative

²⁸ See, e.g., D'Amato, Concept, Chapter 8; Virally, op. cit., n. 8; Judge Ammoun's Separate Opinion in the North Sea Continental Shelf cases, ICJ Reports (1969), pp. 130-131; ICJ Pleadings (1975), pp. 242-243 (United Kingdom); Sinha, op. cit., supra, n. 9.

²⁹ ICJ Reports (1950), p. 276 ff; considered in Chapter 2, supra.

³⁰ ICJ Reports (1952), p. 176 @ p. 200.

³¹ ICJ Reports (1960), p. 6. The Court did not refer to the ruling in the Asylum case. But it did speak of a practice accepted as law; see the next quotation.

obligation.32

and that

The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.³³

It would seem difficult to restrict the dictum in the Asylum case to particular law only.34

Furthermore, to home in on the point that a regional custom must be proved to be binding on the other party is odd as a basis for distinguishing between general and particular law.

Does a general custom not have to be established to the same end?³⁵

³² @ p. 40, cf. also p. 44.

³³ @ p. 39.

³⁴ The wealth of authority suggesting that the distinction cannot be drawn formidable. See, for example, the Dissenting Opinions of Judges Klaestad and Guggenheim in the Nottebohm case, ICJ Reports (1955), pp. 30 and p. 55, para. 4, respectively; ICJ Pleadings (1966), Vol 10, p. 9 (oral arguments of Dr. Verloren van Themaat on behalf of the Republic of South Africa in the South-West Africa cases); the Dissenting Opinion of Judge Lachs in the North Sea Continental Shelf case, ICJ Reports (1969), pp. 231; (see also the interpretation of Judge Ammoun's judgment in that case, above, n. 18); the submissions of the United Kingdom in the Fisheries Jurisdiction case (ICJ Pleadings (1975), p. 240), and the Joint Separate Opinion, @ pp. 51-52, para. 20), and also Separate Opinion of Judge de Castro (ICJ Reports (1974), pp. 91-92); Waldock, 92 Recueil des Cours (1962), pp. 49-50; Thirlway, International Customary Law and Codification, pp. 135-41; Akehurst, Custom as a Source of International Law, 1974-5 BYBIL, p. 1 @ 29-30; Briggs, The Columbian-Peruvian Asylum Case and Proof of Customary International Law, 45 AJIL (1951), p.728, esp. 730; Lauterpacht, Development, pp. 374-384; Fitzmaurice, 30 BYBIL (1953), pp. 68-69; MacGibbon, 33 BYBIL (1957), p. 122; Verdross, Volkerrecht (5th edn. 1964), p. 141; Harris, Cases and Materials in International Law (4th. edn, 1990), pp. 25-27; Brownlie, Principles, p. 6; Koskenniemi, From Apology to Utopia (1989), p. 395. See also the pleadings in the Asylum case (ICJ Pleadings (1950), Vol. I, p. 120.

³⁵ It may be argued that particular customary law, unlike general customary law, is not of the nature of rules, but simply a question of mutual rights and obligations, and that this is why the Court referred, in the Asylum case, to the requirement of proof of a right and incumbent duty, as it seems to have done in all the cases on particular custom. In other words, particular law may not be worthy of the appellation "customary law" at all, as Thirlway points out (op. cit, n. 3, supra); see also Haggenmacher, Deux éléments, p. 37, for a similar inclination. But this does not explain why the Court required that the party relying on particular custom must "prove the rule" (@ p. 266) alleged by it, and why it has quoted the Asylum case in subsequent cases. In any case, it seems to have required exactly the same thing in relation to the North Sea Continental Shelf cases, which concerned general custom ("The States concerned must feel that there are conforming to what amounts to a legal

However, in the *North Sea Continental Shelf* cases, Judge Ammoun, in his Separate Opinion, made the following pronouncement when considering the possibility that there might have been a regional custom binding on the Federal Republic:-

...while a general rule of customary law does not require the consent of all States, as can be seen from the express terms of...[Article 38(1)(b) of the Court's Statute] - but at least the consent of those who were aware of this general practice and being in a position to oppose it, have not done so [footnote, see below] - it is not the same with a regional customary rule, having regard to the small number of States to which it is intended to apply and which are in a position to consent to it. In the absence of express or tacit consent, a regional custom cannot be imposed upon a State which refuses to accept it. (He then cited the International Court in the Asylum case, 1950 I.C.J. Reports, p. 276)³⁶ (parentheses added)

The footnote mentioned reads

Thus the right of countries becoming independent, which have not participated in the formation of rules which they consider incompatible with the new state of affairs, is preserved.³⁷

It seems to be Judge Ammoun's intention to ratify a non-consensual theory of general customary law, because a State that did not know of the general practice is bound as long as those who did know accepted it.³⁸ For a regional custom, on the other hand, the latter, a State must have expressly or tacitly consented before the custom can be opposed to it. This is a re-statement of a widely held view, and in any case it could provide a basis for distinguishing between general and particular custom; it therefore merits detailed consideration. It is submitted that it is a difficult distinction to maintain.

obligation...sense of legal duty" [@ p. 44, para. 77, emphasis added]; "...in such a way as to show a general recognition that a rule of law or legal obligation is involved" [p. 43, para. 75]). It would seem that as far as the end is a right or an obligation, the idea of a rule adds little to the process.

³⁶ See *ICJ Reports* (1969), pp. 130-31.

³⁷ Ibid.

³⁸ But does this mean, as Judge Ammoun implies, that there will be no reason to look at the position adopted by such a State because such a position *cannot* have been taken, as the State was unaware of the practice in the first place? Surely not, because, particularly if the State in question is an interested State, it will adopt some kind of position in its blissful ignorance, which is part of the practice upon which the rule is based.

In the first place, the views expressed in the passage must be qualified on two counts. Firstly, the passage suggests that, in relation to general customary law, if a State was aware of the general practice and was in a position to object, and it did object, its objection would prevent the creation of the rule even as between those who follow the practice on which the purported rule is based, as distinct from preventing the operation of the alleged rule in relation to itself. This would support the dubious *veto* theory, contrary to Judge Ammoun's apparent intention.

Secondly, it would appear that Judge Ammoun's formula only requires us to consider the position of those States who were either unaware or were not in a position to object (excepting, of course, new States), because such States can be bound without their consent.³⁹ It is in relation to these States that Judge Ammoun clearly does intend to highlight the difference between the two kinds of customary law, but there are some difficulties [(i)-(vi) below] with his criteria of differentiation.

(i) It is doubtful whether "awareness" can furnish a convincing basis for a distinction between general and regional customary law. Awareness is a question of fact; either the State is aware or it is not.⁴⁰ It is not apparent why a State in a region must necessarily be any more aware of a practice within that region than in the practice on a particular area of general law in which it is interested but which takes place far from its borders.⁴¹

³⁹ One problem that seems to present itself here is that Judge Ammoun seems to say that while the consent of those who were aware of the practice is required before they are bound, those who did not know of the practice, or those who were not in a position to object, would be bound automatically. This would mean that States who did not have a chance to participate will be bound, while those who were aware would simply have to dissent. But the reason why Judge Ammoun fashions an exception for "new States" is that they had not (and could not have) participated in the formation of rules. So what is the basis of the distinction between old and new States? It is submitted that if Judge Ammoun is to be consistent, the (non-practice) of silent States must itself be part of the constitutive process.

⁴⁰ As Brownlie (*Principles*, p. 157) puts it, albeit in a different context, " (i)f acquiescence is the crux of the matter, then one cannot dictate what its content is to be".

⁴¹ Cf Judge Gros' view in the *Barcelona Traction* case, supra, p. See also *ICJ Pleadings* (1975), Vol. I, where counsel for the United Kingdom pointed out that the United Kingdom reserved its position regarding the unilateral extensions of fisheries jurisdiction by Pakistan,

(ii) If Judge Ammoun is saying (as he seems to be when he says that *tacit* consent can make a State bound by a regional custom) that, for regional custom, awareness can be presumed, then the basis of the distinction falls to the ground; surely awareness can be presumed (and may perhaps be easier to presume) in the case of a truly widespread practice?⁴² At best, the distinction drawn by Judge Ammoun between general and regional custom, to the extent that it is based on the question of awareness, relates to (but falls short of demonstrating) the relative ease with which the fact of awareness can sometimes be proved in relation to regional custom. It does not establish a necessary typological difference between the two kinds of customary law, whereby the applicability of only one kind (i.e. regional customary law) depends on consent.⁴³

(iii) It is not clear what it is that puts a State in the "position" to consent to or oppose a rule. Judge Ammoun clearly states that non-independent countries are an example of States not in a position to oppose a *general* rule. Even in relation to such States, he does not appear to consider their position in relation to a *regional* customary rule; he seems to assume that all States in the region in question are in a position to oppose a rule of regional customary law. But why should the position of a new State, which is never in a position to object to any rule because it did not exist during the formative stages of the rule, be different depending on whether the rule is regional or general?⁴⁴ The point is this - whatever reasons there may be for holding a new State bound by (or exempt from) a general rule of customary law must also hold in relation to a regional rule. If it is true that some States are not in a position to object, then it must be true for both kinds of customary law. This casts further doubt on Judge Ammoun's distinction between general

Tanzania, Iran, the Malagasy Republic, and the Somali Republic. These countries were not neighbours to the United Kingdom, and the United Kingdom most probably did not fish in the areas in relation to which it reserved its postion.

⁴² The view of the United Kingdom in the Anglo-Norwegian Fisheries case was precisely this; while it knew of the practice followed by a preponderance of States, it did not know of Norway's (i.e. its neighbour's) system of delimitation!

⁴³ See Thirlway, *Codification*, pp. 136-139, and Akehurst, *Custom*, pp. 28-31.

⁴⁴ Ibid.

and regional custom.

(iv) Another possible reason (other than the "newness" of States) for considering a State not to be in a position to oppose a rule may be the fact that such a State may be one whose interests are not specially affected.⁴⁵ But this, again, would be problematic. To say that a State's interests are not specially affected, whatever that may mean⁴⁶, is not to say that such a State is not in a position to contribute to the formation of a rule; at most, it is to say that the views of such a State count for less.⁴⁷

(v) Judge Ammoun cites, as authority for his distinction between regional and general custom, the passage in the *Asylum* case where the Court stated that the party relying on a regional custom "must prove the existence of a custom in such a manner that it has become binding on the other party". ⁴⁸ But as has been shown, this reading of the *Asylum* case is untenable. The Court did not require anything that would not be required if the rule in question were a general, as distinct from a regional, customary rule. Surely it must be proved, in any case, that a general rule is binding on a State?

In sum, Judge Ammoun's opinion is that, for general custom, a State's consent appears to mean that it was aware of the general practice, and was in a position to object, but did not do so; but this seems to be exactly what is required for the application of a regional custom to a particular State.

(vi) It is important to examine further his explanation of the relationship between consent (express or tacit) and non-dissent. Judge Ammoun (cryptically, it might first seem)

⁴⁵ See the judgment in this case, ICJ Reports (1969), pp. 42-43, paras. 73 and 74.

⁴⁶ See the present Chapter, Section A, supra.

⁴⁷ See Akehurst, *Custom*, p. 22, and Judge Dillard's Separate Opinion in the *Fisheries Jurisdiction* case (*ICJ Reports* (1974), p. 58, where he implies that the practice of States not specially affected is also relevant in determining the existence of a rule of customary law.

⁴⁸ ICJ Reports (1950), pp. 276-77.

requires the consent of States that were aware and in a position to object, but did not. This could mean either of two things; either that one requires the consent of a State over and above its non-dissent (which would render the requirement of non-dissent otiose), or that consent is expressed by awareness and non-dissent (in view of the ability to dissent). Either would mean that consent is the ultimate criterion; in the latter case, non-dissent is relevant as proof of consent.⁴⁹

These problems undermine any conclusions that can be drawn as to the requirements for the creation of obligations in customary law in Judge Ammoun's opinion, especially as regards the difference between regional and general customary law. If any conclusions can be drawn unequivocally, they are (a) the rather extreme one that if a single State dissents, not only will the rule not be binding on it; it will not arise at all (the *veto* theory), and (b) that a regional customary rule cannot be opposed to a State which has not in some way consented to it, which is all he intended to say in the first place, and (c) that knowledge coupled with a failure to dissent amounts to consent. All of this suggests that any purported distinction between general and particular customary law, if based on the argument that consent is required in one case but not the other, is unconvincing.

Similarly unconvincing is D'Amato's rationalization of the need for a stronger showing of consent where particular law is concerned. Firstly, his statement that "legal systems in the first place are concerned with social interactions, not with what an individual does, without social repercussions, in the privacy of his own room" is not helpful. If customary law is made up of what States do, then "private" acts are what create "public" law. For example, if a State delimits its territorial sea in a particular way, or pays compensation for expropriation according to a standard of its own devising, the general customary law on these matters, to the extent that it exists, is to be found in the concordance of such "private" practice. Any acts which may have relevance at the

⁴⁹ Cf the conclusions reached on the relationship between dissent and the consensual theory in Chapter IV, Section A, Subsection 4(ii)(a) supra.

⁵⁰ Concept, p. 249.

international level also have "social repercussions".⁵¹ Given that we cannot always delimit the precise scope of a particular rule, the consideration that "special rules will (ultimately) exclude general customary law, since the more States adhere to the special rule, the less will the general rule attract the requisite widespread practice"⁵² would suggest that his distinction between the public realm and the private (he quotes Mill) is not a useful one.

Secondly, and most importantly for present purposes, it does not follow that because a relationship is "private", *consent* is what needs to be proved. Legal systems contain rules delimiting the conditions upon which "private" relationships are to be tolerated, and it is those rules which may or may not require that consent be proved; and in international law such rules may or may not state that consent is required for general law. There is no inherent nexus between D'Amato's idea of "privacy" and consent.

Thirdly, his analogy with contract⁵³ (i.e. that "special" customary law, as he calls it, is more akin to contract, unlike general customary law) is similarly problematic,⁵⁴ because (a) a contract, unlike state practice, regional or general, is an essentially private matter which, primarily, is not law-creating but obligation-creating, and (b), in some legal systems, a kind of customary law does arise from a practice between parties in the trade.⁵⁵

⁵¹ In any case, he contradicts himself elsewhere in his book. In Chapter Four thereof, he appears to say that custom can arise from the practice of only two States.

⁵² Villiger, op. cit., p. 34.

⁵³ Ibid.

⁵⁴ Custom is not contract; see Chapter VIII, Section A, Subsection 5, below. Secondly, as shown above, there is no distinction between general and particular customary law as far as the requirements of their creation (other than the number of States to which they apply) is concerned.

⁵⁵ See Treitel, *The Law of Contract* (1991), pp. 194-5, 201-2. Cf. Mendelson, "Are Treaties Merely a Source of Obligation", in *Perestroika and International Law* (1990, Butler ed.), p. 1.

Therefore, it is difficult to sustain the claim that there is a difference between the requirements of general and particular custom as far as the role of individual consent is concerned. If it is required in relation to one, there seems to be no reason why it should not be required for the other.

C. THE BURDEN OF PROOF

It is also sometimes stated that the difference between the two kinds of custom lies not so much in *what* has to be proved, but *how* (and how much). Judge de Castro's dictum in the *Fisheries Jurisdiction* case is of a piece:

International customary law does not need to be proved; it is of a general nature and is based on a general conviction of its validity...quaestio iuris: iura novit curia. Only regional customs or practices, as well as special customs, have to be proved.⁵⁶

In the preceding section, we were concerned with the question of what has to be proved (the substance of the probandum), and now we are concerned with how it is to be proved. As far as the former issue is concerned, it was argued that it is difficult to distinguish between the two kinds of custom on any other basis than the number of States subscribing to it. As regards the latter, even if we assume that there is a higher burden of proof in the case of particular law, it is still consent that has to be proved. The proposition that a rule of particular customary law (or at least consent thereto) has to be proved does not tell us anything about the essence of the particular rule which would suggest a difference between that rule and a rule of general customary law.

⁵⁶ ICJ Reports (1974), p. 79.

⁵⁷ See, e.g., Waldock, 106 Recueil des Cours (1962), p. 50, who argues that consent needs to be proved in the case of particular custom "because that is a derogation from the general law and the acceptance of the custom by the parties to the litigation themselves is the whole basis of the exceptional rule". But in relation to general law, he wrote that "in order to invoke a custom against a State it is not necessary to show specifically the acceptance of the custom as law by that State; its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its actual opposition ...". (ibid.) In other words, consent is still the key issue; the only question relates to the identity of the party bearing the burden of proving the existence of the consent, as presumptions only allocate the burden of proof.

Nevertheless, it seems doubtful whether there is any theoretical or practical basis upon which any legally pre-ordained distinction based on burden of proof can be sustained. If particular customary law is law, and it must be law, it seems peculiar to postulate that the maxim *iura novit curia* should not apply to it. After all, in the *Fisheries Jurisdiction* case, the what the Court said was that

It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing and proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.⁵⁸

It did not say that the position should be different depending on whether the rule is one of general custom or one of particular custom; and the United Kingdom had certainly mentioned the possibility of a regional custom in its pleadings.⁵⁹

Where, then, did this distinction as to proof originate? It seems to be the *Asylum* case; Judge de Castro certainly based his dictum on that, as did Judge Ammoun. But the Court did not seem to be preoccupied with this distinction, and it would seem that to draw the distinction is to read too much into the case. The only other time when the Court spoke of a burden of proof, it was in relation to the much deeper question which arose in the *Lotus* case, concerning the question whether the freedom of States action was to be presumed in the absence of a prohibitive rule or not. There the Court was not concerned with any distinction between general and particular customary law. It would seem better, then, to put the matter thus:

There is probably nothing to forbid a court doing its own research into local custom,

⁵⁸ ICJ Reports (1974), p.9, para. 17; p. 181, para. 18. See, e.g., Francioni, Rivista di diritto internazionale (1971), pp. 397, 419-421 (who seems to imply that the Court will not do its own research into a local custom). On the maxim generally, see Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), pp. 299-300.

⁵⁹ ICJ Pleadings (1975), Vol. I, p. 471.

⁶⁰ See the discussion of the Asylum case, supra, this Chapter, Section B.

⁶¹ See the last passage quoted above, from the *Fisheries Jurisdiction* cases, and Judge Dillard's Opinion in that case (@ pp. 58-59), in particular his reference to the writings of Lauterpacht and Fitzmaurice on the matter.

although in practice a court will probably find it easier to do research into general custom than research into local custom. 62

But are we not, then, back to the conclusion reached in Chapter IV concerning the sliding scale of proof (i.e. that the more widespread the practice, the less proof that it should be binding, and the less widespread the practice, the more the proof required that it should be binding)? This "burden of proof" does not in any way imply the existence of a legal rule requiring that any burden of proof must fall on one particular State in all cases. It is simply a question of a party doing its best to convince the Court or the other party that x is the case. A custom supported by widespread practice has presumptive normative force, while a particular custom does not. But do we have to label them as particular and general in order to characterize the relevant "burden of proof" in each case?

The distinction between general and particular custom regarding the question of burden of proof appears to rest on a basis which is difficult to sustain. The basis of this distinction is the assumption (which is not demonstrated) that particular customary law, unlike general customary law, is not "law". It is extremely difficult to defend this assumption. Alternatively, the assumption could may be characterized as being not that particular customary law is not law, but that it is not (or at least not sanctioned by) a "secondary rule" of the nature of a "rule about rules", but is instead only a "primary rule" specifying conduct. But since the international legal system specifies a process whereby States can (at least) vary the content of their mutual obligations *inter se*, it is difficult to sustain this distinction. Just as one can argue that there are rules stipulating

⁶² Akehurst, *Custom*, p. 19. It is noteworthy that Akehurst refers to *local*, and not even regional, custom. One may even go further than Akehurst and argue that it should be easier to do research into the practice of a smaller number of States than that of a larger number. Judge Read stated in the *Asylum* case that "Considerations of time and space, and the lack of information regarding the course followed by all of the Parties to the Convention, prevent a comprehensive examination of all aspects of this test. It will be sufficient to examine the course followed by Colombia and Peru in granting asylum, and in recognizing the grant of asylum..." (*ICJ Reports* (1950), p. 324).

⁶³ Sandifer, Evidence Before International Tribunals (1974), pp. 123-141.

how general rules are created, one can also argue that there are also rules stipulating how particular rules are created. In fact, is it not the same rule which stipulates how all customary law rights and obligations are created? The *Asylum* case and its progeny certainly suggest so.⁶⁴

D. THE RELATIONSHIP BETWEEN GENERAL AND PARTICULAR LAW

In stressing the "uniqueness" of particular customary law, it is sometimes stated that it is a characteristic of this law that *it derogates* from general international law. Indeed this must be so; it is impossible to have a regional custom which does not derogate from the general position, because there is always a general position, even if it is a general "non-position" (i.e. one that grants liberties rather then rights *stricto sensu*). There are no gaps in the law (it is widely stated that international tribunals have an aversion to non-liquet), and some would even argue that anything not prohibited is permitted.⁶⁵

Particular custom does not, however, appear to depend on the existence of general customary law. Whether general customary law exists or not, the International Court has applied the rule accepted between the parties as customary law. In the *European Commission of the Danube*⁶⁶ case, the Court applied a "usage having juridical force simply because it had grown up and been consistently applied with the *unanimous* consent of all the States concerned" (emphasis added).⁶⁷ In the *Right of Passage* case, the Court

⁶⁴ See *supra*, the present Chapter, Section B.

⁶⁵ See reference to Lauterpacht and Fitzmaurice, in Judge Dillard's Separate Opinion in the *Fisheries Jurisdiction* case (*ICJ Reports* (1974), p. 59.

⁶⁶ PCIJ Reports, Series B, No. 14, p. 17.

⁶⁷ PCIJ Reports, (1927), Series B, No. 14, @ p. 17. See also The Free City of Danzig and the International Labour Organisation, PCIJ Reports (1930), Series B, No. 18, pp. 12-13, where the Court stated that "a practice which seems now to be well understood by both parties, has gradually emerged from the decisions of the High Commissioner and from subsequent understandings and agreements arrived at between the parties under the auspices

expressly stated that since it had found that there was a particular rule in operation between the parties, it was "unnecessary" to consider what the position might be under general customary law. 68 In the light of this, it may be asked whether there is any basis for the treatment of what is termed general custom as the "norm" and what is termed particular custom as the "exception", when the Court has expressly stated that this "norm" was irrelevant. In fact, one may go so far as to argue, as Thirlway does, that "to find that there exists a special custom to a particular effect implies a finding that there is no general custom to that effect"; 69 if there was a general custom of identical content, there would be no point in looking at the particular rule, since the practice constituting the particular rule would also be the practice forming the basis of, or undermining, the general rule. 70

of the League". Haggenmacher (*Deux éléments*, p. 36 ff) argues, in spite of the fact that the Court applied a practice accepted as law between the parties in both cases, that the *PCIJ* did not have "customary law" in mind. What, then is customary law?

⁶⁸ See *ICJ Reports* (1960), pp. 43-44. See also the statement by the Costa Rican delegate at the Vienna Conference on the Law of Treaties (*Official Records*, 1969), p. 72: "...in any conflict that might arise between a customary rule of international law and the principles of inter-American law, Costa Rica could not accept the authority of the former".

⁶⁹ Thirlway, Law and Procedure, pp. 105-106.

To bo de Souza (*EEZ*), pp. 86-87, agrees that doctrine does not seem to have fully appreciated the consequences of the operation of particular law, but his classification of these consequences suggests that he has tied his hands by rejecting a consensual explanation of customary law.

⁽i) He states that "This idea of 'particular derogation' from general law puts into question the legal nature of this 'law'. It seems inconceivable that any legal system would permit individuals to derogate *inter se* from its general rules". But how is it inconceivable? The very fact that I am not liable for a failure to give you £500 is in conformity with the general law. If, however, I enter into a contractual arrangement with you according to which such a duty arises on my part, is that not on the basis of contract law which allows individuals to derogate from the general law? Also, in English torts law, a person is normally under no liability to save drowning children. If that person is a lifeguard, however, the position would surely be different.

⁽ii) The argument that "Only a contradictory 'legal system' could have a secondary rule which serves to undermine the effectiveness and even the existence of primary rules" is just as odd. Why can the secondary rule not very simply stipulate the conditions upon which derogation by parties *inter se* is to be tolerated? Is that not what secondary rules do?

⁽iii) Similarly, his point (@ p. 88), that the right to derogate must be limited if it affects the rights of other States, is, of course, axiomatic. That derogation simply cannot be opposed to States which have not accepted it. This true of his examples concerning atmospheric nuclear

By way of illustration, one may consider the French case of *Rego Sanles v Ministère Public*.⁷¹ The case concerned the arrest of the captain of a Spanish trawler within the French exclusive economic zone. He argued that he had a right to fish in the area involved because of particular law (based on both custom and treaty) in force prior to the establishment of the concept of the exclusive economic zone in international law. The Court of Appeal of Rennes held that

It is possible that Spanish fishermen had established a custom of fishing in the Gulf of Gascoigne...But this custom, if indeed it can be regarded as a custom, has been replaced by another of greater force and scope.⁷²

It would thus seem that (subsequent) general law prevailed over particular law. However, the Court stressed the facts that (a) the Spanish government had not protested against the "new" French claim, and (b) Spain had herself established an exclusive economic zone "without seeking the views of any other party". In other words, the case turned on the practice which, for whatever reasons (including, for sure, acceptance by the parties), was opposable to both parties. The decision was based on time and acceptance, and not on a hierarchical relationship between general and particular law, with the former prevailing. If general custom always overrides particular custom between States subscribing to the latter, there would be no point in the existence of the latter (but this existence cannot be controverted).

tests (fall-out cannot be restricted to just the States in question) and the high seas (the rights conferred by the derogation can only relate to the ships of the derogating States and not the rights of other States in the high seas). To re-iterate, custom is only applicable to States who have accepted it; the greater the number of States following a "peculiar" practice, the less "peculiar" it becomes. Is it not better to look for specific obligations instead of general rules which may not really exist?

Surely the problems he identifies are only problems if one subscribes to the *a priori* assumption that all rules of customary law are monolithic and universal, an assumption which the doctrine of particular customary shows to be wrong?

⁷¹ 74 *ILR*, p. 141 ff.

⁷² *Ibid.*, p. 77.

E. A RATIONAL (AND FAMILIAR) SUGGESTION

In the light of the foregoing it seems plausible, and indeed more satisfactory, to put forward the following analysis. The greater the number of States objecting to a rule, the less the basis for treating them as "persistent objectors" or something similar, as being subject to a "special" legal régime. If there is divergent practice on any issue, the customary law regime to which any number of States subscribes would be binding upon them in their mutual relations. This would be exactly the same as saying that there was no rule of general custom, but only different regimes of particular customary law.

The basic principle would also be the same where the dispute is between States following different practices. For example, if States A and B follow a particular practice which derogates from a general rule (which is all that State C has accepted), then the rule governing the relationship between States A and C and/or States B and C is the more general one. This would be because the practice of States A and B are inapplicable against State C in the absence of its consent, State C having consented only to the more general practice. By the same token, the applicability of this more general rule is conditional upon States A and B having consented (at some time in the past), to the prior general norm. On this analysis, consent is always the crux of the matter.⁷³

The point is therefore that there is no real basis for the treatment of particular custom as being a unique system operating on a special basis alongside general custom. As Akehurst has pointed out, given the small number of States in the world, the difference between a particular rule and a general rule is bound to be unclear.⁷⁴ It is submitted that it is in fact essential to the effective operation of customary law in a divided world that it be

⁷³ See Akehurst, *Custom*, pp. 30-31.

⁷⁴ Custom, p. 30. He quotes Grotius and Vattel for the view that there is very often no law common to all nations.

fragmented in this way.⁷⁵ A sensible way of determining obligations would seem to be offered by the consensual theory.

Conclusions

To put the foregoing in our terms, the majoritarian and persistent objector theories would draw distinctions between general and particular law, while the consensual theory would describe particular law as a miniature version of general law, and conversely, general law as a system of particular law writ large. It is not denied that there are many statements supporting the differences between particular and general custom. What has been argued is that careful consideration of the bases of the distinction reveals that the distinctions cannot be defended either in principle or in practice, so that their force is undermined. The consensual theory is a more natural explanation of the operation of customary law and, in particular, the co-existence of general and particular law. There seem to be no grounds upon which to sustain the argument that the distinction between the role of individual consent in one case should be different from its role in the other since we cannot properly distinguish between both kinds of custom, and the operation of customary law, particular or general, is more naturally explained by the consensual theory.

⁷⁵ Ibid. See also Judge Waldock's Separate Opinion on the Fisheries Jurisdiction case (ICJ Reports (1974), p. 120, para. 35; see also Cassese, International Law in a Divided World, pp. 346-347, 180-185, and Lowe, General Rules, pp. 209-211.

CHAPTER VII

NEW STATES AND PRE-EXISTING CUSTOMARY INTERNATIONAL LAW

One of the standard arguments against a consensual explanation of customary international law is the assertion that newly independent States are bound by all the customary law that exists at the time when they achieve statehood, and it is this issue that will be examined in this chapter. This chapter is concerned with State practice and judicial decisions, bearing in mind the distinction drawn in Chapter One (section C) between the different kinds of non-conventional law, in particular the difference between constitutional law and customary law *stricto sensu*.

A. THE DECISIONS OF TRIBUNALS

There have not been many instances in which international tribunals have addressed the specific question of whether new States are bound by existing rules of customary international law. When they do, the decision-makers do not always say why they hold the views they express.

1. The World Court

The question did not arise squarely before the Permanent Court of International Justice; 'new' States at that time did not plead before the Court that they were new and therefore exempt from the application of rules of customary international law. If anything, the Court appeared to assume that such rules were binding on the new states, but the new

¹ Notably Poland. Cf. Waldock, "General Course on Public International Law", 106 Recueil des Cours (1962), p. 52-3.

² See, e.g. on the question of the effects of a change of sovereignty on acquired rights, the German Settlers in Poland case (PCIJ Reports, (1923), Series B, no. 6, p. 36), considered in Chapter 2, supra; the German Interests in Upper Silesia case (PCIJ Reports (1926) Series A, no. 7, p. 42), to the same effect. In the Tunis and Morocco Nationality Decrees (PCIJ Reports (1923), Series B, no. 4), the Court could have expressed views on the law governing succession to treaties, but found it to be unnecessary to do so; but the Court did stress that such questions had to be decided by reference to the customary rules on treaty law.

states had not argued otherwise.

The position in the International Court of Justice is not significantly different. In the Right of Passage Over Indian Territory case³, Portugal claimed, against India, rights deriving from a bilateral (as opposed to general) custom, on the basis of the practice of India's predecessors in title (the Marathas, and then the British colonial Government). The Court found that the claim was valid, subject to certain limitations. But India had not denied the existence of the obligations. As the Court said, "passage was effected in a way recognized by both sides"⁴, and the practice before India's independence "was unaffected by the change of regime..." when India became independent, so that it was satisfied that 'the practice was accepted as law by the Parties...'. The Court did not have to rule squarely on the question whether India would have been bound by the custom had it objected. All this case tells us is that a new state's assent was sufficient, not that it was always necessary. The case may also tell us that if assent is required, it can be presumed unless the State argues to the contrary.

In the Frontier Dispute case⁷ (between Mali and Burkina Faso) a Chamber of the Court dealt with status and applicability of the principle of uti possidetis juris. On the one hand, the Court found that the principle was one "of a general kind which is logically connected

³ ICJ Reports (1960), p. 6.

⁴ *ibid.*, at p. 34.

⁵ *ibid.*, at p. 40.

⁶ In the Rights of U.S. Nationals in Morocco case (ICJ Reports (1952), p. 172) the decision of the Court was confined to the interpretation of the provisions of the Treaty of Protection between France and Morocco, so that the Court did not apply any general rules of state succession as such.

To the same effect, but concerning the operation of estoppel rather than the validity of a rule of custom, is the *Temple of Preah Vihear* case (*ICJ Reports* (1962), p. 6). Cambodia had not objected to the practice of its colonial predecessors in title, and the Court did not pronounce on the question of succession.

⁷ ICJ Reports (1986), p. 554.

with...decolonization whenever it occurs."8 But it went on to say that

However, it may be wondered how the time hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law.⁹

and then that

The essential requirement of stability has induced African States judiciously to *consent* to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples... Thus the principle has kept its place despite the apparent contradiction which explained its coexistence alongside the new norms. Indeed it was by deliberate choice that African States selected, among all the classic principles, that of uti possidetis juris. ¹⁰ (emphasis added.)

The Chamber thus seemed to base the binding force of the principle on the consent of the African States, including the parties to the present dispute, as expressed generally in Article 3 of the Charter of the Organization of African Unity (1963) and particularly in the Cairo Resolution of the Conference of African Heads of State and Government (1964). It not clear, however, that the principle would have been applicable to these States irrespective of such consent. 12

⁸ See para. 23, p. 566. Perhaps it is significant that the Chamber did not say that the principle was automatically applicable in all cases concerning colonial boundaries; it only said that it was 'logically connected' with decolonization.

⁹ See pp. 566-7.

¹⁰ See p. 567.

¹¹ AGH/ Res. 16 (I), 1964.

Thirlway 61 BYBIL (1990), pp. 106, argues that the Chamber should not be taken to mean that consent is required. He argues that if consent were required, States achieving independence after 1964 would be in the position to reject the principle, and that the principle was one which must apply to all States or not at all. But this is inaccurate, and reflects an a priori approach to law which is characteristic of the first conception. Examples abound of the principle being rejected by newly independent States; see the Separate Opinion of Judge Luchaire in the present case, @ p. 653. He concludes that "the frontiers of an independent State emerging from colonization may differ from the frontiers of the colony which it replaces". See also Pomerance, Self-Determination in Law and Practice (1982), p. 19 ff. Brownlie, giving several examples, (Principles, p. 135) states that "It must be emphasized that the principle is by no means mandatory and the states concerned are free to adopt other principles as the basis of the settlement. However, the general principle...is in accordance

Other pertinent rulings can be found in individual Opinions, 13 but of course, individual Opinions do not carry as much weight as those of a majority.

In the *North Sea Continental Shelf* case, the Court held that the equidistance-special circumstances rule in Article 6 of the 1958 Continental Shelf Convention had not become a rule of general customary law, so that the Federal Republic of Germany was not bound by it. 14 Judge Ammoun, probably in response to the plea by the Federal Republic to the effect that the rule had not become one of regional custom either, 15 stated that the requirements for creation of regional custom were different from those for a general custom; while the consent of all the states involved was required for the former, the latter required only the consent of those states "who were aware of this general practice, and being in a position to oppose it, 16 have not done so...". In a footnote explaining the italicised words, he states that the reason for including the qualification that the states involved must have been in a position to oppose the practice was to "preserve" the "right" of states which had not become independent when the custom was being developed. The content of this "right" is unclear. It seems that there are two possibilities - new States have a right either to reject or to challenge the validity of these rules. If he meant that

with good policy and has been adopted by governments and tribunals concerned with boundaries in Asia and Africa. It is hardly surprising that the principle is not obligatory, as territorial issues are essentially bilateral. Even if the *uti possidetis* principle were applied by tribunals with no explicit reference to the consent of the parties to it, it would not necessarily mean that the new States would be bound by a rule *which they had not accepted*.

¹³ Prakash Sinha (14 *ICLQ* (1965) p. 128) and Abi-Saab (8 *Howard Law Journal* (1962)) point to the rulings of Judge Moreno Quintana and Vice-President Badawi that the Court did not have jurisdiction in the *Norwegian Loans* case (*ICJ Reports* (1957) p. 9, at 28 and 29 respectively). This, they argue, reflects the view taken by the majority of jurists in the non-Western world on the issue of responsibility for treatment of aliens; that is, such matters are within the domestic jurisdiction of the state involved, and are not governed by international law.

¹⁴ ICJ Reports (1969), p. 4.

¹⁵ Pleadings (1968), Vol. I, p. 60.

¹⁶ *Ibid.*, pp. 130-1. See the discussion of his purported distinction between regional and general custom in Chapter VI, Section B, *supra*.

they can reject the rules, then they are bound only if they accept or at least do not dissent. If he meant that they can only challenge the rules, then their status vis-a-vis those rules depends on the success of that challenge (in which case they are bound initially, but their practice may undermine the rules, a situation which is acceptable to traditional doctrine on custom).¹⁷ This latter view does not treat new States as being different from any other States. The former view, on the other hand, holds that new states are not automatically bound *because* they were not, unlike other States, in a position to participate in the formation of the rule, and could thus not have consented. And it is clear that Judge Ammoun wished to distinguish between "old" and new States.¹⁸

In the *Barcelona Traction* case, ¹⁹ the Court was concerned with the existence of a right of diplomatic protection on the part of a state to protect its nationals who were shareholders in a company incorporated in a different state, against a third state which had allegedly committed internationally wrongful acts against the company. The Court held that such a right did not exist in relation to the facts of the case. Judge Ammoun, in his Separate Opinion, ²⁰ embarked upon a thorough examination of the constituent elements of the rule of customary law upon which such a right could be based. ²¹ In doing this, he stressed the changes that had occurred in the international society in the last century, stating that any rule of customary law must include the practice of states other than the older capital-exporting states. His examination of state practice (including treaty

¹⁷ The difficulty here would be the question of the time required for a rule of custom to be overturned. This may be difficult; see Akehurst, BYBIL (1974-5), p. 1, p.19. Presumably, one state alone cannot benefit from this "preserved right", at least not without the consent of other States, since, in his opinion it is the generality of a rule that counts. See also Judge Ammoun's Separate Opinion in the *Barcelona Traction* case (I.C.J. Reports 1970, p. 330, para. 40).

¹⁸ See, *supra*, Chapter 2, for a discussion of the difficulties with his views concerning those States which did have a right to participate.

¹⁹ ICJ Reports (1970), p. 3.

²⁰ *Ibid.*, p. 287 ff.

²¹ *ibid.*, pp. 302 ff.

practice and judicial decisions) and the opinions of writers revealed that there was no consensus; the practice of the older states themselves was neither uniform nor consistent,²² and the new capital-importing states expressly rejected such a right. New States "accepted" the rules on diplomatic protection only

to the extent that they take account of their state of underdevelopment, economic subordination and social and cultural stagnation, in which the colonial powers left them and in which they are in danger of remaining for a long time, in the face of Powers strong in industry, know-how and culture.²³

The implication is that new States were bound only by the existing law which they accepted, or at least did not reject.²⁴ What is unclear is whether the fact that that law was unfair or contrary to their interests is the crucial factor; it could be that new States can reject only such rules. But then States would not generally reject a rule which was not contrary to their interests, and they would reject a rule which was.²⁵ In any event, it seems that Judge Ammoun's theory of customary law requires that law be based on the interests of its subjects, otherwise it can be rejected.

2. Municipal decisions²⁶

It must be remembered that most municipal courts are bound first and foremost by the

²² *ibid.*, pp. 304-8, 315-6.

²³ *Ibid.*, p. 329-330.

²⁴ Cf. Judge Lachs' Dissenting Opinion in the *North Sea Continental Shelf* cases (*ICJ Reports* (1969), p. 227), where he also insists on the participation of a variety of states for the formation of *new* rules of international law; but he does not deal with the validity of *existing* rules vis-a-vis new States.

²⁵ In any event, the reasons for consenting (such as whether a rule is in the interests of a State), or motives, are not the fabric upon which customary law is deduced. Only a State's participation in, or view as to the applicability of, the practice is relevant. In other words, a State may well consent to a rule which is not in its interests, but the fact that the rule is not in its interests would be irrelevant to the position in customary law; all that matters is that it consents. See Chapter 1, section B, *supra*.

²⁶ It is proposed to examine the position taken soon after independence, because, like other states, with the passage of time, they may become subject to the rules of custom on the basis of non-dissent and acquiescence.

provisions of their constitutional law. In many cases, the provisions of the constitutions of new states dictate the status of customary international law in force at the time of independence.

There have been cases in which municipal courts of new States have considered the status of customary international law, and these could be helpful as they could show whether the judges showed that they considered international law to be binding on them. In *Re Henfield*, Chief Justice John Jay of the United States stated that

Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us.²⁷

As this statement was only *obiter*, it was not made clear whether the rights and duties in question were not in the category of constitutional norms of the international legal system, ²⁸ but the context in which the statement was made (the obligations of neutral States in times of war) would suggest that it applied to customary law as well.

The question was also discussed in Ware v Hylton,²⁹ a case which was decided shortly after the United States declared independence. The Supreme Court of the United States held that the terms of a subsequent treaty of peace nullified a law enacted by the legislature of the State of Virginia sequestrating property (including debts) of an enemy alien. The case was thus really about the effect of treaties in the domestic law of the United States. However, some of the judges made some pertinent comments. Mr. Justice Wilson stated that apart from the effect of the treaty, such sequestration was unlawful because international law considered it "disreputable". In so holding, he said that "(w)hen the United States declared their independence, they were bound to receive the law of

²⁷ Reported in American International Law Cases, Vol. 1, p. 125.

²⁸ See *supra*, Chapter 1, section C. It was seen that such norms are not dependent on consent.

²⁹ (1796), (Dall.) 3 U.S. 199.

nations, in its modern state of purity and refinement". 30 (emphasis added). Mr. Justice Chase, for his part, adopted the Vattellian distinction between three kinds of international law; *universal* law, (which is based on "the general consent of mankind", and "binds all nations"), *conventional* law (which is based upon express consent), and *customary* law (which is based on "tacit" consent, and is binding only on those who have adopted it). 31 In his opinion, the relevant rule belonged to the category of *customary* law, so that the practice of the commercial nations of Europe in not confiscating private debts was not binding on the State of Virginia because it had not consented thereto. There are thus two conflicting *dicta* here, 32 the first that new States were bound by the law because it was the law, and the second that new States were bound only by the customary law which they had accepted. 33

In *United Arab Republic v Mirza Ali Akbar Kashani*³⁴, the Indian High Court at Calcutta rejected an argument that sovereign immunity be denied to the defendants because the courts of the United Arab Republic (which had claimed immunity in this case), did not itself accord sovereign immunity in respect of commercial transactions. The Court distinguished between the practice of the courts of Egypt and those of the United Arab Republic; the argument was based on the practice of the former. The Court stated that

The authorities cited show that the Mixed Courts of Egypt for nearly half a century assumed jurisdiction to decide claims against other States arising out of activities *iure gestionis*. The Mixed Courts have now been abolished. Besides a new State called the United Arab Republic has now come into being as a result of the amalgamation of the Republics of Egypt and Syria. It is not

³⁰ *Ibid.*, para. 281. Mr. Justice Paterson (para. 255) appears also to accept that the law of nations was automatically binding on Virginia.

³¹ Cf. Vattel, le Droit des Gens, Introduction, paras. 25 and 26. See also Strupp, Les Règles Générales du Droit de la paix", 47 Recueil des Cours (1934), p. 291 @ 309 ff.

³² Akehurst seems to ignore the judgment of Mr Justice Chase, and treats the case as authority for the view that new States are bound; see his *Custom*, p. 27.

³³ See *The Antelope*, 23 *US*, p. 66 (1825), where the same Court held that the consent of a State is required before a rule of international law can be applied to it. This would suggest that new States are not bound until they consent.

³⁴ 64 *ILR*, p. 394.

known whether the courts of the United Arab Republic administer the same law which used to be administered by the Mixed Egyptian Courts before 1949.³⁵

Thus the practice of a predecessor State in the realm of customary law is not *ipso facto* opposable to its successor.

In other cases, the courts of new states seem to assume the applicability of international law.³⁶ In *Polish State Treasury v von Bismarck*,³⁷ the Polish Supreme Court stated that "no generally recognized international custom prescribes that a successor state accepts solely by reason of state succession obligations at private law", other than those voluntarily undertaken; presumably such a custom would have been applicable had it existed.³⁸

In *Uganda v. Commissioner of Prisons, ex parte Matovu*, ³⁹ before the High Court, the detainee applied for a writ of *habeas corpus*, contending that the detention order authorizing his arrest was *ultra vires* the Ugandan Constitution of 1966. In the course of the proceedings, the Court raised the question of the validity of the Constitution. The Attorney-General argued, successfully, that the Constitution was valid because it was the

³⁵ *Ibid.*, p. 427.

³⁶ The Cour d'Appel of Rabat considered itself bound by the ICJ's decision in the *Rights* of U.S. Nationals in Morocco case (I.C.J. Reports 1952), p. 176; see 52 Rev. Crit. de droit international prive (1953), p. 154.

³⁷ 2 A. D., p. 80.

³⁸ See also *Graffowa v Polish Ministry of Agriculture* (2 AD, p.55); in denying the responsibility of the Polish State responsibility for the actions of German predecessors in title while the latter was an occupying power, the same Court held that "The new State is not bound by the obligations of the old State...either in the domain of public law or in that of private law. It is a moral being distinct from the old State...". There is no specific reference to international law, but that the Court was stating a requirement of international law is probably implicit.

It is also important to note the opposition between the ruling of the court in this case and that of the International Court in the *German Settlers in Poland* advisory opinion, considered in Chapter IV, Section A, Subsection 3(i), *supra*.

³⁹ 37 *ILR* (1970), p. 1.

result of a successful *coup d'etat*, which was a proper and effective means, under international law, of changing the Government and constitution of a state.⁴⁰ This implies the validity of international law, but the basis for this binding quality is not discussed, probably because the norm in question was arguably one of constitutional international law, which as we saw in the first Chapter, is not dependent on consent.

In *The State v Schuman*,⁴¹ the Federal Republic of Germany requested the Government of Ghana to extradite Schuman, an alleged war criminal. After being arrested in accordance with the Extradition Act 1960, Schuman applied for a writ of *habeas corpus*, arguing *inter alia* that the offence for which he was to be extradited was one of a political character. The Court applied international law criteria in determining the character of the offence, but this was probably on the basis that the Act had already incorporated such criteria by providing for extradition. Further on in the judgment, the Court quoted the view expressed by the Nuremberg Tribunal⁴² in rejecting the defence of act of state, on the basis that it has long been recognized that international law imposes duties and liabilities on individuals. Again this was applied because it was international law, and there was no reference to any other reason why it was binding on the court.

In Narasingh Pratab Singh v. State of Orissa⁴³, decided in 1960, the High Court based its judgment on the fact that "It is a well-settled rule of international law that when a territory is ceded by one sovereign to another the rights which the inhabitants of that territory enjoyed as against its former Rulers avail them nothing against the new sovereign...except to the extent to which they have been recognised by that sovereign...".

This assumption as to the relevance of international law is particularly significant when

⁴⁰ He discussed four criteria required by international law; an *abrupt* and *unconstitutional*, political change, which must be *effective* and which must *destroy the existing legal order* excepting what is expressly preserved.

⁴¹ 39 *ILR* (1970), p. 433.

⁴² A.D.(1948), Case 92.

⁴³ 49 I.L.R., p. 360.

it is considered that Article 51(c) of the Indian Constitution of 1949 provides that the State of India shall endeavour "to foster respect for international law and treaty obligations in the dealings of organized peoples with one another". This provision appears under the heading "Directive Principles of State Policy", and these directives are, under Article 37 thereof, "not to be enforced by any Court". 44 It is difficult, therefore to assess the significance of this case.

It thus seems that the position, generally speaking, is neither general nor uniform. The position adopted by the courts of new States, far from telling us whether these courts consider themselves under a duty to apply international law, only tells us, at best, that they sometimes choose to apply international law.

B. STATE PRACTICE

A standard argument expressed by those who argue that new States are bound is that, when new states come into existence, they do not, and are generally not expected to make any express declaration as to which rules of customary international law they accept. If there were express conditions upon which statehood was granted to new States (i.e. if recognition was or is constitutive), then it would seem that the reason why they are in principle bound by the law would be agreement. Speaking generally, the closest the new States come to such a situation is their practice in embracing international law in their constitutions. Many constitutions contain declarations of adherence, in their preambles, to the United Nations Charter and to the Universal Declaration of Human Rights.⁴⁵

⁴⁴ For a highly critical discussion of the handling of international law by the Indian courts, see Agrawala, 2 *Indian Journal of International Law* (1962).

⁴⁵ Cf. Article 4 of the United Nations Charter, which provides that membership is open to States who are willing and able to respect their obligations under the Charter. See the constitutions of Dahomey, Cameroun, Ivory Coast, Malagasy, Niger, Mali, Senegal, Congo Leopoldville, Upper Volta, Chad (1960), and Mauritania and Gabon (1961).

There is other evidence of acceptance of international law in a general sense. General Assembly Resolution 2625 declaring Principles of International Law Concerning Friendly Relations and Co-operation among States 1970) was adopted without objection. However, while new states subscribe to international law in principle, there is often evidence of disagreement when one moves from the general to the particular. This is evident, for example, as shown in the proceedings before the Sixth Committee of the General Assembly, the views taken by the new states on the principle of self-determination and the cognate question of the use of force in cases of civil strife.⁴⁷ This does not, however, tell us much about the status of pre-existing law vis-a-vis new states because the precise limits of the principle of self-determination have always been difficult to draw. It would seem that the position is that the new states do accept the principle, but differ

⁴⁶ Art. 38, Constitution of Mali (1960), states that "The Republic of Mali conforms to the rules of international law". See Art. 31 of the Constitution of Guinea; Art. 9 of the Austrian Federal Constitution (1949). But see the Indian Constitution (1949) Art. 51(c) (cf Article 37), which appears not to be a *legally* binding provision.

The place of international law in the legal systems of the newly independent States is clearly influenced by the positions adopted by their colonial predecessors in title. In order to ensure continuity, many states accepted the validity of the (colonial) laws in existence at the time of independence. Since these colonial powers tend to follow the doctrine of incorporation (see Trendtex v Central Bank of Nigeria [1977] QB 529 (UK) and Government Spagnol v Lambege et Pujol, 1849, Sirey, Recueil general des lois et des arrets, pt. 1, col. 9) according to which customary international law is generally part of domestic law, there is an acceptance of the binding force of customary international law. See, e.g., section 156 (i) of the Nigerian Republican Constitution (1963), which reads "All existing law...shall until that law altered...have effect...".

⁴⁷ UN Doc. A/6547 (7th Dec. 1966). The Report reads "...Several Representatives considered that the right of self-defence, both individual and collective, was enjoyed not only by States but also by peoples defending themselves against colonial domination and struggling for freedom and self-determination...It was argued that the struggle against colonialism was in truth an international struggle...and thus outside aid was permissive." (@ pp. 23-4). The same Report highlights a telling difference in approach to the codification of law; it would, in the view of some of the new states "be undesirable to try to distinguish sharply between existing law and developing law, or between codification and progressive development; gaps had to be filled and logical consequences of rules had to be included" (p. 21). See also UN Doc. A/6799 (26th Sept. 1967) for the lack of agreement on the application of the principle prohibiting forcible intervention to situations "when force is used to deprive people of dependent territories of the right to self-determination". (pp. 60-61).

as to its interpretation in concrete cases.

Another area in which the dissatisfaction of the new states with "old" law has been most forcefully expressed has been the issue of the treatment of aliens and their property. The Eastern European states in their post-war nationalization programmes clearly refused to accept the existence of an international rule requiring (prompt, adequate and effective) compensation, but this view does not seem to have been accepted in general state practice and the jurisprudence of international tribunals.⁴⁸ The position of the new Asian and African states is somewhat harder to state with such precision.⁴⁹ What is clear is that they wish to make the issue of expropriation subject to their own domestic law.⁵⁰ In general, international tribunals, since 1945, have held that the customary rule on such matters includes a reference to international law, and not only to the domestic law of the expropriating State.⁵¹ However, it must be remembered that there has been considerable uncertainty about the state of customary law in this area.⁵² Accordingly, the new States have resorted to various methods of solving the problem.⁵³ The position appears to be

⁴⁸ See Brownlie, *Principles of Public International Law* (4th ed. 1990), pp. 532-535, especially n. 77.

⁴⁹ An amendment to General Assembly Resolution 1803 (1962) put forward by the USSR which would have removed all restrictions on the right to expropriate, was rejected, and only twenty-three African and Asian States voted in favour of it. This was less than half of the total number of African and Asian States in the United Nations at that time; *UN Doc.* A/PV.1193, 14th Dec. 1962, pp. 71-6. See also *UN Docs*. A/5344/Add. 1, 12th Dec. 1962, and A/PV.1194, 14th Dec. 1962, pp. 2-5. The representatives of these States were obviously cautious; they did not want to scare off foreign investment. But D'Amato (Concept, pp. 187-199), strangely, treats this as evidence of the fact that new States are automtically bound by international law!

⁵⁰ See Art. 2(2)(c) of General Assembly Resolution 3281; all the new states voted in favour of this resolution.

⁵¹ See Brownlie, op. cit. supra, pp. 539-543.

⁵² Cf. Waldock, op. cit., p. 53, writing in 1962, stating that the law in this area was unsettled, and that this was the reason why the treatment of aliens (along with the question of the width of the territorial sea) was the most controversial area as far as the new states were concerned.

⁵³ See Brownlie, op. cit., pp. 545-547.

that, because the law here has been controversial for a considerable time, there was nothing for the new States to reject; they simply participated in the development of the law.

The same can be said of the law on the breadth of the territorial sea. In view of the lack of uniformity in State practice and differences of opinion, the Second Committee of the Hague Codification Conference was unable to express an opinion on what the law was or should be.⁵⁴ Similarly, both the First (1958) and Second (1960) UN Conferences on the law of the sea failed to agree on a limit.⁵⁵ Similarly heated debates on the question of state succession to treaties do not really help us to decide whether or not new states are bound by the existing law because such law was not clearly established.⁵⁶

If we look more closely at the position of adopted by some "old" States, there is evidence supporting the view that new States are bound by pre-existing rules of customary law. For example, in the *Anglo-Norwegian Fisheries* case, the United Kingdom and Norway were in no doubt about the fact that a new State was bound.

There is universal agreement that a new State has *no option* but to adhere to generally accepted customary law.⁵⁷ (emphasis added)

Qu'un État nouveau soit lié par les règles coutumières générales en vigeur dans la communauté internationale dont il devient membre, cela ne parait pas douteux.⁵⁸

This view predates the twentieth century. For example, a note from the American

⁵⁴ See 24 AJIL 1930, Supplement, p. 253; Hackworth's Digest Of International Law, p. 1, @ p. 628.

⁵⁵ See UN Doc. A. Conf. 13, especially Vol. III.

⁵⁶ See Makonnen, International Law and the New States of Africa (1983), pp 144-166, and materials cited. See also the Report of the Third Session of the Asian African Legal Consultative Committee, pp. 57, 63-9, on the acceptance by new states of the principle of restrictive sovereign immunity. For similar considerations regarding the obligation to settle disputes in a peaceful manner, see Shihata, 19 International Organization (1965).

⁵⁷ Anglo-Norwegian Fisheries case, (Pleadings), Vol. II, p. 428.

⁵⁸ *Ibid*, Vol. III, p. 291.

Secretary of State to the American Minister to Mexico in 1842 stated that

Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war.⁵⁹

This statement covers both constitutional law and customary law *stricto sensu* (as it includes "usages"), and clearly suggests that new States are bound. Another similar example (dated 1870) states that

If a government confesses itself unable or unwilling to conform to those international obligations which *must* exist between established governments of friendly states, it would thereby confess that it is not entitled to be regarded or recognized as a sovereign and independent power.(emphasis added)⁶⁰

Maine, writing at the turn of the century, stated that

The statesmen and jurists of the United States...look upon [international law's] rules as a main part of the conditions on which a state is originally received into the family of civilized nations. This view...is practically that submitted to...by governments and lawyers of civilized sovereign communities of our day.⁶¹

There is little doubt that this was the position accepted up until the early to middle part of this century, as evidenced in the statements quoted above from the pleadings in the *Anglo-Norwegian Fisheries* case in 1951. The Italian delegate at the 1977 United Nations Conference on Succession of States in Respect of Treaties certainly endorsed it.⁶²

But before proceeding, we should note three considerations.

(i) Consider the following statement from the Reply of the United Kingdom in the Anglo-Norwegian Fisheries case:

⁵⁹ Moore, Digest of International Law, 2nd edn., pp. 5-6.

⁶⁰ Ibid.

⁶¹ This is cited in Moore's Digest, *ibid.*, p. 7.

⁶² Official Records, Committee of the Whole, p. 39, para. 55.

[U]ltimately, the critical question must always be whether, at the time when a custom falls to be appreciated in litigation before an international tribunal, it has come to be accepted as law...⁶³

Consider also this statement from the Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda in the Fisheries Jurisdiction case:

In our view, to reach the conclusion that there is at present a general rule of customary law...There is not today an international usage to that effect sufficiently widespread and uniform as to constitute [a custom under Article 38(1)(b)].⁶⁴ (emphasis added)

It does not seem that the principle contained in these statements can be seriously contested. Even if it can be questioned, the doctrine of intertemporal law would militate against such a questioning. The position, then, is that in order to deduce the existence of a secondary rule of law to the effect that new States are bound *today*, we must include in our survey of the evidence, *recent* State practice and *opinio juris*.

(ii) To this consideration must be added the following consideration regarding the test for the creation of a new rule of customary international law mentioned by the International Court in the *Reservations* case.⁶⁶ The Court, in ruling that the unanimity rule was no longer supported in State practice, noted that

[I]n view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth Session of the General Assembly reveals a

⁶³ Pleadings, Vol. II, p. 430, para. 165.

⁶⁴ ICJ Reports (1974), p. 46, para. 2.

⁶⁵ See Elias, The International Court of Justice and Some Contemporary Problems (1983), Ch. 6.

that a previously established rule of customary rule was considered to have been abrogated by subsequent practice. In all the other leading cases, the question was whether there was a rule at all (see the Lotus case, the Asylum case, the Anglo-Norwegian Fisheries case) or whether there was a "new" rule in a previously unregulated area (the North Sea Continental Shelf cases, the Fisheries Jurisdiction cases). The Nicaragua case saw the Court considering whether the principle of non-intervention had been abrogated (@ pp. 108-109), but because of a lack of proof of opinio juris on the part of States, it found that the practice had not been overturned.

profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice...⁶⁷

In deducing the current rule on the matter, we may thus look at debates and views expressed in international fora, especially the General Assembly. In any event, the multilateral conference has become an invaluable means of deducing the positions of States as well as a, if not the, normal mode of truly universal law-making today.⁶⁸

Similarly, in the Anglo-Norwegian Fisheries case, the Court overlooked the alleged inconsistencies in Norwegian practice because

They may easily be understood in the light of the variety of facts and conditions prevailing in the long period which has elapsed since 1812.⁶⁹

Again, we must take the doctrine of intertemporal law into account.

(iii) Thirdly, it is beyond contention that State practice for the purposes of inferring a rule of customary must include those of States whose interests are specially affected.⁷⁰ Accordingly, the current practice must include those of newly independent States, for their interest in the matter is precisely at stake.⁷¹

⁶⁷ *Ibid.*, p. 26. On the previous page, the Court noted the statement by the Secretary-General's Opinion that "While it is universally recognized that...consent...must be sought [before a State can be bound by a reservation], there has not been unanimity ...as to the legal effect of a State's objecting to a reservation".

⁶⁸ In any event, that is where the evidence of the positions of new States can most profitably be found. See Shibata, "International Law-Making Process in the United Nations": Comparative Analysis of UNCED and UNCLOS III", 24 California Western International Law Journal (1993). It is well-known that, in general, the collections of the practice of such States are few and far between, as shown in Beyerly, Public International Law: A Guide to Information Sources (1991).

⁶⁹ ICJ Reports (1951), p. 138; referred to by Judge Lachs in the North Sea Continental Shelf cases, (ICJ Reports), p. 229.

⁷⁰ North Sea Continental Shelf cases, ICJ Reports (1969), p. 43, para. 74, and p. 44, para. 77.

As to the possibility of their being a presumption against change in the law (see Akehurst, *Custom*, p.19), see Section C, below, where the position before the entry of new States on a large scale, which occurred this century, is examined.

In the light of these three considerations, let us look at the evidence.

At the 1958 Geneva Convention on the Law of the Sea, the delegate of Venezuela made the following statements:

There should be no recognition of a prescriptive title to the detriment of new countries now in full process of development.

It [Venezuela] could not overlook either the new developments in legal thought or the overriding political interests of certain countries.⁷²

The Mexican delegate stated that

The international community could not accept a situation...when a small number of Powers had claimed the right to formulate international rules.⁷³

Interestingly, we may compare the statement of the Pakistani delegate:

...[A] country upon becoming an independent State could not unilaterally denounce certain rules imposed on it before it became a member of the international community.⁷⁴

Nevertheless, Mr N'Diaye of Mali, in the Sixth Committee of the United Nations General Assembly in 1965, stated that

Since international law should be genrated by a dynamic fusion of the wills of all States into a common will, it would be hazardous to seek to disregard the different ways of thinking of the new countries while giving full weight to the principal existing legal systems, which were simply the product of the thinking of the old States. International law should be envisaged as a body of positive rules amalgamating all trends, all doctrines and all legal systems.⁷⁵

The Kenyan representative stated at another meeting in the Sixth Committee that

The present age was one of constant change and development, and what had been good and valid yesterday might be out of date and deficient today...any rule suitable for universal acceptance must be developed with the participation

⁷² UN Doc. A/Conf. 13/39, Official Records, Vol. III, pp. 22-23, paras. 34 and 36.

⁷³ *Ibid.*, p. 65, para. 15.

⁷⁴ *Ibid.*, p. 50, para. 7.

⁷⁵ UN Doc. A/C.6/SR.651 (8 December 1965), Official Records, p. 30.

and freely given consent of all States and then applied impartially.⁷⁶

At the 1968 Vienna Conference on the Law of Treaties,⁷⁷ the Syrian delegate stressed the need for the new States' consent as a condition for the applicability of a rule of customary law to that State. He stated that

More and more new States were joining the international community as subjects of international law with the same sovereign rights as other States and there was no question of imposing upon them customary rules in the formation of which they had not taken part, particularly since some of the rules originated in treaties that were aimed at safeguarding the individual interests of particular States.⁷⁸ (emphasis added)

The delegate from the Democratic Republic of the Congo could not see how a State could be subjected to the traditional practices of other States, dictated by specific circumstances arising out of their interests and arising out of their past struggles...without recognition and acceptance of that custom...⁷⁹ (emphasis added)

The Indian delegate stated that the work of the Conference

was of the greatest importance to the newly independent countries. The codification of the law of treaties would serve to express in writing the contemporary rules of law on the subject, and thus release those countries from the need to refer to customary rules of international law; the search for those lawyer-based rules often gave a picture of what international law had been rather than what it actually is. 80 (emphasis added)

At the 1977 Vienna Conference on the Succession of States with Respect to Treaties, the delegates of Swaziland, Afghanistan and France expressed similar views.⁸¹ The French

⁷⁶ UN Doc. A/C/6/SR.850 (13th October 1965), Official Records Twentieth Session, p. 68.

⁷⁷ The clear consensualist stand taken at the Conference in relation to Draft Article 34 has already been considered (see Chapter V, Section (B), *supra*), and should be borne in mind in this Section.

⁷⁸ Official Records, (1968), Vol. 1, p. 201.

⁷⁹ *Ibid.*, p. 199. See Chapter 2; many of the delegates at the Conference adopted a consensualist stand.

⁸⁰ *Ibid.*, p. 3.

⁸¹ Official Records (1977), Committee of the Whole,, p. 38 ff.

delegate (obviously representing an "old" State) stated that for older States, the rules of international law derived not only from treaties, but also from customary law, while for

newly independent States, which had not had time to become bound by rules of customary law...the rules of international law did not have their source in customary law, but solely in treaty law.⁸²

The debates at the Third United Nations Conference on the Law of the Sea, as seen earlier, ⁸³ particularly as concerns what became Part XI of the resulting 1982 Convention, proceeded primarily on an ideological basis, and seemed really to concern the text of the treaty itself; hence much of the discussion concerned *proposals*. If anything were to be gleaned from the general attitude of the newer States, it would certainly appear to be hostile to the "old order". For example, the delegate from Tanzania stated that the argument of the United States concerning a right of unilateral exploitation based on the principle of the freedom of the high seas "belonged to the old order and had outlived its time". ⁸⁴ He was also not prepared to countenance a system which would "perpetuate, if not intensify, the oppression of the vast majority of the world community by a few technologically advanced countries". ⁸⁵ A more legalistically phrased view was that

[T]here could be no justice if *entrenched rights* acquired by the major maritime nations merely through *custom and usage*, without the overwhelming majority of the international community, were perpetuated.⁸⁶

The latter is clearer evidence of the view that these new States did not regard custom as binding upon them.

In the light of this evidence, it would seem difficult to say that there is a sufficiently general and uniform perception as to the secondary rule regarding the position of

⁸² *Ibid.* See also UN Doc. A/Ac. 125/SR.6, p. 11, where the Algerian representative stated that a general distinction should be drawn between an obligation voluntarily accepted and the general imposition of a law made in other terms by a small international community.

⁸³ Chapter IV, Section B.

⁸⁴ Official Records, Vol.I, p. 20.

⁸⁵ *Ibid.*, p. 33.

⁸⁶ Official Records, Vol. II, p. 218.

new States and pre-existing customary law.⁸⁷ Of course the position of "old States" has not been considered in the same manner. But there is no need to; even assuming that their recent practice is uniform and consistent, we cannot speak of a universal rule of customary law in existence today because their practice cannot be general, in view of the evidence examined.

To recall the words of Villiger, if a customary rule "no longer reflects the needs of the State community, it passes from use, or is modified by a new customary rule".88 The arguments of the new States, if we consider them carefully, would seem to be based on the right to participate in the making secondary rules.⁸⁹ It does seem difficult to argue that law has been made when those who are charged with making it were not in existence. This is precisely the point of the doctrine of intertemporal law, at least as qualified by Arbitrator Huber in the Island of Palmas case; 90 law must move with the times. The argument of the new States may sometimes assume the form of majoritarianism, but it has been shown that this is merely a technique of presenting one's case. The sooner the international community appreciates that there is a fundamental legal (as distinct from ideological) problem at the heart of the system of its law-making procedures in general and customary law in particular, a problem which can only be solved by negotiation and compromise, the better a place the world will be. The legal problem will never be solved by holding on fastidiously to arguments on either side based on ideological considerations, when the problem is primarily a legal one. This problem being referred to is that the secondary rule governing the creation and determination

Akehurst's suggestion (*Custom*, p. 31), that in a case where the views of States on an issue is polarized, the solution is to be found by reference to pre-existing general law which was at one time, accepted by both groups of States, would not be able to operate here. The simple reason is that these States were not in existence at that "one time" to which he refers, so they could not have accepted it. Furthermore, apart from the artificiality of such a solution (which he himself recognizes), the doctrine of intertemporal law poses insurmountable obstacles.

⁸⁸ Customary International Law and Treaties (1985), p. 39.

⁸⁹ See Chapter V, Section A, supra.

⁹⁰ II RIAA, p. 829. See the discussion in Elias, op. cit., supra, n. 65.

of the existence of primary rules of customary law itself fails to satisfy the criteria it lays down for those primary rules.

C. A DEFENCE OF THE CLASSIC CONSENSUALISTS

Strupp, 91 Anzilotti92 and Tunkin93 considered that new States were bound by the international law in existence when they achieved statehood on the basis of their presumed acceptance of such international law. Most modern writers have rejected this view, on the basis that it is fictional; new States have not been required, upon admission, to make a list of those rules customary which they accept and those which they reject. 94 The views of the classic consensualists are now generally considered unpopular.

But let us consider some of the examples of the practice. The diplomatic notes sent by the American Secretary of State quoted earlier, could quite easily to cited as support for the views of the consensualists. Consider the phrases "being received at her own request" and "she binds herself". 95 These seem to imply some sort of contractual setting. Similarly, Hall 96 wrote that

As international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles can not be supposed to be understood or recognized by countries differently civilized...But States outside European civilization must formally enter the circle of law-governed countries. They must do something with the acquiescence of the latter, or some of them, which amounts to an acceptance of the law beyond all possibility of misconstruction...If by its origin [a new State] inherits European

^{91 &}quot;Les règles générales du droit de la paix", 42 Recueil des Cours (1934), Vol. I, p. 310

⁹² Cours de droit international (transl. Gidel), 1929, pp. 8-9.

⁹³ "Coexistence and International Law", 95 Recueil des Cours (1958), Vol. III, p. 19. "Some Remarks on the Juridical Nature of Customary Norms of International Law", 49 California Law Review (1961), p. 428.

⁹⁴ D'Amato's views on this are typical: see *Concept*, p. 191.

⁹⁵ Moore, International Law (2nd edn.), p. 5.

[%] International Law (4th edn.), pp. 42-44.

civilization the presumption is so high that it intends to conform to law, that the first act...unaccompanied by warning or intention not to conform, must be taken as indication of an intention to conform.⁹⁷

He goes on to suggest that the "agreement" described is not merely one-sided:

[A] tendency has also shown itself on the part of such States to expect that European countries shall behave in conformity with the standard which they have themselves set up. Thus China, after France had blockaded Formosa in 1884, communicated her expectation that England would prevent French ships from coaling in British ports.

He goes on to add that

[But] it would be unfair and impossible to assume, inferentially, acceptance of the law as a whole from isolated acts or even from frequently repeated acts of a certain kind.⁹⁸

Also, the admission of Japan into the circle of international law supports this "contractual" approach. President McKinley stated that, by certain treaties of July and August 1899, "Japan's position as a fully independent sovereign power is assured". 99 Moore lists a number of "acts by which Japan recognized the obligations of international law", including one "salutary improvement". 100 The existence of this "contractual" arrangement is supported the provision of a sanction in the case of breach of the condition of observing international on the part of a new State; such a State would be deprived of

⁹⁷ See Moore, *International Law* (2nd edn.), pp. 5-6, cited two footnotes above: the communication continued by stating that no community can be allowed to enjoy the benefits of statehood without submitting to all the duties which that status imposed. "A christian people who exercise sovereign power, who make treaties, maintain diplomatic relations with other states, and who should yet refuse to conduct their military operations according to the usages universally observed by such states, would present a character singularly inconsistent and anomalous".

⁹⁸ It should be noted that the British Government recognized the belligerent rights of China as well as of France, and acknowledged toward both the obligations of neutrality (see *British and Foreign State Papers*, Vol 76 (1884-1885), p. 434).

⁹⁹ See Moore, Digest of International Law, op. cit., p. 9. See also Wolfke, discussing the real politics behind the relationship between great and small powers in the nineteenth century, stated that the Concert of Europe "recognized the independence of new countries imposing on them its own conditions" (in casu, Serbia, Roumania, and Montenegro). See his Great and Small Powers in International Law from 1814 to 1920 (1961), p. 70 and preceding pages.

"the advantages of the public law", 101 and it would thereby "confess that it is not entitled to be regarded as a sovereign and independent power". 102

In the light of these considerations, it does not seem really fictional or surprising that the classic consensualists referred to the notion of presumed acceptance; as seen in the foregoing, in many cases it was actually express. ¹⁰³ It should be remembered that at that time, recognition was considered to be the legal criterion for the creation of a new State. It would be normal for the existing States, given their superior position, to impose conditions upon the admission of new States.

It may be objected that even if this were the case, it is now generally accepted that the constitutive view of recognition is no longer fashionable, and that it is not realistic, 104 so that the "agreement" theory would also no longer be acceptable. But this would hardly undermine the classic consensualists' view; if the new State now does not require the "permission" of the "old" States, it could very simply mean that it did not have to respect those *customary* (as distinct from constitutional) rules which the "old" States had accepted *inter se*. The "tacit agreement" theory is thus not as ridiculous as it has sometimes been made out to be; on the contrary, it seems quite realistic.

It remains to be pointed out that many of the older authorities do not always distinguish between those rules of non-conventional law which are constitutional and those which are customary *stricto sensu*.¹⁰⁵

¹⁰¹ See, concerning the admission of Turkey to the international community, Herslet, *Map of Europe by Treaty*, Vol. II, p. 1254 (cited in Moore, *ibid.*).

¹⁰² See the communication between Mr Evarts, Secretary of State, to Mr Foster, in 1877, cited in Moore, *ibid.*, @ p. 6.

¹⁰³ See Wolfke, op. cit., n. 99, supra.

¹⁰⁴ See generally Brownlie, Principles, p. 90.

¹⁰⁵ See, e.g. the communication between Mr. Evarts and Mr Foster, op. cit., supra, n. 102.

CONCLUSIONS

From this survey, it appears impossible to state with any precision that today, there is a generally accepted rule that new States are bound by pre-existing customary law without their consent. The arguments on either side rely primarily on theoretical arguments, which will be considered in the next chapter. We can assert that new States do not seem to challenge the constitutional doctrine of the system, and most of the customary law stricto sensu. But this conclusion, as regards the customary law,

prove[s] no more than that new States do in fact consent to be bound by the existing body of international law, not that they would be bound by it without their consent.¹⁰⁶

¹⁰⁶ Walden, "The Subjective Element in the Formation of Customary International Law", 12 Israel Law Review (1977), p. 356. Cf. Chapter V, Section C, above.

CHAPTER VIII

JURISTIC OPINION ON THE ROLE OF CONSENT

This chapter is divided into two parts. In the first part, it is proposed to examine the some of the objections to the role played by consent in the creation of rights and obligations under customary international law as contained in the writings of jurists. In the second part, the possible advantages of the consensual theory will be considered.

A. OBJECTIONS TO THE CONSENSUAL THEORY

1. The Problem Of The Vicious Circle

One standard criticism of the role of consent has been described in the following way.

...la question cruciale: ces règles conventionelles et coutumierès relatives aux sources, d'où tiennent-elles leur validité? On voit combien il est difficile de ne pas être pris dans une cercle vicieux. Même la supposition que les règles relatives aux sources font partie d'une catégorie de règles d'une ordre supérieur au reste de la réglementation juridique, ou qu'elles en constituent une exclusivement, n'offre pas de solution, car ici encore se pose la question de savoir comment ces règles supérieur ont acquis leur validité ou leur force obligatoire. \(^1\)

There are two (related) possible responses to this criticism. One is that we are not concerned with why law is binding.² The question why a (hypothetical) rule of law has binding force is a very different question from the question of how (that rule, or any other rule of) law is made, and we are only concerned with the latter.³ The other

¹ Sørensen, Les Sources du Droit International (1946), pp. 14-17. This criticism is levelled against those writers who see the basis of the binding force of international law in the will of States (e.g. Jellinek, Strupp), the will of the international community (Triepel) or a fundamental hypothetical norm (Kelsen, and Anzilotti). See also, on consent as the basis of obligation, Brierly, The Basis of Obligation in International Law and Other Papers (1958, Lauterpacht and Waldock, eds.), and Lobo de Souza, EEZ, Chapter III, pp. 31-39.

² See Chapter I, Section A, supra, pp. 1-2.

³ See Fitzmaurice, 92 Recueil des Cours (1957), Vol. II, pp. 40-44, 98-99. Of course, this is not to say that there is no relationship between the questions why law is binding and how obligations and rights are created. All that is being said, as was stressed at the beginning of Chapter I, is that it is possible to talk about one without talking about the other.

response is that it is possible to see the rule(s) in question (i.e. the rule about the creation of rights and obligations in customary international law) as being themselves customary, and several writers do.⁴ Furthermore, even if there is some reason why the characterisation of rules about sources as being customary is not acceptable, we can still conduct a valuable empirical enquiry to determine how the actors in the international system perceive the content of such rules rules. And if we find that these actors view the rules in question in a particular way, it would be unrealistic to try and fashion a descriptive or prescriptive rule which does not accord with their perceptions. The vicious circle argument is, thus, either not directed at this study, and/or it is not fatal to its utility.⁵

Another related criticism runs as follows:

If the consent theory were truly an expression of an individual state's will to be bound, logic would require that if a state changes its mind it would cease to be bound.⁶

Again, this argument is inconsequential as far as the present enquiry is concerned, for the simple reason (even assuming that we are dealing with the notion of "will" rather than consent *stricto sensu*⁷) that we are concerned with the way in which rights and obligations are created, and not with the reason for their (continued) binding force after their creation. Logic does not require that obligations be terminable at will; in fact, the consensual theory requires that obligations be terminated in exactly the same way in which they were created, i.e. with the consent of the State against whom the custom is sought to be applied.

⁴ See Chapter I, Section C, Subsection 2, supra.

⁵ Some consensualist authors, however, seem to take the vicious circle argument on board; see e.g., Wolfke, *Custom*, Chapter Six (entitled "The Basis of the Binding Force of Customary Rules of International Law). Whether they succeed in providing a solution to the problem or not, it is not considered to be necessary if we are concerned strictly with the process of law creation as distinct from the question of the basis of international obligation.

⁶ D'Amato, Concept, p. 194. See also Pellet, 12 Australian Yearbook of International Law (1991), p. 22 @ p. 35.

⁷ See Chapter 1, Section B, Subsection 2.

2. "Systemic" As Distinct From Individual Consent

Jaffe wrote that

consent is given to international law as a system rather than to every relationship within it.⁸

D'Amato cited this with approval, adding that

By simply engaging in international legal argumentation, or simply by claiming the benefits of international rules relating to boundaries or shared resources, all states have in fact consented to the international legal system not to each and every rule in it, but to the secondary rules of law-formation and the generally accepted mode of argumentation and legal standards of relevance.⁹

Be that as it may, this view begs the following crucial questions, which the present study has sought to answer: (a) have all States really consented to the same rules about law-creation?, and (b) what do these "secondary rules of law-formation" stipulate? What we need to know is the extent to which individual consent is required as provided by these rules, and this criticism takes us only as far as asking the question.¹⁰

3. The Problem Of Newly Independent States

This is the oldest and classic argument against the alleged requirement of individual consent.¹¹ The basic proposition is that consent cannot be the basis of customary international obligation because new States are (considered to be bound) by the customary law in force at the time when they achieve Statehood.¹²

⁸ Jaffe, Judicial Aspects of Foreign Relations (1933), p. 90.

⁹ Concept, pp. 194-95. See, similarly, Walden, "The Subjective Element in the Formation of Customary International Law", 12 Israel Law Review (1977), p. 356.

¹⁰ Charney, *Universal Law*, 533-34, seems, like D'Amato, to postulate that all States are bound by secondary rules. But what if the secondary rule is not clear? What are the States then bound by?

¹¹ See Henkin's statement (216 Recueil des Cours, Vol. IV, p. 51): "Of course, one can take the suggestion that custom is only tacit agreement more seriously if one rejects the view that a new state is bound by earlier custom".

¹² See Kelsen, *Principles of International Law* (1952), pp. 307, 311-117, and the second edition of the same book (ed. Tucker, 1966), p. 444; Guggenheim, *Traite de Droit International Public*, Vol. I, p. 49; Lauterpacht, *Private Law Sources and Analogies of*

It is striking that the majority of writers subscribing to this position reverse the normal process of reasoning; the position of new States is not generally established in itself, but rather, it is used as a knock-down argument to illustrate the falsity of the consensualist's claim. It is also noteworthy that most writers subscribing to this view seem to be primarily concerned with the issue of the basis of obligation. However, as we saw in Chapter VII, it is hardly possible to find the elements required for the inference of the existence of a universally accepted rule in the international practice on the matter. The evidence considered there hardly supports the proposition that new States are bound without their consent. The only support often proferred for the "new States" proposition is doctrinal and theoretical. 15

Problems persist, however, even if we take these theoretical arguments on their own terms.

(i) The main theoretical problem anticipated by these writers is the fear of anarchy. The argument is essentially that the international legal order exists independently of the will of States. If so, new States cannot pick and choose between rules of customary law; if they can, then "old" States must also be free, at least vis-a-vis the new States, to reject any customary law they may choose. This would not only be anarchical, but it would be counterproductive from the point of view of the new States who would then have as much

International Law (1927), pp. 51-60; Waldock, 106 Recueil des Cours (1962), pp. 51-2; Sørensen, 101 Recueil des Cours (1960), p. 1 @ p. 45-47; Akehurst, Custom, pp. 28-29; Green, 4 Israel Law Review (1969), p. 38; O'Connell, The New Nations in International Law and Diplomacy (ed. O'Brien, 1965), and 95 Daedalus, p. 634-6; Walden, 12 Israel Law Review (1977), p. 355ff; Charney, Persistent Objector (1985), p. 2, n. 5; Walden, 12 Israel Law Review (1977), pp. 355-357.

¹³ D'Amato, *Concept*, pp. 191-193, is a notable exception. He looks at state practice, but the examples he gives, however, hardly support his conclusions, especially when read against the background of the practice of tribunals and States as considered in Chapters IV and V.

¹⁴ In particular, Fitzmaurice and Kelsen, op. cit, @ n. 12, supra.

¹⁵ But the arguments of writers who argue that new States are not automatically bound are also not rooted in actual practice but in ideology. For a comprehensive review, see Makonnen, *International Law and the New States of Africa*, Chapter Two.

to lose from the denial of the existing international order as any other State. 16

The first response to this is that it is somewhat melodramatic. If we recall, the difference between constitutional law and customary law was the consideration that customary law is mutable, in that its fabric is the actions of States, while the constitutional law, as a matter of logic, precedes and defines the international legal system. Of course, to take Sørensen's example, (reference) if a new State were to argue that it did not recognize the territorial sovereignty of an "old" State, established before the former achieved independence, the new State would be cutting the ground from under its own feet, since the "old" State would be free to reciprocate, and this would undermine the newly achieved statehood of the new State. But the point is that (a) new States do not challenge such fundamental constitutional norms, such as the sovereignty of other States, as a matter of fact (which could mean that they were bound thereby), and (b) their challenge per se would not be enough to undermine the efficacy of a constitutional norm.¹⁷ Territorial sovereignty is more properly a constitutional notion, rather than a rule of customary law stricto sensu. The fundamental constitutional principles of the international system are not the subject-matter of this enquiry; neither are they principles that should depend on acceptance.

Even if, on the other hand, a new State were to challenge the principle of the freedom of the high seas (another of Sørensen's examples), which is not a constitutional norm, the most "anarchical" result would be that just as that State is arguing that it is exempt from respecting the freedom of other States, those other States are free to adopt the same position in relation to the new State. But why does this mean *anarchy*? If a tribunal had to decide the issue, the most "anarchical" solution, more "anarchical" even than a ruling

¹⁶ See, in particular, Waldock and Sørensen, op. cit. supra, n. 12.

¹⁷ As seen in Chapter 1, *supra*, there may well be challenges to the precise limits of a constitutional norm, which would not detract from the existence of the norm. In fact, the norm of territorial sovereignty, while remaining an undeniable fundamental principle, is one that has been challenged by new States in one sense, namely, the haphazard application/acceptance of the *uti possidetis* principle; see *supra*, Chapter 7, n. 12.

in favour of one of the parties based on consent or non-consent, would be a direction to the parties to negotiate, even if it is only on the basis of Chapter 6 of the United Nations Charter. Surely this happens even where there are no new States involved in the dispute. Why should the fact that a new State is involved cause so much unease? Even if there were no adjudication, what we are left with is a situation in which an old State says that a new State is bound by old rule X, while the new State says it is not. This would mean, at worst, that there is no law applicable on the given point. But as Stone has often pointed out, the fear of non-liquet is unjustified. 19

(ii) Secondly, as argued above, these writers seem to prejudge the issue. Their objection is one that presupposes a theory of customary law when the issue before us is to describe the process of customary law formation. This is confirmed by the fact that many of these writers use the new States' argument to show that custom is not consensual, without rooting that illustration itself in concrete evidence. Without examining the evidence, it could be that customary law is but a network of obligations binding only on States which have consented thereto, as described earlier in Chapters IV-VI, just as it could be, as they perceive it, that customary law generates only monolithic, universally applicable rules.²⁰

¹⁸ See, e.g., the operative part of the judgment of the International Court in the *North Sea Continental Shelf* cases (*ICJ Reports* (1969), p. 4).

¹⁹ Stone, Of Law and Nations (1974), pp. 71-118, and "Non-liquet and the Function of Law in the International Community", 35 BYBIL (1959), pp. 124-161.

²⁰ Some of the writers mentioned above (e.g. Sørensen and D'Amato, op. cit.) claim that the proposition that new States have consented to pre-existing rules of customary law is fictional; new States have never been required, upon attainment of Statehood, to declare which rules of custom they accept and which ones they reject. But, apart from the considerations discussed in Chapter VII, Section C, supra, this is not a good argument. Even those States which were in existence at the time of the formation of the rule in question are not required to expressly declare anything one way or another. Why cannot the consent/acquiescence of new States be inferred in the same way as the consent/acquiescence of such States? See Villiger, Customary International Law and Treaties (1985), p. 21, for the sensible view that new States are in the same position as such States - that they have a period during which they have the option to reject rules. Cf the views of the United Kingdom on the right to dissent as expressed in the Anglo-Norwegian Fisheries case (considered supra, Chapter IV, Section A, Subsection 3(ii), where it was argued that they seem to allow a short time after the establishment of a rule even for existing States).

(iii) Thirdly, it is possible to make the following argument: if a legal subject is under an obligation, the opposability of that obligation is not necessarily conditional upon the acceptance of that same obligation by the other party. What the International Court of Justice said in the *Asylum* case was that the party alleging the custom must prove that the custom is established in such a manner that it has become binding on the other party, not that the substantive obligation must be the same for all States.²¹ This would seem to be

Similarly, Gihl ("The Legal Characacter and Sources of International Law", 1 Scandinavian Studies in Law (1957, p.53 @ 85), in stressing the uniqueness of customary law as compared with treaties, has written that while reciprocity is a characteristic feature of all international agreements, the distinctive feature of customary law is that the obligations binding on each State could well be different (although the position in respect to treaties might require qualification given the faculty of making reservations to treaties). See also Wolfke, Custom, p. 67. What else is the effect of the right to dissent, such as was illustrated in the Anglo-Norwegian Fisheries case, which held, in effect, that while some States may have been bound by the ten-mile rule in respect of bays, that Norway was not?

There are many other examples from State practice which confirm that whatever role the principle of reciprocity plays in the customary law process, it does not require mutuality of obligation, and the absence of such a mutuality does not bring the world to an end. In 1971, Peru and China issued a joint declaration about the establishment of diplomatic relations in which the latter recognized "the sovereignty of Peru over the maritime zone adjacent to her coasts within the limits of 200 nautical miles"; China did not adopt the same limit, at least not at that time (see the Joint Separate Opinion in the Fisheries Jurisdiction case (ICJ Reports, (1974), p. 49). See also Japan's recognition of the rights of the Scandinavian States to a 4mile territorial Sea, while itself maintaining a 3-mile limit (see Whiteman's Digest of International Law, Vol. IV, p. 115. See also the United States' Presidential Proclamation of 1983: "[w]hile international law provides for a right of jurisdiction over marine scientific research within [the exclusive economic zone] the Proclamation does not assert such a right", adding that the United States would "recognize the right of other coastal States to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised in a manner consistent with international law" (See Office of the Secretary-General for the Law of the Sea, The Law of the Sea (1987), p. 138.

See (per contra?) the view that there may be a Kantian categorical imperative built into the system of customary law, by Mendelson, Hohfeld (1990), p. 377, and, implicitly, Cheng, Custom, p. 535. It would seem that this categorical imperative operates only at the level of "secondary" rules rather than those "primary" rules which actually specify substantive conduct. In other words, if, for example, a State claims exemption from a particular rule for x reasons, other States in the same position and in similar circumstances can do likewise; but

²¹ ICJ Reports (1950), pp. 267-277. The essence of the second conception is consent and not agreement, and only if one considers customary law to be a pactum tacitum would one require mutuality of obligation. On this point, see the distinction drawn between the notions of consent and agreement in Chapter I, Section B, Subsection 3, above, and also the present Section, Subsection 5, below. Walden (12 Israel Law Review, p. 357), has written that

^{...}if States can only be bound by rules to which they have consented, it does not follow that they can only be bound towards other States that have accepted the same rule. Consent is not necessarily the same as contract.

correct in view of the consideration that all States have a right to participate in the formation of customary rules which bind them.²² If it is correct, it does not follow that because some new States may reject some pre-existing customary law, "old" States must be able to reject their obligations in return. If this view is taken to its logical conclusion, it would seem that it is the "old" States causing this (quite illusory) anarchy!

It may be argued, in response, that the argument that "old" States should also be free to repudiate rules is based on reciprocity. But is the argument that new States should be bound by one-sided rules, in the formation of which they had no right to participate, consistent with the idea of reciprocity?²³

All of this would suggest that the argument based on the position of new States is far from being fatal to the consensual theory/second conception.²⁴ In any event,

not all States simpliciter can. To take an absurd hypothetical example to illustrate the absurdity of a contrary suggestion, Burkina Faso cannot claim to have its territorial sea delimited according to an alleged ten-mile rule for the closure of bays which may be claimed by say Ghana, because it does not have a territorial sea or a bay, even though it may have an interest in the waters off the Ghanaian coast.

²² See Chapter V, Section A, on "The Right to Participate".

²³ This is actually the view put forward by Abi-Saab, 8 *Howard Law Journal* (1962), pp. 95, 115-116.

²⁴ Kelsen also argues that since individuals are automatically bound by rules in force at the time of their birth, the same must apply to states (op. cit., p. 448; cited with approval by Charney, LVI BYBIL (1985), p. 1, for whom 'societal context' is the basis of international customary obligations). Cf. O'Connell, "The Role of International Law", 95 Daedalus (No. 2 1966), pp. 634-636), and Fitzmaurice, op. cit. supra, n. 11. But again, this seems to put the cart before the horse in basing a view about international law on an analogy with domestic law. Even Wolfke, who is a consensualist (Custom, p. 163, n. 14), goes only as far as comparing a new State to "an adult individual applying for citizenship". It is submitted that even this is not exact. The point is that there is no doubt that individuals are bound by the law duly passed by the recognized secondary processes. The whole question, at the international level, is the nature of these processes. Drawing an analogy with domestic law simply confuses the issue. Even if international obligations are based on recognition thereof by a large number of States, the observations in Chapter VII show us that there is no uniformity in the matter. Considerations of the right to participate, the sovereign equality of States, the requirement of opinio juris on the part of the international community suggest that analogies with municipal law do not really help.

These and similar objections, which are limited in their application to the case of the relationship of newly recognized States to the pre-existing body of international law, are partly irrelevant and have been criticized as such. The contention that existing rules of international law are binding upon newly recognized States independently of their consent does not exclude the propriety of insisting on a consensual basis for the formation of new rules.²⁵

In other words, even it were true that new States were bound by pre-existing customary law, their position is different from that of States which were able to exercise their right to participate in the formation of the law.²⁶ The position of new States is not enough to lead to the conclusion that the consent of any State is unnecessary for the creation of new law, especially if, as was argued earlier,²⁷ all States (a category which would certainly include existing States even if not new States) have a right to participate in the formation of rules of customary law.

4. The Problem Of States New To A Practice

There is the well-known example given by Kelsen that if an existing State acquires for the first time an access to the sea, that State immediately becomes subject to all the norms of international law without there being any attempt on the part of the acquiring State to pick and choose the norms it agrees with.²⁸ This is supposed, like the argument concerning newly independent States, to confirm that consent is irrelevant to the creation of customary law obligations.

In response, there is no practice given to support the contention that States new to a practice have a duty, rather than a liberty, to follow the pre-existing norms. And States do not, as a rule, claim to be exempt from the established law in such situations. Furthermore, there is the following point. Legal rules are a bundle of (finite?) complex

²⁵ MacGibbon, "Customary International Law and Acquiescence", 33 BYBIL (1957), p. 137.

²⁶ Cf. the Separate Opinion of Judge Ammoun in the *North Sea Continental Shelf* cases, *ICJ Reports* (1969), p. 130-1.

²⁷ Supra, Chapter V, Section A.

²⁸ Kelsen, op. cit., n. 12, supra.

rights and obligations. If, for instance, there is a universal rule to the effect that the outer limit of the territorial sea is twelve miles, then the twelve-mile limit is the extent of what is meant by the territorial sea.²⁹ If a State subsequently acquires an access to the sea, and thereby a territorial sea, then it necessarily acquires twelve miles from the baselines from which the territorial sea is measured, unless that State can show that it had not acquiesced in the development of the twelve-mile territorial sea. By acquiring that access and by claiming the benefits of a territorial sea, the State is not consenting to or claiming anything other than a twelve-mile sea. If that State claims more, then other States must consent to that claim, as their vested rights to the international waters beyond the twelve-mile limit would be infringed. The State claiming more would be putting forward a new legal position or attempting to initiate a new rule, and the applicability of this rule to other States must depend upon their acceptance, in accordance with accepted doctrine, including the consensual theory.³⁰ It must be remembered that a State new to a practice is not in the same position as the new State, which could not have participated in the creation of the twelve-mile rule.

Another example may be taken from Condorelli:

Is one really to believe that a State may exempt itself from a principle of international law by its attitude as a "permanent objector", when other States regard this principle as being perfectly in existence? I refuse to believe any such thing...is one to believe that one State has the right to exploit the resources of the continental shelf of another State because it has permanently objected to the rule pertaining thereto?

In relation to the principle of dissent, which is what Condorelli is concerned with, the answer is simply "yes". Such a situation might not be pleasing to the eye, so that one may refuse to believe it; but that has no bearing on the *legal* situation. Condorelli's view may simply be a criticism of what actually happens. On the other hand, if the non-consenting State is a "subsequent objector", it may very well not be able to exploit the said resources. It had the right to contribute to the formation of the rule. It obviously had

²⁹ See Lowe, 17 Journal of Law and Society (1990), p. 388.

³⁰ See Mendelson, *Hohfeld*, p. 378-379.

an "interest" in the law on maritime exploitation, whether as a coastal State or as a landlocked State, in view of its rights in the high seas (which are affected by the development of the continental shelf), and it may possibly have a fleet. If it had not raised an objection all the time, then its qualified silence would amount to acquiescence, and it would therefore be bound.

We may refer to the discussions in the International Law Commission's discussion of Hudson's draft article on the requirements for the creation of customary law. It will be useful to reproduce the relevant part of the records³¹ in full:

- 13. The CHAIRMAN said that as acquiescence could be tacit, absence of protest was sufficient for acquiescence...
- 16. Mr. CORDOVA said that international law was established by States with more frequent international relations, and hence primarily the great powers. He thought that acquiescence by all States was necessary, not merely tacit assent.
- 18. The CHAIRMAN thought that implicit general acceptance was sufficient. This did not mean "universal".
- 20. Mr el-KHOURY asked Mr Hudson for an explanation of a concordant practice which had received the acquiescence of a number of countries. Absence of objection might amount to acquiescence, but if the practice had not been applied to particular States, could the absence of protest on their part be considered as implying acquiescence?
- 22. [Mr HUDSON stated that] what was involved was consensus of opinion proved by acquiescence.
- 24. Mr el-KHOURY asked for clarification as to when a principle could be regarded as receiving "general acquiescence".
- 25. Mr HUDSON said that absence of protest was the criterion.
- 26. Mr El-KHOURY could not see why any particular State should protest against agreements which did not concern it...
- 27. The CHAIRMAN thought it would be better not to spend time on exceptional cases...
- 34. Mr SANDSTRÖM argued that...[w]hat the Commission had to do, without entering too closely into detail, was to establish a general definition of what constituted a rule of customary law.
- 35. Mr KERNO (Assistant Secretary-General) said that...[p]erhaps it was unnecessary to define custom...

These debates on the definition of customary law, particular the exchanges between Hudson and El-Khoury, say a great deal about the present problem. These jurists treated

³¹ Yearbook of the International Law Commission (1950), pp. 5-7.

it as an exceptional case, and offered no real answer to El-Khoury's questions. The issue is that which we examined in Chapter IV.³² The point is that the silence of a State must be qualified before it can be said to be acquiescence.

Other more difficult examples may be imagined. A State might be silent in the face of a developing rule of customary law in relation to which it is not directly affected just yet, and given the other demands on its time and attention, it may not be bothered to do anything about that developing practice. For example, a State might want to launch satellites one day, but not yet; it might suddenly become a major route for diplomatic bags, but not at present. The question then is this: if a rule arises from the general practice of other States, then would the State in question be bound by it?³³

Again, this criticism asks, rather than answers, the crucial question; is the State "new" to the practice under a legal duty to follow the more general practice? Or does it only have a liberty so to do? It must be stressed again that practical, political and social pressures to conform are not, analytically speaking, the fabric of customary international law. That fabric is what States claim and do; the considerations underlying the practice of States do not themselves create customary international law, although they may be relevant.³⁴ Even if a State is not particularly powerful politically or socially or economically, it would mean that its choices are limited in practice, not that it is under a legal duty; surely it is not difficult to imagine situations where even a legal right cannot

³² See, supra, Chapter IV, Section A, Subsection 4(ii)(b).

³³ Wolfke's response to this does not go far enough. He argues that such a State will not be bound, and that the question will not, therefore, arise. But it *can* arise, as the present example shows.

³⁴ Of course, these underlying considerations may sometimes help to shed light on the meaning to be derived from the practice. For example where States may settle a claim for compensation following expropriation by means of a lump sum agreement; if they (even impliedly) say that the settlement is without prejudice to their *opinio juris*, then the practice reflected in the lump sum settlement is irrelevant to customary law. See, e.g., the *Aminoil* case, *ILM* (1982), p. 176.

be exercised because of practical considerations.³⁵ The political or economic strength which the non-consenting State has is relevant only to showing the extent to which the liberty of that State is limited by *political/social pressures*.

Furthermore, given that the practice of other States has a presumptive normative force which may be difficult to rebut, is that State, by remaining silent, not waiving its right to participate? It clearly knows of the general practice leading to the rule. It knew of presumptive force which the general practice has. It knows the beneficial role that dissent can play in this respect. It is perfectly legitimate to infer acquiescence on the part of this State.

Even assuming, arguendo, that knowledge was not so freely transferable in the past, when there were fewer States that "mattered" in the world, it cannot be true now. Especially today, in a world of global and instantaneous communication, in a world of interdependence, no State is an island. The possibility of a State not being interested or not having the opportunity of applying a rule is becoming more and more remote (even if it were a real possibility at one time). In the examples of space law and diplomatic relations identified above, the United Nations system has greatly facilitated the customary law-making process in an invaluable way. And the facility of making clear pronouncements in the context of the UN drafting process is the single most positive step towards truly general law.

This is why, even if (as some have claimed), the requirement of consent is fictional (which is a debateable proposition), it is a very good fiction.³⁶ It recognizes the fact that

³⁵ e.g., where the customs officials of a State are so corrupt that enforcement of its rights in its contiguous zone are not enforced, or where the State is so poor that it does not have the resources to enforce those rights effectively; or where a State's right to self-defence is rendered useless because the armed attack against it has wiped out its paltry arsenal. Surely the States in these examples do not thereby lose their rights to their contiguous zone and to self-defence respectively, in view of the well-recognized principle that the renunciation of a right is not to be presumed?

³⁶ See Section 6 of the present Chapter, below.

law cannot be made when the legislator does not know that it is being made, or for whatever reasons, has not made it. And law becomes stronger and more effective when it corresponds to the perceptions of its makers and the interests of its addressees. The consensual theory is most sensitive to these fundamental considerations, and therein lies its relative strength.

In addition, this objection to the consensual theory presumes that all rules of customary law are monolithic and universal; Kelsen's theoretical stance is certainly of that nature. If, as is often the case with alleged rules of general custom, there is no truly general rule, the issue is resolves itself into a network of special relations based on mutual claims and responses thereto.

5. The Problem Of The Pactum Tacitum

Another criticism is directed at those who see customary law as a pactum tacitum.³⁷ The criticism is basically that customary law and treaty are not the same thing, and that it is inaccurate to equate the two. While it may be that the writers being criticized here did not mean to equate custom and treaty, it is possible to read them as suggesting that equation; for example, Anzilotti's reference to pacta sunt servanda as the basis of customary law.³⁸ Strupp, for example, argues that only those State organs which can bind the State by treaty can express its consent to be bound by custom.³⁹ This clearly has no support in reality.⁴⁰ There is also the consideration that vitiating factors do not play any known role in the customary law process, while they do in the treaty process.⁴¹

³⁷ See, e.g., Cheng, Custom, @ pp. 535-536, Walden, 12 Israel Law Review (1977), pp. 355-357, and Lobo de Souza, EEZ, pp. 39-46, criticizing e.g. Strupp, 47 Recueil des Cours (1934), Vol. 1, p. 309 ff; Anzilotti Cours de droit international (transl. Gidel, 1929); and Tunkin, Theory of International Law (transl. Butler, 1974), pp. 118, ff.

³⁸ *Ibid.*, @ p. 74.

³⁹ *Op. cit.*, pp. 313-315.

⁴⁰ See the last footnote in Chapter I, supra.

⁴¹ See Chapter I, n. 6, supra.

But the point is that the idea of a pactum is by no means required by the consensual theory. Consent does not have to be expressed through a pactum. It does not follow that (a) because there is a problem with viewing custom as a tacit agreement, that therefore (b) consent plays no role in the customary process. The criticism of a requirement of agreement is warranted; but as we have seen, consent is neither contract nor agreement stricto sensu, particularly if those notions require concert or mutuality of obligation. There is no necessary contractual "proposal" or "offer" in the process of making customary law. The law is inferred or deduced from the practice of States, and it is through this practice that consent is manifested.

6. The charge that the requirement of consent is fictional

It is often said by non-consensualist writers that the alleged requirement of consent is a fiction, which does not correspond to reality.⁴⁵ It was argued in Chapter IV that the extent to which it is fictional may not be great.⁴⁶

But even if we take this criticism on its own terms, the first observation is that an objection to fictions seems strange, coming from lawyers. As Fuller puts it,

The law has always been notorious as a field of fiction and pretense. Not only are the doctrines of positive law interwoven with fictions, but theories of the

⁴² See the *Nicaragua* case, *ICJ Reports* (1986), p. 95, para. 178, 179.

⁴³ See Chapter 1, Section B, *supra*, and in the present Section, Subsection 3(ii), nn. 20-22, *supra*, and accompanying text.

⁴⁴ See Cheng, Custom, pp. 535-536. See also Haggenmacher, Deux éléments, p. 57.

⁴⁵ See, e.g., D'Amato, *Concept* (1971), 191-195, and Charney, *Persistent Objector*, p. 17, and references cited.

⁴⁶ Chapter IV. Section A. Subsection 4(ii)(b).

nature of law in general have always contained a flexible admixture of fiction.⁴⁷

It would seem that the problem lies not with what may be termed "fictions of law" (e.g. corporate legal personality and international personality), but with "fictions of fact", i.e. where it is postulated that something has happened when in fact it has not or may not have happened (in casu, that a State has consented when it in fact may not have). But this is perfectly normal in legal doctrine. For example, there is a presumption of death in most systems if a person has been missing for a set number of years; there is a presumption of advancement in English law, to the effect that a donor or purchaser is obliged to support or provide for the person advanced;⁴⁸ there is a presumption, of particular interest here, that everybody knows the law; finally, the word "constructive" refers to nothing other than a fiction, and is commonn to many legal systems.⁴⁹

It must be remembered that a fiction is not a lie; the pretence or assumption contained in it is not made with the intention of deceiving. Neither is a fiction an erroneous conclusion; it is normally a statement, the author of which may not believe in its truth, but which is made because it has a certain utility.⁵⁰ Is any statement an entirely accurate expression of reality, particularly in the context of customary law which is sometimes said to be spontaneous and not self-conscious?

A further point could be made concerning the difference between a fiction *stricto sensu* and a *presumption*. If there is such a distinction, it would seem to be between a fiction

⁴⁷ See Fuller, Legal Fictions (1967), p. 98.

⁴⁸ See Pettit v Pettit [1970] A.C. 777; Tinker v Tinker [1970] P. 136.

⁴⁹ As pointed out in Chapters IV and VI above, the only way to rationalize the evidence is to say that consent is the explanation of the creation of customary law. Either (a) a practice is so general that a silent State is presumed to have consented, or (b) the practice is inconsistent and is not uniform, in which case, we fall back on the principle that rights and obligations depend on mutual recognition (i.e. consent), in the absence of a general rule. In other words, the requirement of consent is a legally ordained one.

⁵⁰ Fuller, op. cit., pp. 5-10. He also points out that no statement is an entirely adequate expression of reality.

and a rebuttable (rather than conclusive) presumption; the conclusive presumption, to all intents and purposes, is a fact. ⁵¹ Fuller suggests that if a presumption is (a) based on an inference justified by common experience, (b) is rebuttable, and (c) suggests that a case should be disposed of in a certain way (rather than requiring that a fact to be assumed *per se*), then it is not really fictional. The requirements of generality, consistency uniformity, and the facility of the international conference all seem to put the alleged requirement of consent into the realm of *presumption* rather than *fiction*. Perhaps the requirement of consent is not so objectionable if it is seen as a presumption rather than a fiction.

Another aspect of the charge that the requirement of consent is fictional is the consideration that the silence of a State in the face of a general practice is not necessarily the same as consent. This issue has already been dealt with,⁵² and it may be added here, for the sake of argument, that it is not fictional, and that even if it is, it is a good fiction. Another objection is that a State cannot consent, and that the anthropomorphization is inappropriate.⁵³ This has also been dealt with.⁵⁴ Other criticisms are levelled against the notion of will.⁵⁵ Similarly, the notion of will is linguistically (and, it is submitted, conceptually) different from the notion of consent, and this has also been discussed.⁵⁶

⁵¹ *Ibid.*, pp. 40-48.

⁵² See Chapter IV, Section A, Subsection 4(ii)(b). There the argument was made (pace D'Amato, Concept, pp. 195-197) that there rather than the notions of consent and acquiescence being analytically useless (tü-tü) concepts, it is rather silence and non-dissent, that are by their very nature, unhelpful in justifying a normative/prescriptive inference.

⁵³ See, e.g., D'Amato, *Concept*, pp. 193-194.

⁵⁴ See Chapter II, Section B, supra.

⁵⁵ See, for a recent restatement of such criticisms, Pellet, 12 Australian Yearbook of International Law, p. 23.

⁵⁶ See Chapter I, Section B, Subsection 3, *supra*. For further refutations of the charge of "fictiveness", see Wolfke, *Custom*, pp. 161 ff. He also deals with the criticisms (of which the views of De Visscher are of a piece) that the consensual theory is morally bankrupt. The easy response to this is (a) "morality" is a question-begging notion (b) whose morality is to prevail in the event of conflicting views (c) the International Court has consistently maintained that law and morality are different; see Akehurst, *Custom*, p 33 ff. See the next subsection on morality.

7. The Problem of Morality

It is sometimes said that the consensual theory can lead to morally opprobrious consequences.⁵⁷ Apart from the problems as to what is meant by morality and whose morality we seek, there is the additional consideration that morality and law are different things. If law is based on morality, then the existence of different moral attitudes would be at least as chaotic, and possibly more so, than a consensual explanation. Neither does reference to the morality of the majority help here; many morally opprobrious rules of law (such as slavery and the legality of the use of force as a means of settling disputes) have been a part of customary law, based on the view of the relevant majority at the relevant time. Furthermore, it is sometimes postulated, as an example of the moral opprobrium inherent in the consensual theory, that South Africa would be free from any rule prohibiting apartheid. But it should be remembered that we are concerned with customary international law. There are other sources of law in the international system. In the case of South Africa, it would appear that South Africa could easily have been held bound, for example, on the basis suggested by Judge Jessup, 58 namely, a treatyinterpretation approach. He spoke of a solution "which takes account of the views of the contemporary international community", but at once added that "This is not the same as proving the establishment of a rule of customary international law, and I have already explained that I do not accept the Applicants' alternative plea which would test the apartheid policy against an assumed rule of international law." He would have taken account, for example, of General Assembly Resolutions condemning apartheid in interpreting South Africa's obligations under the mandate, as this would impose no new obligations on South-Africa. There is a difference between treaty-based practice and customary law practice⁵⁹ (although the difference may not be easy to draw at times).⁶⁰

⁵⁷ See, e.g., Falk, in *Change and Stability* (Cassese and Weiler), p. 123: "[i]f one emphasizes the indispensable character of consent one arrives at a particular conclusion that seems to me politically and morally undesirable".

⁵⁸ ICJ Reports (1966), p. 441.

⁵⁹ See Shaw, "Title to Territory in Africa" (1986), p. 86: Custom differs from treaty interpretation in a number of ways. It is founded on State practice, whereas treaty interpretation relates to practice construed with

The position, then, is that there are other possible sources of obligation; the supposed failure of a consensual customary method does not necessarily imply the absence of morality in international law.

Conclusion

It thus appears that the arguments made against the consensual theory of international law do not provide any convincing reasons for rejecting that theory.⁶¹ It will be argued in the next section that there are good reasons for preferring the consensual explanation. Watson has written that the reasons for he dismissal of the classic theories of consent is simply that "insisting on the consent of States to the creation of new norms puts a rather strict limit on the degree of creativity available to commentators".⁶²

B. THE MERITS OF THE CONSENSUAL THEORY

The possible advantages of the consensual theory will be discussed in this final section. The first part will deal with its analytical advantages, while the second part will place the

reference to a treaty provision, and it (custom) is dependent on *opinio juris*...This ...is not necessarily the case with respect to the interpretation of treaty-charters, for practice not amounting to custom may have the effect of interpreting a particular stipulation.

⁶⁰ See the *North Sea Continental Shelf* cases (*ICJ Reports* (1969), pp. 72-75, where the Court confirmed Shaw's observation, *ibid*. We may compare this with the *Nicaragua* case, in relation to which the Court has been criticized for failing to separate treaty-based practice from customary law practice; see, e.g., Mendelson, 26, *Coexistence* (1989), p. 85.

⁶¹ One final category of objections is that levelled against the "liberal" conception of law, voiced by writers of critical legal studies school, of which Koskenniemi's From Apology to Utopia (1989) is an excellent example. See also Kennedy, International Legal Structures (1987). It is not proposed to deal with them here; unlike their work, the present enquiry assumes that law, as a concept, exists, and that it can be determined in an objective and coherent way. See Mendelson's contribution in Chapter Four of Change and Stability (Cassese and Weiler, eds.), for the unchallengable view that objectivity is itself an important value which law (and international law in particular) must strive to maintain.

⁶² See *PASIL* (1992), p. 108.

consensual theory in the broader context of the contemporary international system.

1. Analytical Advantages

The analytical advantages of the consensual theory when compared to the first can be illustrated by Judge Tanaka's Dissenting Opinion in the North Sea Continental Shelf cases. He stated that

Those who belong to the school of positivism and voluntarism wish to seek the explanation of the binding power of international law in the sovereign will of States, and consequently, their attitude in recognizing the evidence of customary law is rigid and formalistic. On the other hand, those who advocate the existence of law apart from the will of States, are inclined to take a more liberal and elastic attitude in recognizing the formation of a customary law attributing more importance to the evaluation of the content of law than to the process of its formation. I wish to share the latter view. The reason for that is derived from the essence of law, namely that law, being an objective order vis-a-vis those who are subjected to it, and governing above them, does not constitute their "auto-limitation" (Jellinek), even in the case of international law, in which the sovereign will of States plays an extremely important role.⁶³

This illustrates a number of features which are implicit in some non-consensual theories. Firstly, the terms "voluntarism" and "positivism", if they imply that will is the essential element, deserve the criticism levelled at them here. But if, as has been argued earlier,

consent is the essential criterion, then these criticisms may be misdirected. Secondly, the consensual explanation does acknowledge the "objective existence of law apart from the will of States", and it does not necessitate acceptance of Jellinek's theory of auto-limitation; as argued earlier, 64 consent plays a very restricted role in the categories of constitutional law, and to less restricted degree, the fundamental principles of the international system. And in any case, we have seen that once law is created, it has a life of its own, and that consent plays a much more limited role. Thirdly, and perhaps most importantly, is it analytically and methodologically useful to subscribe, as Judge Tanaka does, to a theory of law that pays little attention to the way in which law is created and focuses more on evaluating its content? This turns things upside-down; surely

⁶³ ICJ Reports (1969), p. 178.

⁶⁴ See *supra*, Chapter 1, Section C.

we must know that something is law before we can evaluate its content.

He proceeded to cite a passage from O'Connell, who also subscribed to a non-consensual theory. O'Connell wrote that

Much of the traditional discussion of customary law suffers from the rigidity and the narrow-mindedness of nineteenth- century positivism, which was itself the product of a static conception of society. The emphasis that the positivist places on the will of the State over-formalises the law and obscures its basic evolutionary tendency. He looks to positive practice without possessing the criteria for evaluating it, and hence is powerless to explain the mystical process of *lex ferenda*, which he is compelled to distinguish sharply, and improperly, from *lex lata...* 65

This approach is tantamount to saying that we should not bother with the law-creating process, but that we should somehow apply the "law" nevertheless. It suffers from the same defects as the methodological position it is used to justify; it remains forever hoisted on its own "intellectualist", and therefore arbitrary, petard.

But there are further problems. Firstly, the consensual theory as shown here is not based on any version of nineteenth-century positivism, but on the way customary law is perceived by the current participants in the international legal system. Secondly, concerning the charge of being static, there are good reasons for arguing that the consensual theory is better able to account for change in a customary régime. A widely accepted description of this process is as follows. A new rule may be put forward by one State and accepted by others. These States would be bound by the new rule *inter se*. As for the other States, if they do not accept this new practice, they will be bound by the old practice even in their dealings with States adopting the new practice. It may well be that the number of States adopting the new practice eventually exceeds the number who do not, and under a non-consensual theory, it would be said that the old rule has been replaced by the new one. Those States which insist on the old rule will, after the new rule attains widespread support, be regarded as persistent objectors. States whose practice differs from the generality will be regarded as bound *inter se* by a regime of special

⁶⁵ O'Connell, International Law (1965, 1st edn.), Vol. I, pp. 20-21.

custom. The views of new States do not count. The somewhat bizarre distinction between the existence of a rule in the abstract and the applicability of the same rule would be necessary. The difficulties caused by the size of the required majority and the degree of uniformity and consistency would also remain.

But the consensual conception would not have to resort to such a complex explanation. The position would be, simply, that a State is bound only by what it can somehow be said to have accepted. Simply, from a descriptive point of view, there is a change in the pattern of obligations in the relevant area of law, the prescriptive applicability of a particular rule depending on its acceptance by a given State. If, as the International Court seems to require, there is a high threshold of generality for the creation of a universally applicable rule of customary law (coupled with the requirements of uniformity and consistency), then it would become a matter of evidence (or lack thereof) of finding out the implications of the State's silence.

The difference, pace O'Connell, is between a conception of customary law that looks for universal rules in a world of differing practices (the intellectualist, majoritarian and is some respects the persistent objector theory) and one that looks for obligations based on acceptance, with general rules being relevant as a means of determining those obligations (the consensual theory).

It is submitted that the problems attendant upon the consensual theory are the problems (of cognition) attendant upon custom as a source of (international) law.⁶⁶ The customary law process is a complex one, and the consensual explanation seems to provide a more concrete⁶⁷ (if not completely ideal) way of dealing with the problem. Even if it is

The merit of this view seems to lie in its concreteness. The law need not be

⁶⁶ Cf. Brutails, *La coutume d'Andorre*, (2nd. edn 1965), pp. 47-74 (esp. 56). See Mendelson, "Practice, Propaganda and Principle in Intenational Law", *Current Legal Problems* (1989), pp. 11-15.

⁶⁷ As Koskenniemi has written (From Apology to Utopia, (1989), p. 411,

fictional, it seems preferable to rely on a concrete fiction than a more abstract one.⁶⁸ This leads on to the next sub-heading.

2. Contemporary International Society

Wolfke has put this point most eloquently.⁶⁹ The "international society, characterized by co-existence of States of essentially different social and economic systems, and whose peoples have different traditions and creeds", clearly suits the consensual theory. The consensual explanation "is relatively clear, comprehensible in every corner of the world, truly democratic, verifiable, and therefore acquiring the confidence of the governments of all States. Thus [it] seems to give the biggest, if not unique, chance of functioning of international customary law in an ideologically divided world." It avoids some of what may seem to be, to a hard-headed voluntarist, complacency or a priorism which are attendant upon non-consensual theories. Some such theories seem to view law from the

ascertained in an abstract *erga omnes* manner... Merrills notes..."opposability of particular claims is a far more significant issue than their conformity with an uncertain customary rule". Analytical mind is immediately tempted by this reduction of abstract categories into specific legal relationships.

⁶⁸ Judge Tanaka in the North Sea Continental Shelf cases (ICJ Reports (1969), pp. 178-183, illustrates that the further one strays from the consensual theory, the further one gets from methodological consistency. One the one hand, he stressed the difference between the equidistance rule as a useful technical norm of a geometric nature, but which was nevertheless optional, on the one hand, and the fact that "the legislator" had subjected it to a juridical evaluation and invested it with non-optional legal status, on the other (@ pp. 182-183). He also, most cryptically, stated that the equidistance method was ius cogens within the institution of the continental shelf on the basis of logical necessity (@ p. 181). At the same time, he was aware that "the doctrine that the equidistance principle is inherent in the institution of the continental shelf would certainly make a highly controversial impression". Surely, if "the legislator" had truly laid it down, it would not "make a highly controversial impression"? To reconcile all these apparently conflicting statements, he interposes a duty of interpretation incumbent upon the Court (@ pp. 181 and 183). When compared with the judgement of the majority, and the fact that he satisfied himself that the Federal Republic had consented to the rule, it would seem that the only "legislator" in this case was Judge Tanaka himself.

To conclude, it is more than interesting to note that Judge Tanaka wrote, in a non-judicial capacity (15 Japanese Annual of International Law (1971), p. 1, @ p. 19) that custom, like treaty and unlike general principles of law, does not exist apart from the will of States, and that only general principles "bind States regardless of their will"!

⁶⁹ See Wolfke, Custom, p. 160.

point of view of Holmes' "bad man", implying that States are essentially selfish and unruly,⁷⁰ as some international relations theorists would indeed argue.⁷¹ But this does not seem to be a true description of the way international society is progressing. The increasing importance and expanding role of international organization also plays an important part in facilitating international dialogue, an essential element in the peaceable development of international society.⁷²

We may note the following view, expressed by van Hoof:

Deviating from the consensual basis of international law is at best deceiving, but may be outright dangerous. In the best possible case it creates expectations which are [un]realistic because the State, which is held to be "bound", did not really consent to or accept the rule concerned and is, therefore, unlikely to comply with it. In the worst possible case it may fuel

⁷⁰ See Holmes, "The Path of the Law", 10 *Harvard Law Review* (1897), pp. 457-478; see also Twining, "Karl Llewellyn and The Realist Movement (1985), p. 18, and "The Bad Man Revisited", 58 *Cornell Law Review* (1973), p. 275.

⁷¹ See, e.g., Morgenthau, "Positivism, Functionalism, and International Law", 34 AJIL (1940), pp. 260-284. See *per contra*, Brownlie, "The Reality and Efficacy Of International Law", 52 BYBIL (1981), p. 1.

The recent reference to the idea of consensus rather than consent in the law-making process confirms this point. As Sørensen puts it, regarding the persistent objector rule, This negative emanation from the doctrine of tacit consent can reasonably claim a permanent place, I submit, even when the positive emphasis in the law-making process is shifted from consent to the less rigid notion of consensus. (PASIL (1981), p. 140, 147).

On consensus, see Zemanek, "Majority Rule and Consensus Technique in Law-Making Diplomacy'. in The Structure and Processes of International Law (MacDonald and Johnston eds., 1983), pp. 857-87, and Cassese, *International Law in a Divided World* (1986), 195-98. See also Shibata, "The International Law-Making Process in the United Nations: A Comparative Analysis of UNCED and UNCLOS III", 24 California Western International Law Journal (1993), p. 17.

If consensus is based on a substantial convergence of views and no fundamental differences, then dissent would thwart consensus, unless of course the parties have agreed to a specific system of voting. And if dissent is the only way to thwart consensus, then why would a State not dissent? See, e.g., Rule 69 adopted by the European Conference on Security and Cooperation: "Consensus shall be understood to mean the absence of any objection expressed by a Representative and submitted by him as constituting an obstacle to the taking of the decision in question". See also the well-known gentleman's agreement adopted by UNCLOS III in 1974. The importance of consensus is that the minority becomes involved in the law-making process and can therefore see to it that its interests are safeguarded.

As a result of the influence of the international organization, it seems that the world can truly claim to be a system of "civilized" nations.

international conflicts...⁷³

⁷³ Rethinking the Sources of International Law (1983), p. 79.

CHAPTER IX

CONCLUDING REMARKS

Customary international law, as a secondary rule of process, seems to have failed by the very same standards which it sets for those primary rules which it is supposed to create. That is to say, there appears to be a lack of uniformity, consistency and *opinio juris* as to the nature of the rule governing the creation of customary international law, especially as regards the role of consent. There is a real problem for us at the heart of customary international law, which is disquieting when we consider how important customary international law is in the international legal system and how important the international legal system is in the international political, social and economic system.

It is hoped that it is clear from the preceding Chapters that this conclusion does not necessarily involve forcing all the evidence into the "Procrustean bed of the voluntarist thesis". The point is that the position is far from clear, and that since we cannot conclusively pronounce one way or another upon the question of the *necessity* of consent, all we are left with is the principle that the consent of States is *sufficient*.

The best approach, it is submitted, is to proceed on the basis of dialogue and negotiation, with majority rule helping to bring non-conformists into line. The difficulties with the views of majoritarians like Charney is that they sometimes seem to assume, without demonstration, an answer to the question. For example, he wrote, relating to South Africa and apartheid, that "persistent objector status did not in any way protect them from the pressure exerted by the international community to force them to *conform* to the norm". Apart from appearing to assume that South Africa was bound by this "norm", surely what he ends up saying is that they were pressured into accepting what the rest of the international community willed. What if they did not accept, as was the case until the past few years? The acceptance is what matters. Majority pressure does not amount to law.

¹ See Condorelli, in Change and Stability, p. 120.

² Persistent Objector, p. 15.

Witness what became Part XI of the 1982 Law of the Sea Convention; is the United States bound by a rule of customary law, based on Part XI, regulating unilateral exploitation of the deep sea bed? Continued pressure may or may not force a State to accept. This is precisely both the reason for, and the advantage of, the international forum as means of contemporary law-making.

We may conclude by considering the following quotations.

On the one hand the growing interdependence of States and the increasingly serious danger signals in all spheres of life create an almost irreversible pressure towards cooperation...On the other hand, it may be noted that the widening of the original Euro-American into a universal legal community gave rise to a grave loss of homogeneity in its underlying social and moral values.³

He goes on to suggest that custom may be inappropriate to meet these demands. One alternative is to reject custom for this reason. The other, which it is submitted, is preferable, is based on the following considerations.

International law is not an adversarial system of law...many of its rules have evolved from the practice of States and do not often stipulate rigid obligations...This flexibility may, of course, be perceived as a weakness, for states need to know with some degree of certainty the precise scope of their legal obligations. In international law, however, the flexible or open-ended nature of rules means that diputes are less likely to be seen as 'right' versus 'wrong'. The absence of rigid and precise obligations leads to modest claims and, because there may be no objectively 'right' answer, there is a premium on compromise.⁴

If so, we can draw the following conclusions, which are supported by, and advocated in, this study:

If it is correct that consensus lies at the heart of customary law, it would indeed be a contradictio in adjecto to speak of superimposed customary law. [i] All States participate as equals in the formative process of customary law, and the conditions for the formation of a customary rule are such that [ii] even a State's passive conduct has to be qualified to be of any significance. [iii] If a State opposes a customary rule from the early stages onwards, the State will not be bound qua persistent objector. And if many States object, the rule will never arise. (numbering added)

³ Simma, "Consent: Strains in the Treaty Process", in McDonald & Johnston (eds.), *The Structure and Processes of International Law* (1983), p. 485.

⁴ Dixon, Textbook on International Law (2nd. edn., 1992), pp. 9-10.

⁵ Villiger, Customary International Law and Treaties (1985), pp. 38-89.

SUMMARY

- 1. There is a difference between the way law is made and the reason why law is binding. There is a difference between consent and other similar notions. There is a difference between customary law and other kinds of non-conventional law. Insufficient attention has been paid to these facts. The function of *opinio juris* in the law-creating process is difficult to separate from the function of consent. Customary international law is both created *and* evidenced by the practice of States, and through this practice, consent is manifested (Part One).
- 2. The jurisprudence of the International Court shows that it always satisfies itself of the consent of the Parties to the customary law it applies. The jurisprudence of other tribunals does not reveal any uniformity (Chapter IV).
- 3. The practice of States does not shed much light on the matter mainly because of inconsistency. Many States appear to require their consent as a condition for the applicability of customary law to themselves (Chapter V).
- 4. The distinction between general and particular customary law is difficult to maintain, and it is difficult to argue that what is required for one is not required for the other, as far as consent is concerned. It seems much more consistent to argue that the role of consent is as follows: where a practice is truly widespread, it would be necessary to prove a State's dissent in order to avoid it being bound, as there appears to be a presumption of consent in the face of a general practice; where the practice is not so widespread, evidence of consent on the part of a State would have to be shown (Chapters IV and VI).
- 5. There is insufficient contemporary support for the proposition that new States are bound automatically by pre-existing rules of customary law (Chapter VII).
- 6. The opinions of writers do not provide convincing reasons why the consensual explanation should be rejected; in fact, there seem to be very good reasons for preferring the consensual explanation (Chapter VIII).
- 7. The nature of contemporary international society makes the consensual theory particularly important. The codification conference is the most appropriate system for law-making in today's world (Chapters VIII, Section B, and Chapter IX).

8. The evidence suggests that there is no universal rule which says that a State can be bound without its consent. In the absence of a general rule, there is the general principle that rights and obligations are to be determined on the basis of mutual claims, acquiescence and recognition. These are all consensual.

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ABBREVIATIONS

AD Annual Digest of Public International Law Cases

AJIL American Journal of International Law

BYBIL British Yearbook of International Law

ICLQ International and Comparative Law Quarterly

ICJ Reports Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice

ICJ Pleadings International Court of Justice: Pleadings, Oral Arguments, Documents

IJIL Indian Journal of International Law

ILM International Legal Materials

ILR International Law Reports

JIL Journal of International Law

PCIJ Reports Publications of the Permanent Court of International Justice

Recueil des Cours Recueil des cours de l'Académie de droit international

RIAA United Nations Reports of International Arbitral Awards

RGDIP Revue générale de droit international public

SAYIL South African Yearbook Of International Law

Zaörv Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

YBIL Yearbook of International Law

