
CUSTOMARY INTERNATIONAL LAW IN THEORY AND PRACTICE
With Special Reference to the Emergence of the Exclusive Economic Zone

Thesis submitted to fulfil the
requirements for the PhD degree

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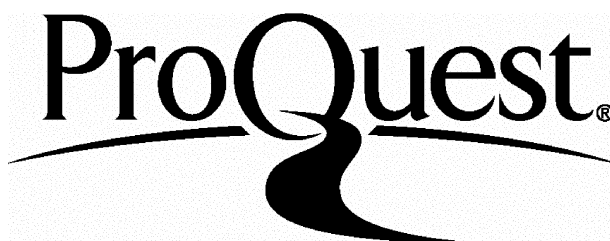
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ABSTRACT

There are many practical and theoretical difficulties regarding customary international law which remain unresolved. Pending theoretical debates, not to mention discrepancies between the existing theories on the subject and the realities of State practice, only serve to confirm this. This thesis attempts to explore those difficulties, relating them (though not exclusively) to an institution of international law which has been created by the operation of a customary process, namely, the Exclusive Economic Zone (EEZ). The EEZ is used to exemplify the development of customary law, rather than as a study in the substantive law of the sea. Two main objectives are pursued in this thesis: first, to further the understanding of the nature of customary international law, and secondly, to develop a method or technique whereby a customary rule can be identified.

Accordingly, the thesis has been divided into seven chapters. Chapter I introduces the reader to the concept of the international system, and describes the inter-relation between the international system and the international legal system. Chapter II offers a description and analysis of the drafting history of Art. 38 (2) of the Statute of the Permanent Court of International Justice with a view to unravelling the conception of customary law which underlies it and its successor, Art. 38 (1)(b) of the Statute of the International Court of Justice. Chapter III is an investigation into the practical and theoretical significance of the concept of consent in the formation of a customary rule.

The following two Chapters contain a study of the two components of a customary rule: the practice of States (IV) and the subjective element (V). Chapter IV seeks to determine, *inter alia*, what types of act constitute State practice and which organs of the State are considered to represent the State in their actions, so far as the customary process is concerned. Chapter V examines the various theories on the subjective element, and presents a tentative definition of the subjective element which takes into account the evolutionary character of the customary process. Drawing partially on the preceding chapters, Chapter VI is a study on the nature and operation of a customary process. This chapter considers three main issues: how State behaviour is affected by the international system; the legal effects of State acts and interactions; and the role of institutional means (i.e., international organizations) on the customary process. To test and illustrate the propositions and conclusions arrived at, this chapter refers especially to the customary process of the Exclusive Economic Zone. Finally, Chapter VII is an inquiry into the nature of the inductive method and its utility as a technique for ascertaining customary law, followed by a proposal for a general method.

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INTRODUCTION

This thesis is concerned with one of the recognized sources of international law, namely, customary international law. The relevance of a study on this subject can hardly be questioned. The decline, predicted by some commentators, of customary law as a law-making process has not materialized. On the contrary, the contemporary law-making effort of the United Nations has promoted on an unprecedented scale the development of general customary law in new fields. It is not surprising then that in the recent practice of the Court and arbitral tribunals, theoretical and practical aspects of customary law have constantly been raised. The need to explore this subject carefully therefore remains strong, for there remain many controversial issues related to it which need to be addressed. In initiating this type of investigation, however, one can clearly perceive the wide range of complex issues which are involved. This scenario may either intimidate or attract the investigator. To the mind of the present writer, the attraction of this issue lies precisely in its complexity.

This thesis has two main objectives. First, it purports to further the understanding of the nature of customary international law, both as a distinct type of law-creating process on the international plane and as a distinct body of international rules. The second objective of this thesis is to develop a method or technique whereby a customary rule can be identified. It has to be said that the formulation and effective use of this method is only possible if the nature of that which is to be ascertained (customary law) is first established. That is the reason why the elaboration of this method is the object of the last Chapter (VII).

The first six chapters, taken as a whole, are intended to explore some recurring and controversial questions related to customary international law. These questions include the following:

- What is the relationship between the international system and the international legal system? How is the operation of legal and political processes affected by the international system?
- What is State consent and what role does it play in the customary process?
- What is *opinio juris sive necessitatis*, how is it manifested in the customary process, and what is its role in the customary process?
- What is State practice? Which organs of the State are considered to represent the State in their actions, so far as the customary process is concerned? Which requirements have to be satisfied in order for an international practice to be regarded as an established custom?
- How does a customary process operate?

Each one of these questions raises other questions, and a satisfactory answer to them would seem to require the knowledge and use of a number of theoretical concepts and frameworks. For instance, one cannot understand properly the subjective element of a customary rule (*opinio juris*) without having recourse to some fundamental concepts studied in legal theory, such as the concept of legal obligation. Also, the nature of the international system and the customary process would seem to be best understood if one uses some theoretical positions offered by disciplines akin to international law, especially international relations. Hopefully, the reader will find that the study which follows takes due account of the need for a broader treatment of the issues concerned.

Many of the questions enumerated above have already been discussed in the doctrine. However, an analysis of the existing theories, doctrines or views on the customary process and the nature of the customary rule gives rise to some concern. As will be seen in the ensuing study, some theories show logical inconsistency, others misrepresent the realities of State practice and inter-State relations, and yet others provide only a partial description or explanation of the customary process and the customary rule (on account of excessive or exclusive emphasis on only one or some aspect(s) of the question). One of the reasons for

this situation may be found in the different conceptions that writers hold of underlying fundamental concepts such as law, international law, legal rule, legal system, and so forth. Sometimes a writer fails to realize his own assumptions, and sometimes he simply does not want to make it plain to others. In both circumstances, he employs terms, concepts and theoretical assumptions without first defining them. Apart from that, it also happens that a writer is viewing the phenomenon from a different perspective. Be that as it may, the apparent shortcomings of those theories do not necessarily make them worthless; each one has its own contribution to the growth of knowledge of the discipline.

How does this study stand in relation to those theories? It does not claim to be the definitive statement on customary law, nor does it purport to be an exhaustive treatment of the issue. It endeavours to explore the theoretical difficulties which those theories have identified or raised and attempts to reconcile them with the realities of State practice. Although this writer has attempted to state the issues clearly, and define his terms of reference and the meaning of the concepts adopted as much as possible, his personal limitations are easily seen by any reader. This study will achieve its aims if it succeeds not only in providing (tentative) answers, but also in raising other questions and discussions, for this writer associates himself with those who think that knowledge grows out of refutations and critical arguments.

With regard to the methodology adopted, the thesis has been organized roughly according to the general questions enumerated above. Thus, there are six chapters which deal with, respectively, the international system (Chapter I), Art 38 of the Statute of the Permanent Court of International Justice (Chapter II), State consent (Chapter III), State practice (Chapter IV), the subjective element (Chapter V), and the customary process (Chapter VI). As noted above, Chapter VII (A Note on the Inductive Method) relies on the preceding chapters to achieve the second objective set out for this thesis. The method employed in the thesis' arrangement is clear: the object of study has been divided into several related parts and each one of them is examined separately. This is done, however, without losing sight of

the interconnections between the various subjects involved. Hopefully, the structure as designed will present the reader with an overall idea of the main issues pertaining to the object of the thesis as defined above.

Finally, an explanatory note should be made on how the customary process of the Exclusive Economic Zone is dealt with in this thesis. It is not intended to present a full, separate analysis of the development of the customary process of the Exclusive Economic Zone. This task would go beyond the objectives of this thesis. Of course, the analytical framework developed in this thesis could in future be applied to a detailed and exhaustive study of this and other cases. For the purposes of this thesis, however, that particular customary process (or specific instances of State practice related to it) is used to illustrate and/or test the various propositions advanced and conclusions reached. The reader will notice that, in some cases, instances of State practice from other fields are also mentioned. These other instances were cited because they were regarded as good illustrations of the particular point that was being made. But overall, greater emphasis is laid upon the evolution of the customary process of the Exclusive Economic Zone, particularly in Chapter VI.

CHAPTER I

THE INTERNATIONAL SYSTEM

The expression 'international system' is sometimes used by writers on international law issues to refer (presumably) to the political and social environment in which States behave and of which States are but a component. However, few of them attempt to define what they mean by that expression. This attitude is to be regretted, for it is thought that if the concept of international system, and the theoretical approach associated with it, are properly defined and applied, one may understand better the nature and state of international law, and more importantly, the nature and operation of the customary process. This chapter purports firstly to explain the concept of international system and describe its general attributes, and then relate it to the international legal system. It is to be hoped that the ensuing study will help other inquiries which follow, especially Chapter VI, which deals with the customary process.

I. The International System

In international relations theory, the concept of international system is mostly associated with a systemic approach to international relations. Various theories have been advanced which claim to represent a systems theory. In general, a systems theory defines a system by reference to three main features: (1) the presence of regular interactions between some determined elements; (2) the integration of those elements into a whole; (3) the fact that the whole does not correspond to the mere sum of its elements. The presence of those features on the international plane has justified the formulation of the concept of international system.¹ Some clarifications must now be made. A social condition called 'interdependence', which manifests itself in the fact that the units of the system are mutually dependent in many ways and to various degrees, underlies characteristics 1 and 2 in the following way. It is the condition of interdependence which causes (and explains) the occurrence of regular interactions on the international plane between the units composing the system.² Also,

interdependence is a factor which causes (and explains) the integration of separate units into a coherent system.³ As regards characteristic 3, it is intended to mean that an international system is not only formed by a set of interacting units: it is supposed to have a structure as well. It is submitted that those two components of the international system are conceptually distinguished and each operates on a different level. The definition, for the purposes of this study, of each component of the international system will now be pursued.

The structure of the international system is constituted by the combination of two things: the arrangement of the system's units according to an ordering principle, and a distribution of capabilities amongst them.⁴ The ordering principle of the international system, that is, the principle which determines how the units stand in relation to one another, is anarchy. It is important to define clearly what is meant by anarchy here. Following the meaning generally attached to this term in international relations theory, anarchy is to be understood here as the absence of a world government (or a set of genuine supra-State institutions) and the existence of a decentralized realm where each unit constitutes an autonomous centre of decision.⁵ Whether any kind of international order amongst the units is possible in such situation is a question which can only be answered if first one's own conception of order is defined. Prof. Bull, for instance, in a study devoted solely to this theme, has defined international order as 'a pattern of activity that sustains the elementary or primary goals of the society of states, or international society'.⁶ If one then considers the goals to which he refers (for example, the preservation of the system, and the maintenance of independence or external sovereignty of individual states), it would seem that the international system's structure, though anarchic, is nevertheless far from showing a pattern of complete disorder or chaos. In short, the international system's structure may be anarchic and at the same time sustain a limited degree of international order. As will be seen below, international law is one of the factors which help the maintenance of that order.

The system's structure, as already pointed out, is also determined by the way in which the capabilities are distributed amongst the units of the system. In the international system, the

capabilities are unequally divided amongst them, which accounts for a *de facto* system of stratification characterized by an oligarchic configuration of power.⁷

The principal units of the international system are States. They are portrayed as rational entities which, by their behaviour, seek both their self-preservation and to increase their own capabilities. Thus, each unit stands against another in a permanent state of competition for power.⁸ Instances of international co-operation among the units result primarily from the perception of common interests and needs, and instances of agreement spring from the mutual accommodation of interests.⁹

In line with Prof. Waltz's view, a fundamental assumption in this work is that the two components of the international system mutually affect each other and both contribute to the legal and political outcomes in the system.¹⁰ Generally speaking, the system's structure influences the behaviour of the units and the outcomes of such behaviour. A unit, therefore, is unable to control the political and legal processes within the system; on the contrary, its behaviour may lead to unwanted consequences by reason of structural constraints.¹¹ The structure as described above influences the behaviour of the units in various ways. For instance, the asymmetric distribution of capabilities means that, in an anarchic arena, a greater role is played by the more powerful States. The particular ordering principle, in turn, determines that the political and legal processes within the system are ultimately collective, i.e., their outcomes depend upon the reaction (or behaviour) of the generality of States.¹² An anarchic arena composed of units with different capabilities also stimulates competition between them. When there is competition among units which are interdependent but autonomous and 'egocentric', the results of individual initiatives become somewhat unpredictable, since they depend on the reaction of other units which (supposedly) act on the basis of their particular interests.¹³

Prof. Aron has proposed a classification of international systems on the basis of their social texture. Thus, an international system is homogeneous when its units organize themselves

according to the same principles and claim the same values.¹⁴ In his view, the contemporary international system is heterogeneous. It is submitted, though, that the international system displays traces of both homogeneity and heterogeneity, depending on the perspective adopted. For instance, if one bears in mind the common needs and interests shared by States with relation to international peace and security, the system would be homogeneous. That would be the case in respect of other needs as well, particularly those related to the maintenance of the international system and the preservation of its components. On the other hand, each individual State has its own national interests (as it sees them) to pursue in the international arena, and the power resources available vary considerably. There are even groups of States which act uniformly to achieve some special interests, and they may be opposed by other special-interest groups. All these competitive claims and interests show that the international system is also heterogeneous, and a good illustration of this is found in the disparate interests at stake during the Third United Nations Conference on the Law of the Sea.

II. The Relationship between the International System and the International Legal System

It is submitted that international law's structure, process and norms reflect the nature of the international system. Thus, in view of the ordering principle of the system's structure (anarchy), international law recognizes each State as an equal sovereign, and therefore relationships between them are formally horizontal in nature, being based on co-ordination or integration.¹⁵ Similarly, the prevailing ordering principle in the international system explains the fact that, in contrast with a municipal legal system, the formal structure of the international legal system exhibits a conspicuous institutional deficiency in the lack of a centralised (international) legislature, a judicial organ endowed with compulsory adjudication *erga omnes*, and a centralised mechanism or authority empowered to enforce its norms and the decisions of the judicial authority.¹⁶ Its institutional framework consists of decentralised law-creating methods or processes, 'loose' (voluntary) mechanisms, institutions or processes for settling inter-State disputes, and various degrees and types of decentralised (though in some cases collective or organised) sanctions or enforcement actions. It follows that the interpretation of

the rules of international law, the matters regulated by them, their normative quality, and their range of application are largely conditional upon the discretion of its addressees.¹⁷

When it is said that the legal processes within the system are decentralized, this does not mean that each unit is an autonomous and self-sufficient legislative authority. International law, like municipal law, is a social phenomenon: it has been made necessary by the fact that each State lives in a society of other like entities, and therefore a body of norms with general scope *ratione personae* is required to regulate every individual conduct in a manner which takes into account the rights and duties of all States. Kant, realizing that law imposed limitations on individual freedom 'to the extent of its agreement with the freedom of all other individuals', concluded, with regard to the formation of law, that 'it is only when all determine about all that each one in consequence determines about himself'.¹⁸ This seems to hold true for the international legal process, so far as it can only lead to the creation of general norms of international law when the generality of States participates in it. In international legal discourse, this unorganized ensemble of units (just referred to as the 'generality of States') is commonly described by the expression 'international community of States'.¹⁹ Thus, Art. 53 of the Vienna Convention on the Law of Treaties prescribes that a given international norm is a rule of *jus cogens* only if it has been 'accepted and recognized' as such by the 'international community of States as a whole'.²⁰

International law and existing international institutions function as pillars of the international system. International law upholds the international system through the application of a set of fundamental rules and principles which constitute a minimum necessary for the system's maintenance and orderly operation. For instance, formal equality amongst States, their sovereign existence, territorial integrity and political independence, and the pacific settlement of disputes which may arise between them should be secured by the uniform and universal application of those rules. In this sense, all those rules may be regarded as primary systemic rules. They contribute to what Prof. Mosler has termed 'l'ordre public de la communauté internationale'.²¹

From the perspective of the system's units alone, international law may be regarded as a derivative structural element, i.e., an element determined by the system's structure which acts as a structural constraint on the behaviour of the units.²² It is today indisputable that every State has to accept some degree of legal limitation to its own autonomy and freedom of action if it is to be a recognised and acting component of the current international system. But international law plays a wider role than merely restricting State behaviour: it regulates, formalizes and determines the legal consequences of interactions between States.²³ Indeed, without international law, a regular or smooth process of interactions amongst the system's units would be more difficult. It would seem sufficient to point out that without international law there would be no security in bilateral or multilateral engagements entered into by States. Last but not least, international law also provides States with the 'legal entitlements' (rights and duties) necessary to formally (or legally) define them as subjects of international law.²⁴

There seems to be a permanent tension within the international system between the need for strengthening it and the inherent struggle for power among its components.²⁵ This oscillation between co-operation and conflict within the international system is reflected in the content and state of international law. As a matter of fact, any form of international regulation arrived at presupposes some degree of co-operation, but a distinction may be drawn between patterns of co-operation (which strengthen the international system) and patterns of conflict in international law. Patterns of co-operation are manifested, for instance, in those 'primary systemic rules' mentioned above, and in other norms of general international law which are also community-oriented in content but differ from primary rules in that they do not perform the same function, that is, their operation is not essential to the maintenance of the international system.²⁶ To a detached observer, all those general rules and principles would apparently bear witness to a certain degree of homogeneity in the international system and some hierarchy or pattern of structural relations amongst the norms of the international legal system.

On the other hand, patterns of conflict are reflected in international law when the importance attached by States to considerations of national interest in their foreign policy and behaviour

creates highly competitive environments in some fields, causing the fragmentation of the respective legal regimes and affecting the degree of effectiveness of its norms.²⁷ This is plainly illustrated by the existence of conflicting (general or other) rules and principles; particular rules and regimes which derogate from general rules and principles; mechanisms or techniques whereby States may avoid or change the operation of rules in order to fit their own interests (such as contracting out arrangements or escape clauses, reservations, and compromise texts which are ambiguous and therefore capable of different if not contradictory interpretations); violations of general rules and principles (though often justified by the perpetrator on legal grounds); and so forth.

¹ See, *inter alia*, Bertalanffy, Ludwig von, General System Theory (New York, George Braziller, 1968), pp.18-19; Braillard, Philippe, Théorie des systèmes et relations internationales (Bruxelles, Établissements Émile Bruylant, 1977), pp.51, 149-150; Holsti, K., International Politics (New Jersey, Prentice-Hall, 1967), p.29; Kiss, A., and D. Shelton, Systems Analysis of International Law: A Methodological Inquiry, Netherlands Yearbook of International Law 1986, pp.45-50.

² The term 'interaction' refers here to acts and reactions of, or communications between, the system's units on all fields (economic, political, and so forth). Although interdependence undoubtedly accentuates the need for interactions between the units, it does not necessarily imply stability and order within the system.

³ See Deutsch, Karl, The Analysis of International Relations (New Jersey, Prentice-Hall, 1978), pp.198-201

⁴ See Waltz, K., Theory of International Politics (California, Addison-Wesley, 1979), pp.80-101.

⁵ See, for example, Axelrod, Robert and R. Keohane, Achieving Cooperation under Anarchy: Strategies and Institutions, 38 (1) World Politics 1985, p.226.

⁶ See Bull, Hedley, The Anarchical Society (London, Macmillan Press, 1977), pp.8, 16-19.

⁷ In Prof. Aron's words: 'La structure des systèmes internationaux est toujours oligopolistique'. See Aron, Raymond, Paix et guerre entre les nations (Paris, Calmann-Lévy, 1962), p.104.

⁸ Prof. Morgenthau has put it in this way: 'International politics is a struggle for power. Power is the immediate aim.'. See Morgenthau, Hans, Politics among Nations (New York, A. Knopf Inc., 1948), pp.13-14.

⁹ It is noteworthy that Hume also explained how (egoist) men could submit themselves to limitations upon their behaviour by reference to their common interests: 'It is only a general sense of common interest... which induces them to regulate their conduct by certain rules'. See Hume, D., A Treatise of Human Nature (Oxford, Clarendon Press, 1960), Selby-Bigge (ed.), p.490.

¹⁰ See Waltz, *op. cit. supra* n.4, pp.39, 68, 74.

¹¹ *Ibid.*, pp.107 *et seq.* This point will be developed further in Chapter VI.

¹² Thus, the existence of international institutions would seem to reflect the need for the participation of the generality of States in those processes.

¹³ An example given by Prof. Waltz illustrates well the point: 'If one expects others to make a run on a bank, one's own prudent course is to run faster than they do even while knowing that if few others run, the bank will remain solvent, and if many run, it will fail. In such cases, pursuit of individual interest produces collective results that nobody wants, yet individuals by behaving differently will hurt themselves without altering outcomes'. See *op. cit. supra* n.4, pp.107-108.

¹⁴ See *op. cit. supra* n.7, p.108.

¹⁵ The fundamental principle of sovereign equality - enshrined in the UN Charter, and reaffirmed in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UN General Assembly Resolution 2625) - is a good example of the rejection, by States, of any *a priori* state of subordination in their relations with one another. Other concepts such as territorial integrity and political independence are also illustrative of this. It is not denied, however, that there may be diverse degrees of *de facto* political or economic subordination in inter-State relations.

¹⁶ The structure of the international legal system is still far from representing a world legislature or even a federal legislature. See Cheng, Bin, Introduction to Subjects of International Law, in International Law: Achievements and Prospects (Paris, Martinus Nijhoff, 1991), M. Bedjaoui (ed.), pp.33-34.

¹⁷ It is not suggested that in view of these characteristics, the international legal system is not a legal system at all, or that it is inoperative and ineffective. The best position in this respect seems to be held by those who, despite acknowledging its weaknesses and its uniqueness, consider that it works well up to a point as a legal system as its rules are generally observed by States in their mutual intercourse.

¹⁸ See Kant, Immanuel, Eternal Peace (Boston, The World Peace Foundation, 1914), translated by W. Hastie, pp.30, 37.

¹⁹ One of the definitions given by Prof. Basdevant to the expression reads as follows: 'Expression employée... pour désigner l'ensemble des Etats en tant qu'ils sont rapprochés par le sentiment de communauté... et qu'ils constituent, en conséquence, une collectivité, une société régie par le droit international'. See Basdevant, J., Dictionnaire de la terminologie du Droit International (Paris, Sirey, 1960), p.132. Prof. Schwarzenberger has made the following distinction between 'society' and 'community': in the former, conflicting interests and the 'law of power' prevails, while in the latter identical interests and the 'law of co-ordination' predominates. He maintains that relations between sovereign States 'are more typical of those found in a society than in a community'. See A Manual of International Law (London, Stevens & Sons, 1967), pp.10-12. This distinction is untenable because even he concedes that in actual life those two types of social relations are hybrid, i.e., one finds conflicting interests in a community and identical interests in a society. It would perhaps be more convenient to use both expressions interchangeably. At any rate, the expression 'international community of States' is meant here to encompass both co-operation and conflict between its members.

²⁰ See also use of the expression by Denmark in I.C.J. Pleadings, North Sea Continental Shelf cases, Vol. I, 1968, p.190; Australia and New Zealand in Nuclear Tests cases, Pleadings, Vol. I, p.502, Vol. II, pp.266-267; Hungary in I.C.J. Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order n.1 of 26 January 1971, Vol. I, p.359. As to the Court, see Barcelona Traction, Light and Power Company Limited, Judgement, I.C.J. Reports 1970, p.32, paras.33-34.

²¹ See Mosler, Hermann, The International Society as a Legal Community (The Netherlands, Sijthoff & Noorhoff, 1980), pp.17-20. See also comments by Prof. Lauterpacht on his Draft Articles on the Law of Treaties, where he mentions the existence of 'principles of international public policy', in Yearbook of the International Law Commission, 1953, Vol. II, pp.154-155. The International Law Commission has also made a distinction, in its Draft on State Responsibility, between obligations which are 'essential for the protection of fundamental interests of the international community' and those which are not. See Yearbook of the International Law Commission, 1980, Vol. II, Part II, pp.27 and 32.

²² See Abbott, Kenneth, Prospectus for International Lawyers, 14 Yale Journal of International Law 1989, pp.344-346.

²³ See Henkin, Louis, How Nations Behave (New York, Columbia Univ. Press, 1979), p.15. In the words of Dr. Kratochwil, 'Law, therefore, is not simply a "constraint", but it also functions to orchestrate and thereby facilitate, social interaction'. See Kratochwil, F., Thrasymachos Revisited: On the Relevance of Norms and the Study of Law for International Relations, in International Law (Aldershot, Dartmouth, 1992), M. Koskenniemi (ed.), p.49.

²⁴ See D'Amato, A., Is International Law Really "Law"?, in M. Koskenniemi (ed.), International Law (Aldershot, Dartmouth, 1992), pp.39-41.

²⁵ The conflict between a State's aims and needs and the system's requirements has been referred to by Prof. Coplin in his article International Law and Assumptions about the State System, in The Theory and Practice of International Relations (New Jersey, Prentice-Hall, 1974), David McLellan *et alii* (eds.), p.355. Kant has described a similar tendency on human society in those terms: 'By this antagonism I mean... their tendency to enter into society, conjoined, however, with an accompanying resistance which continually threatens to dissolve this society'; he calls it 'the unsocial sociability', see *op. cit. supra* n.18, p.9.

²⁶ This seems to be the case of the common heritage of mankind principle. It is not intended here to classify those two groups of rules according to their normative value (whether one group represents rules of *jus cogens*, for example) or examine their hierarchy. This task has been performed by Prof. Macdonald in his article Fundamental Norms in Contemporary International Law, The Canadian Yearbook of International Law 1987, pp.115-149.

²⁷ For an account of the fragmentation of a specific legal regime, see Mendelson, M.H., Fragmentation of the law of the sea, Marine Policy 1988 (July), pp.192-200.

CHAPTER II

ARTICLE 38 OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

This chapter purports to describe the drafting history of Art. 38 (2) of the Statute of the Permanent Court of International Justice, and then investigate the positions assumed by the members of the drafting committee with a view to unravelling a common conception of customary law which may underlie it. Having regard to the importance attached to this article by international tribunals and writers alike, it is considered that the conclusions drawn from this exercise may shed some light on the understanding of customary law.

I. Drafting History

By article 14 of the Covenant of the League of Nations, the Council was entrusted with the preparation of plans for the establishment of a Permanent Court of International Justice. A committee of jurists, named the Advisory Committee of Jurists, was immediately set up by the Council with the view of devising a Statute for the future organ.¹ At the very beginning of its work, the Committee had before it a number of plans for the constitution of the Court advanced by various States. Some of them made no mention of the rules to be applied by the Court for determining the rules of international law, whereas others attempted to list them in detail.

A first proposal was presented in 1918 by Sweden, Denmark and Norway, containing a draft for an international juridical organization which should apply, in the absence of any conventional law, 'established rules of international law' or 'generally recognised rules'.² This plan was apparently replaced by the Five Neutral Powers plan (Denmark, Norway, the Netherlands, Sweden and Switzerland), in which the Court was called upon to apply, in the absence of any treaty provision, the 'recognised rules of international law'.³ An individual

scheme was also forwarded by Switzerland, in which the proposed Court should apply, in the absence of any agreements in force, the principles or generally recognised rules of the law of nations.⁴ Another formula, rather simple and concise, was presented by Germany, whose project prescribed that the Court should decide in accordance with international agreements, international customary law, and general principles of law and equity.⁵

In addition to the proposals advanced by States and other entities, the Committee took into account existing conventions which dealt with the matter.⁶ The Convention for the Establishment of a Central American Court of Justice, for instance, prescribed that points of law should be decided by the Court in accordance with the principles of international law.⁷

In examining the proposals, a member of the Committee, Lord Phillimore, initially advocated the wording of the Five Powers' project, with a minor modification: he wished to add to the words 'rules of international law' the words 'from whatever source they may be derived', so that there remained no doubt as to whether the Court could apply rules of customary law.⁸ In reality, despite the fact that the Final Report of the Committee referred to the plan of the Five Powers as a valuable source of information, the Committee seems to have departed from the plan in many respects. The first text upon which the Committee worked was a proposal made by Baron Descamps, the President of the Committee, which reads as follows:

The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:

1. Conventional international law, whether general or special, being rules expressly adopted by the States;
2. International custom, being practice between nations accepted by them as law;
3. The rules of international law as recognised by the legal conscience of civilized nations;
4. International jurisprudence as a means for the application and development of law.⁹

Descamps' proposal displayed some points which are common to most of the drafts mentioned above. There is, firstly, an order of precedence in the application of the different rules of international law. Secondly, the idea of customary rules as a distinct category of norms of international law was recognised, although its definition was not very clear. This

proposal was soon replaced by an amended text submitted by Mr Root and Lord Phillimore.

The new text incorporated several amendments in the following terms:

The following rules are to be applied by the Court within the limits of its competence, as described above, for the settlement of international disputes; they will be considered in the undermentioned order:

1. Conventional international law, whether general or special, being rules expressly adopted by the states which are parties to a dispute;
2. International custom, being recognised practice between nations accepted by them as law;
3. The general principles of law recognised by civilised nations;
4. The authority of judicial decisions and the opinions of writers as a means for the application and development of law.¹⁰

Point two of the new proposal was slightly different from the original text, in that the word 'recognised' had been added to the English text. The French wording, however, maintained the expression 'common practice' (*pratique commune*), which added another difficulty to the interpretation of the provision. This modification was discarded in a subsequent proposal which was sponsored by Baron Descamps and Lord Phillimore, and later on amended by Mr Rucci-Busatti. It reads as follows:

The rules to be applied by the Court for the settlement of any international dispute brought before it, arise from the following sources:

1. International conventions, either general or special, as constituting rules expressly adopted by the States which are parties to a dispute;
 2. International custom as evidence of common practice among said States, accepted by them as law;
 3. The general principles of law recognised by civilised nations;
- The Court shall take into consideration the judicial decisions rendered by it in analogous cases, and the opinions of the best qualified writers of the various countries, as means for application and development of law.¹¹

This proposal brought the English text of point two into line with the French text, and added a significant modification: the customary rule, in order to be applicable to the parties, should be in force between them, that is to say, the parties should be following the customary practice and accepting it as law. This was a point about which Mr Rucci-Busatti felt very strongly, and he held this view throughout the works of the Committee.

At the 24th meeting of the Committee a plan on various issues under discussion was submitted by Lord Phillimore and Mr Root. The Root-Phillimore plan abandoned the main alteration to point two suggested in the last proposal but preserved the general features of the previous proposals. Art. 31 of the plan prescribes the following:

The rules to be applied by the Court, within the limits of its jurisdiction as defined above, in the settlement of international disputes, are the following, and are to be applied in the order in which they appear below:

1. Conventional international law, whether of a general or special nature, forming the rules expressly adopted by the States which are parties to the case;
2. International custom, as evidence of a common practice in use between nations and accepted by them as law;
3. The general principles of law recognised by civilised nations;
4. The precedent of judicial decisions and the opinions of the publicists as means for the application and development of law.¹²

Later a Drafting Committee was appointed with a view to drafting the final formula of the whole project on the basis of existing proposals. With regard to the rules to be applied by the future Court, two texts were submitted by the Drafting Committee. The wording of point two remained the same in both texts, and the final Draft Scheme adopted by the main Committee reads as follows:

Article 35. The Court shall, within the limits of its jurisdiction as defined in article 34, apply in the order following:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
2. International custom, as evidence of a general practice, which is accepted as law;
3. The general principles of law recognised by civilised nations;
4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹³

Paragraph two of the Draft Scheme prepared by the Advisory Committee of Jurists remained almost unchallenged when examined by the Council and the Third Committee of the League of Nations. The only country to suggest an amendment was Argentina. The Argentinian amendment reads as follows:

2. International custom, as evidence of a practice founded on principles of justice and humanity, and accepted as law;¹⁴

The Argentinian proposal was rejected by the Third Committee, which finally adopted paragraph two as worded in the Draft Scheme of the Advisory Committee of Jurists.¹⁵ The Final Draft Scheme presented to the First Assembly of the League of Nations by the Third Committee reads as follows:

Article 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
 2. International custom, as evidence of a general practice accepted as law;
 3. The general principles of law recognised by civilised nations;
 4. Subject to the provisions of art 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;
- This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.¹⁶

This Final Draft Scheme was approved by the Assembly of the League of Nations on December 1920 in a Resolution concerning the establishment of the Permanent Court of International Justice.¹⁷ A review of the whole Statute was made in 1929 by another Committee of Jurists, but Art. 38 remained unaffected, apart from a minor alteration in the French text of paragraph four.¹⁸

II. The Interpretation of the Committee

Was there a common understanding, by the members of the Committee, of the meaning to be attributed to this article? That is a question to which no definite answer is possible. The way in which the whole article was formulated certainly does not offer much help, since it incorporated compromises from different legal traditions or systems.¹⁹ Furthermore, the fact that two or more members of the Committee agreed on the formulation of a provision does not necessarily mean that they were in agreement as to its interpretation. But the greatest difficulty in assessing the understanding of the Committee lies in the deficient records of its proceedings, especially of the opinions adduced by the members on the various proposals. Despite those limitations, it is thought possible to ascertain, though tentatively, the understanding of the members of the Committee on some aspects of the provision.

In explaining his original proposal, Baron Descamps defined an established custom as a 'rule established by the continual and general usage of nations, which has consequently obtained the force of law'. He then added that custom resulted from the 'constant expression of the legal convictions and of the needs of the nations in their mutual intercourse'.²⁰ The time or repetition element is clearly present in his definition ('continual'), and the reference made to a 'general usage' might indicate that he envisaged only general customary law. The striking thing about his explanation, however, is that he seemed to consider the normative attribute of the rule (in his words, 'the force of law') as a mere **consequence** of the first elements (time or repetition and generality of practice). If this is what he really meant, then it is plausible to assume that what underlies point two of his proposal is the idea that the determinant factor for the establishment of an international customary rule is the existence of a 'general practice', and the expression 'accepted as law' would allude to an effect implied from that practice. His observation that custom resulted from the 'constant expression of the legal convictions' could be read in this sense, so far as those legal convictions are considered to be implied from the general and continual practice. With regard to the word 'needs', he seems to be saying only that every custom (or law) is necessary; it would seem unjustified to read beyond that.

It is to be remembered that Baron Descamps' formulation of point two was similar to the following definition of custom offered by Isidore long before: 'custom is a kind of law instituted by general conduct, which is accepted as law [i.e., written law] when law is lacking'.²¹ The interpretation given by Suarez to that definition corresponds to the views expressed by Baron Descamps on custom. Suarez considered that the expression 'accepted as law' refers to the 'juridical element' of a customary rule, and that this element is but an effect of the frequency or repetition of general conduct, which he termed the 'factual custom'.²²

Did other members of the Committee understand the wording of point two of Baron Descamps' proposal in the same sense as he did? That is not clear, although there is no doubt that the wording of his proposal finally prevailed. Four members of the Committee expressly manifested - at different stages of the works of the Committee - their support for point two of

Descamps' proposal: Mr Root, Mr Loder, Lord Phillimore and Mr de Lapradelle.²³ It also is to be noted that the Final Report of the Committee, in commenting on the rules to be applied by the Court according to the final Draft, mentioned 'international custom in so far as its continuity proves a common usage', leaving aside any reference to the element of acceptance of the practice as law.²⁴ There may be a case for arguing that the general feeling of the Committee as regards the expression 'accepted as law' was that it either referred to the normative quality of the rule, which would be a consequence of an existing general and continual practice, or to the consent of the States to the corresponding customary rule, which would be an element implied from this practice.

The only member who opposed the wording of paragraph two was Mr Rucci-Busatti. Since his views were clearly rejected by the Committee, one could infer from this what was **not** regarded as international customary law in the minds of the members of the Committee.

Mr Rucci-Busatti held the view that a rule of customary law could be applied to a case before the Court only if the parties to the case followed the corresponding practice and accepted it as law. This view lays a strong emphasis upon the recognition of the rule by each party so as to make this rule binding on them, what draws the notion of customary law near to that of treaty law. It is not difficult to understand why, in voting against the wording of point two of the Final Draft, he declared that 'custom, like any other convention applicable to a case, must be in force between the parties in dispute'.²⁵ A somewhat similar view had been endorsed by contemporaneous writers such as Bonfils and Fauchille, when they affirmed that reciprocity was important for the creation of a customary rule because customary law was a tacit convention.²⁶ It is not clear whether the Committee rejected Mr Rucci-Busatti's viewpoint because it understood that a general customary rule might be applicable to a State which plainly had neither pursued the conduct required nor accepted it as law. A reasonable conclusion would be that the Committee regarded as perfectly possible the application - by the future Court - of a general customary rule to a State without having first to establish the recognition of the rule by this State, provided that the rule had already secured general

recognition as reflected by a general practice pursued as a matter of legal obligation. Indeed, some distinguished writers have held that this is the correct interpretation, which is sustained by subsequent international judicial and arbitral practice on the matter.²⁷

A common feature in the majority of the proposals submitted by States, regarding the law to be applied by the Court, is the definition of customary rules as (generally) recognised rules of international law. What was intended by the word 'recognition' is a matter for speculation, since those proposals were unaccompanied by any explanation. Perhaps the meaning to be attributed to those proposals was simply that, as Mr Root and Mr Adatci remarked, customary law is 'positive international law', or as Lord Phillimore said, it is 'international law actually in force'.²⁸ Anyway, the first amendment advanced by Mr Root and Lord Phillimore stated that international custom would be 'recognised practice between nations accepted by them as law'. As the word 'recognised' was deleted in future texts with the sanction of Mr Root and Lord Phillimore, one is led to conclude that in the end they were satisfied that the word would not add much to the text. The Committee, for instance, might have reached the conclusion that when States pursue a course of conduct which is generally adopted as a matter of law, then their recognition of the corresponding customary rule would be implied from their own conduct, what made the word 'recognised' a useless repetition.

It is significant that the amendment to the text of point two proposed by the Argentinian delegation - by which the practice would have to be 'founded on principles of justice and humanity, and accepted as law' - was rejected by the Sub-Committee of the Third Committee of the League of Nations. The Argentinian proposal meant that not all general practices would bring about a customary rule, even if they were also accepted as law; it would have restricted the validity of State conduct as a law-creating factor to those cases in which it were in harmony with the subjective principles of justice and humanity. Moreover, there is no reference in the amendment to the degree of participation in the practice, a fact which might suggest that a custom may be created regardless of the number of States involved in it. The

rejection by the other States to this proposed amendment shows their disapproval of the ideas underlying it.

Paragraph two of Art. 38 refers only to a general practice, which suggests that the Committee dismissed or did not address itself to the possibility of the Court applying a bilateral or special customary rule. One can only speculate as to the reasons which motivated the position adopted by the Committee: 1) it could have been thought not to be possible for a rule of this kind to come into being; 2) this type of rule may have been regarded as requiring proof of its recognition by each contesting State before the Court could apply it, as advocated by Mr Rucci-Busatti, though the majority was not prepared to concede this; 3) the Committee may have been seeking to list and define only general rules of international law, apart from particular conventional law.

III. Doctrinal Discussions

The wording of Art. 38, paragraph two, of the Statute of the Permanent Court of International Justice (and Art. 38, paragraph 1(b) of the Statute of the subsequent International Court of Justice, which is substantially the same) has been construed in different ways. At least three distinct interpretations of that provision have been advanced. There are firstly those who argue that it may be interpreted in the sense of providing a description of a particular type of rule (the customary rule) to be applied by the Court. Others would say that it deals with the definition of the particular process whereby a customary rule is generated (the customary process). Finally, the case has also been made that it can be read as an (absurd) authorization for the Court to apply a qualified type of 'practice' (as opposed to a legal rule) to the dispute.²⁹ These questions could be partially clarified if one assumes that Art. 38 lays down various types of international rules which the Court is bound to apply, and paragraph two represents, in this context, a definition of an **established** customary rule. It does not, therefore, take into account the development of a customary rule within the legal process. The customary rule to be applied, in the meaning of Art. 38, has already matured, and this explains why the corresponding practice is 'accepted as law', that is to say, *lex lata*. There is every

reason for this position: States, for instance, would be reluctant to allow the Court to apply an incipient customary rule which might be contradicted by another established or nascent rule or even opposed by many States, including the contending States.

A common criticism of the wording of that provision is that a customary rule does not, as the article declared, evidence a general practice accepted as law, but the reverse is the case.³⁰ In this sense, the original proposal of Descamps would seem to have been better formulated, since it avoided altogether the word 'evidence' and used instead the word 'being', thus making it clear that what followed was intended to be a definition of custom.

The argument has also been advanced that the wording of the provision, especially the expression 'accepted as law', reveals the conception that the customary rule exists prior to the general practice concerned; thus, the general practice would be only an evidence of that rule.³¹ There is, however, no indication that the members entertained this notion of customary law. As already pointed out, a study of the positions assumed during the works of the Committee suggests (though this is rebuttable) that the conception of customary law held by the majority of the members was that the customary rule results from the general practice of States.

Although Art. 38 has raised some doctrinal arguments and criticisms, its operation by the PCIJ did not encounter much difficulties. When the United Nations Conference on International Organization began its work on the establishment of the International Court of Justice, there were two recommendations advanced by States concerning the insertion of this article in the Statute of the future Court. The Informal Inter-Allied Committee supported the preservation of the article, asserting that 'although the wording of this provision is open to criticism, it has worked well in practice and its retention is recommended'. Likewise, Venezuela expressed the view that the provision of Art. 38 did not give rise to 'any fundamental objection'.³² The United Nations Committee of Jurists, which was set up to prepare the Statute of the International Court of Justice, finally decided to preserve the text of the article, justifying this decision on the ground that the article had given rise to 'more

controversies in doctrine than difficulties in practice'. Its Final Report also made clear that it expected the future Court to 'put the article into operation'. In fact, the experience of both the Permanent Court of International Justice and the International Court of Justice indicates that the Court has not been limited by a strict interpretation of Art. 38, being always ready to assimilate the developments of State practice and international relations. The fact of the matter is that as soon as 1928, a good deal of arbitration treaties had adopted that article, and reproduced *in toto* its paragraph two, in their provisions regarding the applicable law.³³

How the Permanent Court interpreted this provision, and particularly, how the International Court of Justice interpreted it, this is a question which will be examined in the chapters which follow.

¹ The Committee was composed of Mr Adatci (Japan), Mr Altamira (Spain), Mr Bevilacqua (Brazil, later replaced by Mr Fernandes), Baron Descamps (Belgium), Mr Hagerup (Norway), Mr de Lapradelle (France), Mr Loder (Netherlands), Lord Phillimore (United Kingdom), Mr Rucci-Busatti (Italy), and Mr Root (USA).

² See Permanent Court of International Justice, Advisory Committee of Jurists, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice (London, 1920), p.179.

³ See Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, July 16th - July 24th, with annexes (The Hague, Van Langenhuysen Brothers, 1920), p.89.

⁴ See *op. cit. supra* n.2, .267.

⁵ See *op. cit. supra* n.3, p.91.

⁶ The other entities mentioned were the Interparliamentary Union and International Law Union, *Ibid.*, pp.89-91.

⁷ See *op. cit. supra* n.2, pp.146-147.

⁸ See *op. cit. supra* n.3, p.295.

⁹ *Ibid.*, p.306.

¹⁰ *Ibid.*, p.344.

¹¹ *Ibid.*, p.351.

¹² *Ibid.*, p.548.

¹³ *Ibid.*, pp.636, 680.

¹⁴ League of Nations, Permanent Court of International Justice, Documents Concerning the Action Taken by the Council of the League of Nations under Art. 14 of the Covenant (Geneva, 1921), p.68.

¹⁵ There is no comment within the Sub-Committee of the Third Committee on the refusal of the Argentinian proposal, *Ibid.*, p.145.

¹⁶ *Ibid.*, p.219.

¹⁷ *Ibid.*, p.257.

¹⁸ See League of Nations, Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes of the Session held at Geneva, 1929, p.124 (Final Report).

¹⁹ See Scelle, Georges, Essai sur les sources formelles du droit international, in Recueil d'études sur les sources du droit en l'honneur de François Geny (Paris, Libr. du Recueil Sirey), Tome III, p.411.

²⁰ See *op. cit. supra* n.3, p.322.

²¹ See The Classics of International Law (n.20), Selection from Three Works of Francisco Suarez (Oxford, Clarendon Press, 1944), ed. James Brown Scot, Vol. II (The Translation), p.441-442.

²² *Ibid.*, pp.445-448.

²³ See *op. cit. supra* n.3, p.293-295, 584.

²⁴ *Ibid.*, p.729.

²⁵ *Ibid.*, p.729.

²⁶ See Bonfils, Henry, Manuel de droit international public (Paris, Libr. Arthur Rousseau, 1914), pp.24-25; Fauchille, Paul, Traité de droit international public (Paris, Rousseau & Cie, 1922), Tome I, pp.42-43.

²⁷ See Basdevant, Jules, Règles générales du droit de la paix, 58 Recueil des Cours de l'Académie de Droit International 1936-IV, p.509; Le Fur, Louis, La coutume et les principes généraux du droit comme sources du droit international public, in Recueil d'études sur les sources du droit en l'honneur de François Geny (Paris, Libr. du Recueil Sirey), Tome III, p.363.

²⁸ See *op. cit. supra* n.3, pp.294-295.

²⁹ See, *inter alia*, Kelsen, Hans, The Law of the United Nations (London, Stevens & Sons Ltd, 1951), p.533; Wolfke, Karol, Custom in Present International Law (Wroclaw, 1964), p.18.

³⁰ See De Visscher, Charles, La codification du droit international, 6 Recueil des Cours de l'Académie de Droit International 1925-I, p.352.

³¹ Lauterpacht, Hersch, Règles générales du droit de la paix, 62 Recueil des Cours de l'Académie de Droit International 1937-IV, p.62; Kelsen, *op. cit. supra* n.29, p.533.

³² See Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. XIV, United Nations Committee of Jurists, UN Information Organizations, New York, pp.435-436.

³³ See, for instance, Acte général de conciliation, de règlement judiciaire et de règlement arbitral (1928), Art. 18; Convention pour le règlement pacifique des différends entre la Finlande et la Norvège (1926), Art. 2; Traité d'arbitrage et de conciliation entre l'Allemagne et les Pays-Bas (1926), Art. 4; Traité d'arbitrage et de conciliation entre l'Allemagne et le Danemark (1926), Art. 4; Traité d'arbitrage et de conciliation conclue entre l'Allemagne et la Suisse (1921), Art. 5; Traité de conciliation d'arbitrage et de règlement judiciaire entre la Norvège et la Pologne (1929), Art. 6; in Permanent Court of International Justice, Series D, n.6, Collection of Texts Governing the Jurisdiction of the Court, 1932, pp.75, 160, 183, 187, 289, and 411.

CHAPTER III

STATE CONSENT

The purpose of this Chapter is to examine the issue of State consent from the perspective of the customary process alone, that is, attention is focused on the delimitation of the concept and its general role in the formation of a customary rule. Theories which stress the need for State consent in the legal process are commonly classified as consensualist or voluntarist. They have been formulated with a view to answering the problem of the basis of obligation in international law, especially the question why are international legal rules binding on States. But those theories have also had an impact on the field of formal sources of law. This Chapter examines first those theories which are deemed to represent the mainstream of consensualism in order to evaluate their explanatory power and general consistency. In particular, this examination will seek to know whether those theories provide a satisfactory answer to this fundamental question: 'Does State consent alone, i.e., independent of any superior norm to that effect, explain the transmutation of a given standard of conduct into a customary rule or, in other words, is State consent alone that which imparts to a customary rule its legal character?' The second part of this Chapter purports to examine the proposition that the expression of State consent is a necessary step in the procedure which leads to the formation of a customary rule. That proposition contains both theoretical and factual assumptions which will require careful consideration.

I. A Critique of Consensualist Theories

Historically, the first elaborate ideas about the need for State consent in a legal process were developed during the classic period of international law. Classic writers used it to explain the creation of positive legal rules (as opposed to natural law rules and principles) in a society which lacked a centralized legislative authority. Thus, Vattel and Wolff classified customary

law as 'Voluntary Law of Nations', and noted, like Grotius and Vitoria, that customary law arose from the (tacit) consent of States.¹

In general, consensualist views which have developed since the classical period rely strongly on two main premises: 1) that States are sovereign and independent entities and 2) that there is no superior legislative authority. From those premises, they justify their conclusions that States are their own law-makers, and that they exercise their law-making capacity by the operation of their will. The main theories are discussed below.

1. The Autolimitation Theory

The autolimitation theory takes as a starting point those premises to justify the principle of State autonomy. A corollary of that principle is that a State's will not only explains why sovereign entities could possibly be bound by legal rules but it also explains the formation of legal rules. Its basic proposition is that international norms result from the will of a State (or, better still, two or more States) to limit its own conduct by the application of a legal rule.² It is fair to say that the autolimitation doctrine represents the strongest form of a consensualist view.

It is true that the autolimitation doctrine offers a general explanation for the limitation of a sovereign's autonomy in the international system. But is this really a legal limitation, if its operation and continued existence depend upon the will of the State concerned? In other words, if this limitation is attributed solely to the sovereign's own will, then, as correctly pointed out, it could not be justified as legal, for the same State could hypothetically withdraw its consent at will. This being so, it would be very strange to speak of any binding prescription or legal rule resulting from such autolimitation; such attitude would be better described as a mere political commitment.³ It follows that, in the light of this objection, the will of States alone could not be a law-making element. Of course, this objection may be overcome by maintaining that, once consent to the rule is expressed by States, it is no longer revocable at will. Judging from the assumptions of the autolimitation doctrine, the

irrevocability of a State's will after it has been manifested could only be valid if this same State had first consented to this condition, or to the rule which determined this condition. In such case, however, the original objection could be raised again, since this State could theoretically retract its first consent to the original rule or principle (like the principle *pacta sunt servanda*) which imposed this limitation on its will. The circularity of the problem is inevitable.

If the proposition is correct that a rule is not a legal rule unless it applies to its addressees regardless of their will, then it could be argued that consent alone could not possibly create a customary rule, since a further principle behind it is needed in order to secure the application of the rule independent of the subject's will.⁴ It seems rather superficial to make a distinction between the operation of a legal rule and its creation, in order to emphasize the role of consent in the formative stages of the rule only. Therefore, a solution to the dilemma presented above would be to call upon a metaphysical or natural law principle, antecedent to the *pacta sunt servanda* rule, whose validity would not depend upon the States' will. But to justify the irrevocability of a State's will in this way would be contrary to what the autolimitation doctrine stands for. At any rate, any such ultimate principle could hardly be identified, since the regression in a causal chain could continue *ad infinitum*. Fortunately, one does not have to go that far, because the main point has already been made, namely, that having regard to the main assumptions of this theory, consent cannot be the original and sole factor which creates the legal rule.

The autolimitation theory, however, brings into light a more fundamental discussion. It may be interpreted to convey the idea that State rights spring solely from its inherent sovereignty, and therefore those rights are both extensive and unhindered except to the extent to which a State consents to impose limits on itself. In this case, international law would be no more than a set of rules grounded in State consent and designed to restrict (as far as its consent covers) State autonomy in determined areas of State conduct. Therefore, States would be bound solely by a set of norms which expressly prohibit some types of conduct, and where law is silent or unsettled, States would be free to act as they wish. Leaving aside the questions on the

revocability of the voluntary restriction, this view is indeed untenable because in a community of States, a State's rights cannot possibly be *a priori* unlimited. It has been said, correctly, that in a community of sovereign States, no State is actually sovereign (at least in the absolute sense), for otherwise there could not be a minimum of order nor even a community.⁵ It could be replied that States are aware of this, and this is the reason why they voluntarily limit themselves. But is it a voluntary act based on a free and autonomous will or rather a limitation imposed by the need for a legal order? If the latter were the case, it seems contradictory to rely on a conception of sovereignty and at the same time acknowledge that States feel 'compelled to will' some restriction to it. It would be more reasonable to hold that State rights are *a priori* limited by the simple fact that there are other States in the international system.⁶ Even if, as has been cogently argued by Prof. Rawls, liberty can be restricted only for the sake of liberty itself (otherwise there would be no liberty), this justification still corroborates the fact that in any social order unlimited liberty is an impossibility.⁷ It follows that the theory which accords to States originally unlimited rights is unwarranted.

It is noteworthy that Hobbes has embarked upon a similar debate about whether individuals had unlimited rights and how it affected law. He said firstly that, naturally, 'every man has a Right to every thing'.⁸ Then he concedes that if this natural right remained unlimited, there could be 'no security to any man'.⁹ His answer to this puzzle was to state that there were two fundamental laws of Nature: first, that every man ought to endeavour peace; second, that a man 'be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe'.¹⁰ Thus, he clearly recognized that the co-existence of unlimited rights was not feasible. His solution to the problem, however, is similar to the autolimitation view: there has to be a willingness to limit oneself to the extent to which others do the same. Yet he submits this willingness to a 'fundamental law of nature'. If law is, as he defined, that which 'determineth, and bindeth', then this willingness should not be confused with an autonomous will; indeed, how can there be 'willingness' in the normal sense of the word if this disposition is not autonomous or really

voluntary? The only conclusion which could be drawn from Hobbes' propositions is that the manifestation of State will creates law because there is a fundamental law of nature that so determines.¹¹

Authorities such as Lauterpacht and Fitzmaurice refused to accept the view that States rights are originally unlimited; the latter described it as 'obsolete, unscientific and retrograde'.¹² They argued, by contrast, that sovereignty in international law is a quality conferred by international law, and hence it could not be either the basis or the source of international norms. Their view puts international law rather as an autonomous legal system from which State rights are derived. From this perspective, legal rules are created only because international law, through rules which have been termed 'secondary rules', prescribes this effect when a given procedure is observed. The problem with this view is that, firstly, it does not account for the origin of those secondary rules, and the consensualist may ascribe it to the consent of States. It might also be argued that this view assumes the completeness of international law, i.e., that international law presents a set of basic rules and principles from which all existing and possible rights are deduced or deducible; or that all areas of State conduct and all types of inter-State interactions are subsumable under current international law.¹³ While this may - arguably - be an acceptable proposition to some when applied to the field of judicial or arbitral competence and procedure, the operation of a legal process may reveal that State officials often notice or claim the existence of gaps in the law and the need for creating corresponding rules.¹⁴ Furthermore, if the international legal system is really autonomous, then at least its basic rules and principles are not susceptible of being changed by State will, or in other words, are underogable. Indeed, the advocates of such view would then quickly cite art 53 of the Vienna Convention on the Law of Treaties as an evidence that there are rules which are underogable. But the same article plainly allows for derogation of those rules by another rule of the same type; in addition, the fact that they are rules of *jus cogens* says nothing about how they were created in the first instance, and the case could be made that State consent played a fundamental role in their formation.¹⁵

The doctrine of originally unlimited rights for States is also analytically false, as Brierly pointed out, because a legal right presupposes the 'validity of an objective legal system'.¹⁶ Moreover, it seems inaccurate and logically inconsistent the very idea of unlimited rights, for if such rights were unlimited then they were not legal rights in the strict sense. Legal rights only make sense in an environment where the holder's autonomy is in some way generally restricted.¹⁷ Prof. Hart might have had this point in mind when he put forward the view that the question of the extent to which a State is sovereign has to be answered by reference to the rules composing the international legal system.¹⁸

2. The Collective Will Theory

In addition to the autolimitation theory, there is a second consensualist theory, advanced by Prof. Triepel and others.¹⁹ Their view also relies on the State's will as the source of all legal obligation. They differ from the former in that they emphasise the law-creating role of a 'collective will', formed by the union of individual wills having the same content. Triepel's theory, in particular, presented a new ingredient: the collective will stands both as an aggregate of individual wills and as a will distinct from each individual will.

This view alone is also unable to explain the law-creating force of the 'collective will', except by reference to something else. In a word, if the collective will of States brings about law then it must have this effect because an international rule, for instance, so provides. When applied to the customary process, this theory encounters some difficulties. There is no clarification as to whether the existence of will alone is sufficient, regardless of any external criteria such as uniformity of practice and so forth. Naturally, this could be overcome by saying that the will is evinced by those external criteria, as Oppenheim did, but in this case it will be objected that the collective will idea is an abstraction of little use since what actually counts in a legal process is the manifestation of those criteria (see *infra*). In addition, the proposition that the collective will is the factor which creates a customary rule seems to run against an accepted distinctive feature of the customary process, namely, the normative role of State practice.

Triepel's proposition that the collective will is distinguishable from each individual will also raises the question whether this distinct collective will does not imply the existence of a distinct legal personality. According to Strupp, it follows from Triepel's theory that the formation of a collective will signifies the concomitant creation of a distinct legal person endowed with legislative competence.²⁰ In reality, it is known that any such legal person is a mere hypothesis. It seems likely that Triepel adopted a type of contractarian view without paying due regard to the reality of the international legal process or the international system. The original contract theory was formulated by Rousseau with a completely different purpose in mind. It was an attempt to justify the basis of legitimate authority within municipal societies.²¹ Rousseau put forward the theory that an act of association involving every individual person produces 'a moral and collective body', a 'public person' which has a 'general will'.²² Each individual, however, can still have a 'private will contrary to or different from the general will that he has as a citizen'.²³ While Rousseau's theory attempted to explain that which he recognized as a sovereign State with a proper will on the basis of the voluntary alienation of each individual's rights and liberty, it would seem a futile exercise to apply the same reasoning on the international plane, for there is no such comparable sovereign in the international system, at least in the sense of a sovereign with legislative powers.²⁴

If the collective will theory follows Rousseau's analogy, and therefore each State is considered to exist both as an individual and autonomous entity and as a member of a sovereign with legislative powers, the objection could be raised that this sovereign does not really enact law, for legislation is supposed to be enacted towards third parties, although the sovereign himself may also be bound by it. Another question arising out of this possible twofold condition of a State is whether a State's will which has already been manifested (and therefore integrated into the collective will) may be withdrawn. According to those who maintain this theory, the will may not be withdrawn. If this were to be so, then it could be theoretically conceivable that an individual State which changes its will would stand in contradiction to itself in this way: it would be holding an individual will which is contrary to

the will which it had previously manifested and which remains a part of the collective will. Needless to say, that is a logical impossibility.

A contractarian view presumably starts from a well-defined initial situation in which the agreement is formulated. This being so, the collective will theory would have to be reformulated in order to explain the existence of special customs, opposing customs, individual practices differing from an established general custom, and so forth. The reason is that those possibilities would require the acknowledgement of distinct sovereigns, sometimes having opposite wills, and therefore distinct initial situations, sometimes opposite to each other.

The role of a sovereign in a legal process has been discussed so far without any serious questioning of the basic premise of the argument. Thus, one should ask whether a social practice has to be sanctioned (expressly or tacitly) by a sovereign's will in order to become a custom, or, in other words, whether it is the sovereign's will that which imparts to a given custom its legal character. It seems fair to hold that this question is not settled in legal theory on municipal custom. There are those which undoubtedly advocate such a view.²⁵ They state, firstly, that a statute in a municipal society is plainly enacted by a sovereign on the exercise of its legislative powers. But is the statute's legal force based exclusively on the authority of the sovereign? Could it not be the case that the normative effects of the exercise of the sovereign's authority, and his authority itself (let alone 'sovereignty' as a quality), was first conferred by rules of the legal system? As to municipal customs, they may argue that a social practice is not a custom unless and until it is applied by the Courts and other State officials. The fact, they argue, that the State recognizes a custom, applies it, and does not abrogate it by means of a subsequent statute, for example, indicates that the sovereign has manifested its will regarding that practice. However, this is still an inappropriate analogy, since the condition of the international system is completely different. Its decentralized and anarchical character determines that the possibility of a superior sovereign is only conceivable if one identifies it with the community of States, an assumption which begs the question.²⁶

Triepel did well in not equating the collective will of States with the will of all States. It is widely accepted nowadays that general customary law is formed by the participation of the generality of States and not the universality of States.²⁷ Nevertheless, he did not espouse an explanation given by Rousseau for the prevalence of the majority's will over the minority's will, namely, the existence of a previous pact by which this majority rule was unanimously adopted.²⁸ Triepel may have rejected this assumption for the reason that he saw it as a mere hypothesis; or else, that this assumption could give rise to the objection that the original pact was derogable. On the other hand, he also jeopardized the consistency of his theory by asserting that a State finds itself bound, regarding an international legal rule, both by its own will and the common will. If general customary law is created by the general will as opposed to the 'universal will', and if it applies to all States, then surely there should be States which for some reason had no will of their own regarding some general (customary) norms and are nevertheless bound by them.

3. The Tacit Pact Theory

The idea of customary law as being represented by a tacit pact was first expressed by the Roman Jurisconsults.²⁹ During the classic period of international law, some leading writers, such as Vitoria, Wolff and Vattel also espoused this view.³⁰ Since then, more refined views have been developed along those lines. It has to be observed, however, that some slight variations may be found in the way some contemporary writers have expounded it. One of such writers is Prof. Anzilotti, whose view may be summarized as follows. He first sets out a fundamental premise: that States are sovereign entities, and therefore an international legal norm cannot be created except by means of an agreement between equals.³¹ He then points out that the type of agreement which gives rise to a customary rule assumes a tacit form.³²

One is never sure as to whether by tacit agreement Prof. Anzilotti meant a species of treaty or simply an agreement *latu sensu*, that is, a consensus or coincidence of wills. None the less, as the binding force of both the tacit agreement and the express agreement was said by Anzilotti to rest on the same rule, *pacta sunt servanda*, one is led to believe that he referred to custom as

a mere species of treaty.³³ If such interpretation is correct, then there would be no difference between a custom and an informal treaty. That seems to be a great dilemma for all those who advocate the tacit agreement view. One could firstly ask why attribute a different name to custom given that it does not represent a distinct category. Secondly, if custom is a type of treaty, it would follow that those rules generally applicable to treaties - regarding their formation, operation, termination, and so forth - would be equally applicable to custom.³⁴

Considering, in particular, some general rules which deal with State consent in a treaty process, they are clearly inapplicable to the customary process. For instance, in a treaty process, only specific persons who have or are supposed to have full powers may qualify as a State's representative for the purpose of expressing the consent of this State to be bound by a treaty.³⁵ Having regard to this condition, Prof. Strupp has put forward the view that only those organs which, according to the internal legal order, can express a State's consent to be bound by a treaty, may manifest a State's will or consent in the customary process.³⁶ Anzilotti made no such explicit statement, but he plainly discarded organs which perform solely internal acts (as opposed to international acts) from the list of those organs whose acts may reflect a State's will or consent regarding a given tacit agreement.³⁷ As it is explained in more detail in Chapter IV, there is an overwhelming body of State and judicial practice, not to mention doctrine, which holds a broader view on this question, conceding the possibility that any organ or agent from the three main branches of the State may - without the need for special powers - participate in the customary process.³⁸ Furthermore, it is very questionable whether consent in the customary process would be really expressed in the same way as consent is expressed in a treaty process, that is, by a single and definite act. If there is no formal act in the customary process whereby a State's consent is given, there is no need for representatives vested with special powers. Thus, the rule regarding legal capacity of State organs or agents to convey a State's consent to be bound by a treaty seems to be inapplicable to the customary process.

If this idea of custom as a species of treaty is pursued further, it should also be possible for a State to invoke the application of rules which establish general grounds for the invalidity of consent. Thus, factors such as error, fraud, coercion, corruption of a representative, and lack of authority of a representative could be deemed to vitiate consent to a customary rule.³⁹ Again, the nature of the customary process seems to explain the fact that there is no evidence that this possibility has ever been realized in practice. The last two factors, which refer to a State's representative in the exercise of his function, can be dismissed on the ground that the expression of consent in the customary process does not seem to require a single competent representative for the accomplishment of a single act. Fraud and error, however, are not theoretically inconceivable.⁴⁰ A State may plead error, for instance, in acquiescing in, or consenting to a legal claim (or the situation created by it) of another State. But the plea of error regarding an on-going general practice, as opposed to the practice of a particular State, would seem inadmissible. Otherwise, one would be accepting the (absurd) possibility that the same State could have consented in error to every claim and practice which forms the general practice. Therefore, unless one is referring to a bilateral custom, error and fraud in consent would seem to be inapplicable to the case of a general custom. The very fact that there is no known case where a State has invoked any such grounds as invalidating its previous consent to a customary rule attests that they are inappropriate to the case of customs.

The idea of custom as a tacit agreement would introduce an element of uncertainty into the legal relations of the States bound by a custom. So far as State consent in the customary process is considered to be tacit, the stability of the 'agreement' would be seriously weakened, since a tacit manifestation can be more easily denied by the State who is supposed to have expressed it.

The tacit agreement theory, when interpreted in the sense that custom is a type of treaty, would indicate that a general custom could only be formed in either of the following ways: 1) as the aggregate of a number of similar bilateral agreements or 2) originally as a bilateral agreement open to all States, which progressively extends the number of States parties to it.

The second description would seem to be more reasonable, since a State's consent to an international practice can only be vis-à-vis all States, i.e., *erga omnes*. In other words, when a State is consenting to a general customary rule, it knows that the number of States involved in the international practice may enlarge and in fact it desires that the practice be generally established in this way. On the other hand, there is not a shred of evidence that States engage in an international practice and express their consent to it with a view to forming, acceding to or entering into a type of multilateral agreement.

This model of a (general) customary process presumably presents the same normative range of a multilateral treaty process: the scope *ratione personae* of the resulting general customary rule should be limited to those States which actually consented to it. One should bear in mind that if custom is to be seen as a type of treaty, States are only bound by it if they have first consented to it, and in Anzilotti's view, this consent is tacitly manifested. If this were the case, then the Court should apply a particular custom to a case only after it has satisfied itself that both parties to the case had at some point in the past consented to the rule. However, as Chapter IV demonstrates, this has not been the procedure adopted by the Court. Moreover, the analysis of the drafting history of Art 38 (2) of the PCIJ's Statute has shown that the Drafting Committee clearly rejected a definition of custom which required the need for the consent of the States before a custom could be applied to them.⁴¹ Another bar to this model of a general customary process is that general customs may apply to States which could never have consented to them, either for lack of interest or lack of opportunity. One wonders whether Anzilotti could not have had recourse to the analogy of an objective regime established by a treaty. Had he done so, then he might have been able to explain how a general custom (as a type of multilateral treaty) would be applicable to some States regardless of their will. But that approach would still require the definition of an objective treaty, and the determination of how far it would really resemble a custom. Perhaps the fact that he and other voluntarists have not considered this option attests to its lack of cogency.

It has to be admitted, however, that there is some consensus in the doctrine - and the Court's practice may be interpreted as endorsing it - to the effect that the scope *ratione personae* of bilateral and sectional customs is really limited to the States which participate in them.⁴² But the sole fact that the Court envisaged a limited scope *ratione personae* for such types of custom does not justify or explain the conclusion that it sanctioned the tacit pact theory in those cases.

In contrast with the indications given by Anzilotti as to the 'conventional nature' of custom (contradictory though as it may seem), he made a distinction between custom and treaty in the following way: while a tacit agreement is an 'spontaneous' and 'almost unconscious' manifestation of certain necessities arising out of a common life, a treaty presupposes a 'voluntary co-operation', a 'more developed conscience' of the necessities of the collectivity.⁴³ If anything, this distinction adds to the confusion between both terms, for if treaty is the genus and custom the species, then custom could not lack an essential quality of treaty, namely, its voluntary and conscious character. Indeed, it is difficult to conceive how an agreement could arise from an unconscious and spontaneous manifestation. This also throws some doubt as to whether a tacit agreement *latu sensu* is feasible, unless the spontaneous manifestations meet each other 'by chance'. Consent is necessarily a voluntary and conscious act, which means that in propounding that distinction Anzilotti seems to negate the very basis of his theory, namely, the voluntary character of the customary process.

It should be noted, finally, that Anzilotti also makes clear that it is not a State's will or consent that produces law-creating effects but rather the law which attaches such effects whenever this will or consent is manifested.⁴⁴

Another account of the tacit agreement doctrine was given by Prof. Tunkin.⁴⁵ He defined 'consent' and 'recognition' in the same way, namely, as the expression of a State's will to consider a particular customary rule as a norm of international law.⁴⁶ He also added that 'the bonds between a State accepting a customary norm of international law and other States who

already have recognized this norm are basically identical with those bounds established among States with the aid of an international treaty'.⁴⁷

It is noteworthy, firstly, that Tunkin also defined *opinio juris* in the same way: '*Opinio juris* signifies that a State regards a particular customary rule as a norm of international law, as a rule binding on the international plane. This is an expression of the will of a State, in a way a proposal to other States'.⁴⁸ Thus, he put consent as synonymous with the subjective element, both meaning that a State 'considers a customary rule as a norm of international law', and both being the expression of a State's will. The question that needs to be addressed is why should one have two concepts (or three, if one takes into account the term 'recognition') to convey the same idea. Perhaps this was a compromise, dictated by a dilemma which can be described as follows: if *opinio juris* were to be discarded altogether, then Tunkin would be isolated in the face of a settled view in doctrine and in the case law of the Court to the effect that this element is necessary for the definition of a customary rule; on the other hand, the idea of dismissing the concept of consent in the customary process would be inconceivable for Tunkin.

In addition to using those two concepts interchangeably, Tunkin brought in another source of confusion. It has already been pointed out that, in Tunkin's view, both consent and *opinio juris* spring from a State's will. After defining *opinio juris* in this way, he added that 'when other States also express their will in the same direction, a tacit agreement is formed with regard to recognizing a customary rule as an international legal norm'.⁴⁹ Given that this 'co-ordination of wills' as expressed in a tacit agreement aims, in Tunkin's opinion, at the 'recognition of a certain rule of conduct as a norm of international law' (which, it should be recalled, is precisely the definition assigned by him to *opinio juris* and consent) it would follow that: 1) *opinio juris* and/or consent would be the object of a tacit agreement resulting from the co-ordination of at least two States' wills; 2) this tacit agreement would therefore represent an agreement to do something, namely, to consent or to hold an *opinio juris*; in other words, it is an agreement to recognize a given 'customary rule' related to an usage as a norm of international law. The first point to be made about this view is that it offers no definite

conclusion as to what brings about a customary rule: is it the (tacit) agreement itself, the act of recognition, *opinio juris*, consent, or the original will to agree (either in isolation or in conjunction with the other State's will)? The answer might be found in the view that they are all relevant and part of the customary process which, according to Tunkin's framework, could be described as follows:

usage > co-ordination of wills > tacit agreement > consent or *opinio juris* or
recognition > customary rule

This description, however, may leave the wrong impression that each element corresponds to a separate period in time, whereas, for instance, it would be very difficult to distinguish between consent and the co-ordination of wills from a time perspective. In addition, given that consent is mostly tacitly manifested, and therefore it is to be inferred from practice (or usage), should not practice and consent be viewed as a single phenomenon or simultaneous?

Tunkin's view does not seem to employ the term 'recognition' in its ordinary sense, that is, as an act of identification of something which already exists. He seems to suggest that without State recognition (consent or *opinio juris*) there could not be a customary rule but an usage only. Therefore, he envisages 'recognition' as a type of constitutive act, an act which brings about the customary rule. If, however, this term were to be used in its proper sense, then recognition of a customary rule (which, in Tunkin's view, represents also *opinio juris* or consent) should, by logic, constitute a mere admission of the existence of such rule, and the element which brought about that customary rule should be looked for elsewhere.⁵⁰ The main difficulty about the meaning attributed by Tunkin to the act of recognition is that, being constitutive in character, recognition should be express and not assumed to happen in such a general and widespread way, as in the case of a general custom. This form of describing consent (i.e., recognition) resembles Rousseau's hypothesis of a general consent to a social contract. As a direct result of this theoretical exercise, recognition may be assumed, presumed or alleged even in situations where a State did not have any occasion for or interest in

manifesting its position regarding a given international practice.⁵¹ The very fact that every State is not required to prove its prior (tacit) recognition of a general customary rule bears witness to the hypothetical character of this view.

Tunkin also leaves no very clear indication concerning the nature of the tacit agreement leading to a customary rule, but it seems possible to arrive at an interpretation. On the one hand, he has pointed out that the bonds between the States parties to a tacit agreement are 'basically identical' with those established by a treaty. On the other hand, he has stated that the expression 'tacit agreement' is 'somewhat misleading as it may be interpreted as meaning that in this case the process is the same as in the case of the treaty process, whereas the customary process is a specific process of norm-creating'.⁵² From those two assertions one can conclude that in Tunkin's view: 1) custom and treaty share the same binding force or normative quality; 2) custom is a different legal process, and therefore its product, a customary rule, is distinct from a treaty rule. As to the binding force, he would perhaps be clearer if he said that both the customary norm and the conventional norm share the same normative quality simply because they are legal norms. With regard to the distinctiveness of the customary process, it can only mean that by 'tacit agreement' Tunkin was referring to a mere 'coincidence of wills', and not to a tacit agreement in the sense of an informal treaty. Thus, the expression 'co-ordination of wills' would also seem inadequate, for it may mislead the reader into thinking that the customary process is not the result of a mere convergence of wills but rather of a purposeful act of a conventional nature.

II. State Consent or Will as a Part of a Law-Creating Procedure

The examination of the main consensualist theories above seems to lead to the conclusion that State consent or will alone is unable to explain its own validity or its law-creating (or normative) force. It has also unravelled some inconsistencies in those theories which affect the very concept of consent in the customary process as adopted by them. It can be argued that it is irrelevant whether there is some superior rule or principle which determines that the manifestation of State consent produces normative effects, for even if consent is only a step in

a law-creating procedure, the fact remains that consent is necessary and indeed essential for the creation of customary rules. Whether this argument is logically consistent or whether it faithfully reflects the reality of the customary process depends upon the investigation of some basic premises which seem to be behind it. They may be summarized as follows: 1)that it is clear what State consent or will means, and when and how it is expressed; 2)that, as in a treaty process, the rule or the practice to which a State expresses its consent is clearly identifiable or known; 3)that this method is logically consistent, workable, and in fact operates in any customary process; 4)that States recognize their consent or will as a law-creating means (though they may not necessarily recognize, or may disagree as to the principle which validates this method). This will be examined in detail below.

Premise 1

*It is clear what State consent or will means,
and when and how it is expressed*

Most consensualist theories use the terms 'will' or 'consent' without first defining or elaborating on them. In general, they limit themselves to mentioning in a rather vague manner how those concepts function in a legal process. This attitude may be attributed to an idea that both terms are self-explanatory or self-evident. In doing this, however, they fail to define what is included in and what is excluded from those terms. This is surprising if one realizes that those concepts are fundamental to consensualist theories. The limitations and problems regarding the use of such terms become manifest when they are examined in more detail.

It is perhaps appropriate to commence the treatment of this question by dealing with the word 'Will', if only because it is a term of a wider scope than 'Consent'. 'Will' refers to volition, a state of mind, and ordinarily means (deliberate) desire or intention. Applied to the customary process, a State's will could only mean (from a voluntarist perspective) an intention or desire that a customary rule be created. In legal theory, a distinction is made between the acts accomplished to the end intended by a will and the will itself. Although the act(s) are

originated or motivated by the will, the substance of the will, that is, what is intended, is represented by the end to be achieved (the customary rule) and not by the act(s).⁵³

A State's will should not be confused with the expression 'legislator's will' as used in legal theory applied to municipal legal systems, for the latter usually refers to the intention or purpose of a law which has already been enacted. By contrast, one is concerned here with the intention to create a law or have it created. Similarly, a State's will should not be understood as a State's desire or intention that it be bound by a customary rule, or that its practice be in conformity with a customary rule, for it would presuppose the existence of a customary rule and hence negate the law-creating effect or role of such will. It may be argued against the last assertion that State practice can be sometimes both constitutive and declaratory of customary law. However, a piece of practice can be declaratory only of something which already exists. If the customary rule already exists, one is speaking of 'constitutive' in the sense of 'corroborative', and the role of will in the **formation** of the rule is not proved.

It is common ground that in some fields of municipal law, such as contract law and criminal responsibility, mental states and subjective notions play an important role.⁵⁴ What has to be asked, however, is whether legal consequences result from those subjective factors alone or from the acts performed under them. It seems fair to hold that law attaches legal consequences not to the intention of an individual, but to the acts accomplished by him. The notion of will plays a part in qualifying or defining the purposes or motivations of such acts, or the end intended by such acts. Thus, intention alone could not produce legal effects unless it were accompanied by an act or conduct. For instance, if someone wills or intends to kill somebody but does nothing to that end (either directly or indirectly), the law attaches no legal consequences to it. In the same vein, a State's will alone would be incapable of producing any legal effect in the customary process, unless it were externally manifested through acts or behaviour. What has been said so far may be summarized in two propositions: 1) a will and the acts performed under it are closely related; 2) the performance of acts would be a necessary condition for the production of the legal effects intended by a will. Proposition 2 seems to

substantiate another conclusion, namely, that only the acts themselves would bring about any legal effects and the will concerned would serve to qualify the legal effects intended by such acts.

It may be argued that so far as there is a causal connection between a subjective factor (like intention or will) and an objective factor (an act or conduct), the former is to be considered the principal or sole normative element. By 'normative element' is meant an element which, when manifested, produces law-making effects by virtue of a superior norm which so prescribes. The problem is that when a relationship is seen as a causal connection, then the initial cause is undetermined since there is always an antecedent. In the case of 'will', its antecedent could be described, for example, as 'sufficient reason'.⁵⁵ Apart from that, this relationship may be much more complex than some would have thought. For instance, it is possible that an individual performs a single act with many different (but not mutually incompatible) intentions. It is also possible that he performs many acts (or successive acts) with a single intention in mind. Last but not least, an individual may perform an act with an intention opposite to or distinct from the intention which would normally be construed from such act.⁵⁶ The same variants and others more are conceivable on the international plane. For instance, it is theoretically possible that a given State has its real intention misread by other States when they consider the former's practice or the justification of its practice.⁵⁷ It is also possible that a State attempts to cover its real intentions behind a given act or conduct in order to mislead other States or simply avoid hostile reactions on their part.⁵⁸ Another possibility is that a State fulfils an act which does not conform to what it really willed because its plans were badly realized. Another example is when the consequences of an act performed by a State, though foreseen by it, were not all intended.⁵⁹ In other words, a given State anticipates that a certain course of action may give rise to three or four different consequences, say, 'A', 'B', 'C', and 'D'. Although this State would do everything possible to avoid result 'D', it finds results 'A' and 'B' most desirable, and in calculating the final cost-benefit (considering also the possibility of result 'D' not occurring) it decides to carry out the action. If all results come

about from its action, how can one establish any link between that State's will and result 'D'? Finally, different organs of the State may have different intentions.

It may be noticeable from the examples just given that the relationship between a subjective factor and an objective factor is even more complex in the international system. This is explained by the system's anarchical character, which determines that in the customary process what other States interpret as the will or intention of a given State (as manifested in its practice) may prevail over what this State may really have willed. If the determination of a State's will is subject to third party construction, then the utility of the concept as proposed by the consensualists is open to doubt. It is well-known that a State or group of States may deliberately hold a distorted or partial interpretation of a given practice on account of a given political interest.

The complex relationship between a subjective factor and an objective factor brings into light the potential difficulties surrounding the ascertainment of a subjective factor, but they may also serve to support those who dispute that a subjective factor is a normative element. This is so because, as pointed out above, if a subjective factor is really the normative element, then State practice should **always** correspond to it and this is not likely to occur in inter-State relations as demonstrated above. Doubts concerning the normative force or role of a subjective factor may also be raised from another perspective. Even if consent could be rightly inferred from State practice, it does not follow that consent alone is that which gives rise to a customary norm.⁶⁰ Moreover, as a State's will (subjective factor) in the customary process is always (or mostly) manifested tacitly, and the only way of ascertaining it is through an objective reality (this State's practice), then the former may be discarded as a mere abstraction, since in the 'real world' of the customary process it is the practice which in the end counts.⁶¹

Turning now to another point, the notion of will is closely associated with voluntary behaviour. If a will is indeed valid and capable of producing legal effects only when the corresponding behaviour is voluntary, then no legal effects should be inferred from a

behaviour which is involuntary. From a consensualist position, it follows that 1) an act performed by a State under (foreign) compulsion should be regarded as legally sterile; 2) a State which performs an involuntary act should be able to claim afterwards that no legal effects could be derived from it. As regards proposition 1, it seems to be settled that acts performed under compulsion may in some exceptional cases be legally valid and produce legal effects. A notable example is a treaty of peace which is imposed upon an 'aggressor' State; its validity, according to the Vienna Convention on the Law of Treaties, is unaffected, notwithstanding the fact that one could not speak of a truly voluntary behaviour on the part of the 'aggressor State'.⁶² In relation to proposition 2, suffice it to say that there is no known precedent in the customary process where a State has made any such claim. Ihering, however, has observed that even in the case of physical compulsion it is possible to deduce an act of will.⁶³ Undoubtedly, there is always an intention behind every act, even when it is fulfilled under compulsion; for example, an intention to preserve oneself. But it seems unwarranted to infer from that that the behaviour in question was truly voluntary.

The second term, 'consent', may be regarded as a derivation from 'will' so far as consent constitutes an act of will, that is, one consents as a result of one's will or because one wills to. 'Consent' ordinarily means 'agreement (to)', and applied to the customary process it would mean a State's agreement to the creation of a customary rule. As pointed out in relation to State will, State consent in the customary process could not mean the agreement of the State to be bound by a particular customary rule, since this would presuppose the existence of the said rule and therefore negate the normative role of consent. Putting it in general terms, consent could not be a mere recognition of a customary rule, for it would be logically contradictory to assign a law-creating role to an act (recognition) which implies the existence of the very rule to be created by it. Bearing in mind what has already been said, the proposition could be put forward that, from a consensualist standpoint, when a State agrees to the creation of a customary rule, it is either agreeing that 1) a given customary rule, which bears no relation to any existing international practice, is to come into existence and be opposable to it, or that 2) a given international practice is to be transformed into or treated as a customary rule. Both

meanings are undoubtedly very similar, but a distinction may be drawn between them as follows.

Option 1 indicates that consent is simply an initial act in a law-creating procedure which is consummated by subsequent State practice. Therefore, both State practice and consent would be necessary law-creating factors in the customary process. Option 2 ascribes to consent an exclusive normative role in the creation of a customary rule; without it the established practice would not represent a custom. Under option 1, consent and practice are regarded as separate or distinguishable elements, each performing its function or role at a distinct phase (or time) of the customary process: consent comes first and practice follows. Under option 2, both elements are still seen as distinct but the timing of their operation is the inverse: practice comes first and consent is later expressed. The problem with both meanings is that it is widely claimed by consensualists that consent is ascertained and/or expressed in the State practice concerned. It is not difficult to see the reasoning behind this idea: when a State engages in a given practice and behaves as if it reflects a legal rule, its consent to that rule is rightly to be inferred from its conduct. It is submitted, however, that this reasoning may also suggest that both elements are in reality simultaneous and that State practice is what actually functions as the normative element in the customary process. If 'acting' is the same thing as 'acting and consenting', it follows that acting is what really matters.

Premise 2

*The rule or the practice to which a State expresses
its consent is clearly identifiable or known*

Both State consent and will require an object to which they are to be addressed. Certainly a State has to be consenting to something which is discernible or identifiable by a specific content. It seems unfounded to say that a State's consent 'determines the content, scope, and character of a given rule', for at least the content of the rule should be known to, or at least envisaged by, the State before it consents to this rule.⁶⁴ Otherwise, a State could see itself in a

difficult position as the evolving rule turns out to be against its immediate interests, having a content to which that State would never have expressed its consent.

If, as has been submitted, consent is necessarily expressed in relation to something whose content is already envisaged, to what is the State consenting? In a treaty process, State consent is manifested to a proposed rule, or to a set of rules, whose content have been the subject of negotiations. By contrast, State consent in the customary process could only relate to the content of an international practice. When a State participates in an incipient international practice it is not manifesting its consent to a customary rule which is being proposed (as would happen in a treaty process) for the reason that one cannot speak of any definite rule at all at that stage. In the early development of any customary process there is no established customary rule; the 'rule' is still gaining expression, definition (a uniform content) and normative force as a result of State interactions. As a matter of fact, the consenting State cannot be certain whether a customary rule will emerge from the international practice concerned or not. All there is for this State is an international practice and the option of adopting it or not. Thus, State consent in the customary process would merely reflect the attitude of the State concerning an evolving international practice, to the effect that it agrees that such practice be applied to, or pursued by itself and any other State.

It might be argued, on the other hand, that an evolving customary rule is secondarily (or indirectly) the object of a State's consent so far as the international practice concerned is expressive of a proposed legal rule. Indeed, it seems to be undisputed that at least the contents of the eventual customary rule will emerge from the uniform features of the international practice. Accordingly, an expression of consent by a State would indicate that it thinks that the international practice in question is reasonable, and that it agrees that a customary rule whose content is identical to that practice should be generally established. This argument seems to be very persuasive, but there are still some questions which it fails to answer.

In a treaty process, the rules are first negotiated and then written down in the form of a treaty. Although those rules are sometimes stated in detail, there may be room for conflicting interpretations regarding its meaning, and this actually occurs from time to time. In the customary process, the definitional problem is aggravated by the possibility that there may be conflicting interpretations even as to whether there is a customary rule at all, or what this rule stipulates, let alone its meaning or scope. Uncertainty as to the existence of a given customary rule is more probable in the initial stages of the customary process, when State interactions, occurring at different times and places, are still developing. At this phase, it may also be hard to identify a uniform pattern of conduct. Given that there is no established rule nor any settled and uniform practice in the initial stages of the customary process, one can draw the conclusion that, in an incipient customary process, there is no defined common object to which a consent could be expressed. If State consent is indeed inapplicable in the formative stages of a customary rule, then its law-creating force is open to doubt. This proposition only adds to the argument that it is inappropriate to have recourse to the idea of consent as part of a law-making procedure.

A final point could be made. A State is more likely to consent to an international practice - or to a future customary rule - only to the extent to which its content corresponds to the substance of its own practice. In other words, if one wishes to ascertain what is covered by a given State's consent, one should look at the content of this State's practice. When, for instance, a State 'x' proclaims a territorial sea of 20 miles, it seems incorrect to infer that this State manifested its consent to a customary rule which established anything less than this (like a 10-mile limit for the territorial sea), even if other States had followed such criterion. Provided that the logic of this argument is not seriously questioned, a general proposition can be drawn from it as follows: when there is any difference between an international practice (defined as the aggregate of the States' practices) and the practice of a particular State, or, what amounts to the same thing, when its practice is only generally in conformity with the international practice, the resulting rule may not be considered to have received its consent.

It seems inappropriate in this circumstance to refer to the notion of 'partial validity' of consent, in the sense that that State's consent covers only the content of the international practice which coincides with the content of its own practice. State consent has to stand and operate in its entirety, unless the consenting State expressly consents to the partial validity of its consent. Otherwise, one would be negating the sovereign equality of States, a postulate which is highly valued by the consensualists. Similarly, it would be unwarranted to suggest that if a customary rule emerges whose content bears only general correspondence with a particular State's practice, then it has to be presumed that this State has acquiesced in or consented to whatever is the difference in the rule's content. If this were so, this act of acquiescence or consent to the rule could only have come about **after** the rule had already been created. Thus, the original State's consent could not have had any part in the law-making procedure which led to the customary rule.

The argument may be advanced that it is possible that a State agrees in advance to a rule whose content goes beyond its own claim and practice. For instance, one could envisage a situation where State 'x', which claims a 20-mile territorial sea, would consent to a rule which permits the establishment of a 40-mile territorial sea. Given that its claim is in accordance with the rule, State 'x' would be prepared to consent to that rule. That is indeed a real possibility⁶⁵; but another possibility is that State 'x' would oppose anything more extensive than what it claims. The reason is simple: in this example, the other States would have a considerably larger area under their sovereignty and jurisdiction than State 'x'. It would seem unjustified to presume that State 'x' would have consented to a rule which benefits other States to the detriment of its own interests.

Having examined the position of a single State, it can be added that this problem is likely to occur in relation to every other State. One should not forget that, by definition, a general custom may be brought about by only a generally uniform international practice, a principle which is supported by the Court's practice. By the same reasoning, an international practice

which is generally uniform would not be regarded as representative of the consent of the States involved in it.

Premise 3

*The method is logically consistent, workable
and in fact operates in the customary process*

Leaving aside for the moment the various considerations offered above against the idea of State will or consent being law-creating factors, some conditions would have to be fulfilled so that the consensualist view might be considered logically consistent. Firstly, in order to bring about a customary rule, a State's will or consent must be accompanied by at least one other State's will or consent whose content is identical. This point has been made by Triepel in the correct realization that if the (law-creating) wills are dissimilar no common rule could result from them. A minimum of two wills or consents is thought necessary because the simplest type of custom - a bilateral custom - requires the participation of at least two States. Secondly, bearing in mind that State will or consent is conceded by consensualists to be mostly tacitly manifested, and to be ascertained by the practices concerned, the meaning attached by each State to its own practice and to the practice of others must also be the same, namely, the existence of a common will or consent towards the creation of a particular customary rule. In addition to that, the practices concerned should also be identical or at any rate very similar in content so that a common meaning may be inferred from them. Otherwise one should assume that States could infer the same meaning from disparate practices, which can only be possible by error or by manifest political purposes. If that is admitted, however, State will or consent could not possibly have had any normative role since the real will or consent would have had no effect. In a word, three main conditions have been described: 1) identity of wills or consent; 2) identity of meanings assigned to the individual practices concerned; 3) material identity of those practices.

In a sense, condition 1 just enunciated is determined by condition 2, which in turn is determined by condition 3. Nevertheless, this relationship should not be understood as implying that the verification of condition 3 automatically determines the fulfilment of condition 2 and/or 3. Even if condition 3 is verified, this does not mean that a common meaning is necessarily going to be attributed to it; it only means that a common meaning may be attributed to it. Having said that, it is to be questioned whether such conditions are feasible and indeed occur in the customary process.

As regards the third condition (a course of conduct being pursued in the same way by all States), it has already been pointed out that in the initial stages of the customary process - where State consent or will is supposed to operate normatively - two practices can hardly be identical. Indeed it is very unlikely that any settled custom will ever be represented by an identical international practice. A general uniformity, on the other hand, seems more feasible in any customary practice, and this is the view to which the majority of writers and the Court are inclined.⁶⁶

In the event that a given international practice is identical, a common or similar meaning of the corresponding consent or will could be construed from it. But even in such ideal conditions (identical practice), there is a certain degree of uncertainty as to whether a common will or consent will be identified in the interpretation of each individual practice. Arguably, the same problem would be much more accentuated if such interpretation is based on a body of practices which are only generally uniform. The difficulty in extracting a common consent from an international practice which is generally uniform has already been demonstrated.

The brief discussion above seems to suggest that conditions 2 and 3 could not be fully satisfied. Thus, one could quickly draw the conclusion that, so far as conditions 2 and 3 together are necessary prerequisites of condition 1, the latter could not be fulfilled either. Condition 1 could also be dismissed from another perspective. In a decentralized and uncoordinated process as the customary process, where each State is an egocentric and

autonomous participant, it seems very optimistic to suppose that the creation of a specific rule with a specific content will be equally consented to or willed by a significant number of States or all States. This view would describe the customary process as much smoother than it really is, there being no accommodation of diverging interests, no conflicting practices, and so forth.

Setting aside the more general arguments discussed above against the overall logical consistency of the consensualist view, it seems now proper to examine how the customary process would operate if State consent or will were a law-creating factor and contrast the conclusions with the actual operation of the customary process. The first argument about how a 'consensualist customary process' should operate would run as follows: whenever the resulting customary rule is universally applicable, all States must have first consented to its creation, or what amounts to the same, no rule can be applicable against a State unless this State has first consented to its creation. In contradistinction to this view, it is widely accepted in doctrine, in judicial and arbitral practice, and in State practice, that general customary rules, though resulting from the participation (and consent, some would say) of only the generality of States, are applicable to all States. In order to remedy this discrepancy, one should look for the consent of all States to a majority rule in the customary process. This task, however, seems a little unfeasible. It would be better to assume it, but an assumption cannot prove the existence of a fact (in this case, a collective act of consent). Another option is to say that States behave as if such rule existed. Indeed, it may well happen that from time to time a large group of States propound the creation (or existence) by majority processes or their consent of a general customary rule. None the less, when and if there are States which contest the law-creating power of a given majority, how can the original agreement to the majority rule be considered established?

It might be argued that, on the other hand, the 'consensualist customary process' view seems to be correct in the case of bilateral or sectional customs, where - it is believed by some authors - each State subject to it must have consented to it (even though they do not precise what they mean by 'consent'). Those authors invoke the case-law of the Court in their

support. It is submitted, however, that the Court's practice would hardly endorse that conclusion. On the contrary, the Court seems to rely solely on State practice and *opinio juris* in order to find out whether an alleged bilateral or sectional custom existed and applied between the contending States.⁶⁷

As a corrective move, consensualists might put forward that, in the case of a general custom, only the States directly affected by it should be expected to consent to the rule concerned. But what is the criterion for distinguishing between a State directly affected and a State indirectly affected or not affected at all?⁶⁸ Supposing that a given State is only indirectly affected, should not its consent be required as well? If its consent is not necessary, then it follows that a customary rule may be created and operate against a State's interests (even if they are not primary interests) and will, which is supposedly anathema to the consensualist view. It could then be argued that, while only the consent of the States directly affected is considered sufficient to bring about a customary rule, it is the consent of the majority of such States that really counts. This view would only enlarge the number of States which are bound by the customary rule without their having consented to its formation. Furthermore, where a majority decides for the whole group, the consensualist view is proven incoherent.

Another point which could be raised in defence of the consensualist view of the customary process - as described above - is that there is a recognized rule which prescribes that when a State persistently, and from the outset of the customary process, dissents from a customary rule, it either contributes to the impairment of the rule's development or immunizes itself against the rule's application. Thus, this 'persistent dissenter rule' could be said to corroborate the view that a customary rule may not be applied as against a State which has not first consented to it. Now supposing that any such 'persistent dissenter rule' really exists - a fact that is disputable, as will be demonstrated elsewhere⁶⁹ - the case may be made that it actually undermines the consensualist view. Firstly, it may be pointed out that the 'persistent dissenter rule' is mostly advocated as an exception or counter-balance to the majority rule, thus corroborating the latter. Secondly, the 'objector rule' has a very limited scope: if a State

dissents from a rule but not persistently or not from the beginning of the customary process then its dissent is invalid and the customary rule (which came into existence without its consent) applies against it.

An example which has been much discussed in this debate about the 'consensualist customary process' concerns the so-called 'new States'. The revised version of the consensualist view holds, in short, that those 'new States' have tacitly consented to the body of customary law applicable at the time they attained independence.⁷⁰ It should be noted, firstly, that the consent allegedly manifested by the 'new States' is not of a law-creating character, for the general customary rules already existed. It would be better described as an agreement by each 'new State' to the extension of the application of those customary rules to itself. Having said that, it would be questionable whether all such customary rules really received the consent of the 'new States'.⁷¹ That those 'new States' disliked some of the old international law is clearly shown by their move towards its reform by means of multilateral and majoritarian law-making procedures.⁷² It is difficult to assume that a State has tacitly consented to something to which it has openly attempted to modify, unless it is conceded that it was initially compelled to do so.

The consensualist view seems to suggest that a 'new State' would have discretion in consenting to the old customary rule. It is difficult, however, to envisage a sound legal basis for an open challenge. A 'new State' could not challenge the **existence** of the rule, since the other States and possibly the judicial and arbitral bodies (if called into question) would find it unwarranted. Equally, a new State could not prevent the **application** of the old rule as against itself by invoking the 'persistent dissenter rule', for the requirement that the objection should be manifested from the outset of the customary process could not be satisfied. The fact that new States have not openly challenged the bulk of 'old' international law from the start may also be explained without any reference to their consent. Prof. Vellas, following Savigny, has put forward the view that those customary rules represented an imperative need of the international society and hence they were obligatory to those 'new States' regardless of

their consent.⁷³ This may be true of some of those rules, but it seems incorrect to ascribe this status to all pre-existing general customary rules.

In addition to the debate over the 'new States', another question that has been raised is what happens when a State sees itself in a new situation to which an existing customary rule or set of rules are now applicable.⁷⁴ This State supposedly had never the opportunity for or interest in manifesting its consent to the creation of the now applicable customary rule. Again, its consent would mean only the agreement by a State to the extension of the application of an existing rule to itself; thus, this State's consent had no law-creating meaning, since the rule had already been formed.

To be fair to the consensualist view, that are some views put forward by the non-consensualists which are equally objectionable. For instance, some writers have put forward the argument that States recognize the existence of norms which have not been created by formal processes and are independent of State will.⁷⁵ Indeed some positivists have conceded this.⁷⁶ But what are those norms? Some refer to general principles of law. The consensualists might argue that they represent a different category of international rules, and even if it is acknowledged that they are involuntary and informally brought about, consent still applies to the creation of conventional and customary norms. In addition, one could follow the line that those principles are general principles of international law and are abstracted from a number of relevant rules which are consent-based. This particular way of envisaging the expression 'general principles of law' as embodied in art 38 of the Court's Statute was advanced by Prof. Schwarzenberger. Yet when he applies this to specific principles, such as the principle of legal sovereignty, he describes, among the underlying rules, the rule that 'without its consent, a subject of international law is bound by applicable rules of universal or general international customary law...'.⁷⁷

Other rules that might be regarded as having been created without reference to the State's consent are those which can be named 'secondary rules', that is, superior 'rules' which

regulate the creation of international rules, their modification and their application. One of such rules is the *pacta sunt servanda* rule. Again the consensualists might agree with the existence of such rules and argue that this does not make any difference to their claim so far as one of those rules prescribes that consent is a necessary part of the customary process. But that is an assertion which has to be proved by the investigation of whether States themselves recognize the existence of such a rule.

Premise 4

*States recognize their consent or will
as a law-creating means*

This is perhaps the most important pillar on which the consensualist case could rest. For if it can be demonstrated that, despite all the theoretical and practical difficulties involved in the concept of consent, all States recognize the existence of a type of secondary rule, or a requirement, by which their consent (whatever it may mean) to a customary rule is essential to its creation, then the consensualist view would be upheld by the law-makers themselves. The universality requisite is thought necessary because if some States fail to recognize the law-making role of State consent in the customary process while others do recognize it, then the case of the consensualists would not be entirely satisfactory. In the same vein, of course, it could not be said that the case of the non-consensualists was entirely proved. The reason for this is clear: given the decentralized character of the international system, a (secondary) rule which regulates the creation of general international law and has a universal scope *ratione personae*, must be recognized as such by all the law-makers.

How is the States' recognition of this 'secondary rule' ascertained? The obvious answer is to search for instances in which States declare that a given customary rule could not be applied as against them because they had not previously consented to the creation of that rule. The first difficulty in this investigation is that some States may be found to hold different positions according to the situation, that is, to the customary rule concerned and the interests which are

affected by it. An ambiguous attitude like that only serves to throw doubt upon the existence of the secondary rule. Secondly, some States and (certainly) some writers who endorse the need for consent may sometimes envisage consent not in the sense that is being pursued here, i.e., as a law-creating factor, but simply as a factor related to the **application** of an established customary rule. Thus, a State may say that a given customary rule cannot be applied as against it without its previous consent. In this case, although consent is certainly being mentioned, this instance has no evidential value regarding the existence of the secondary rule. Incidentally, it has already been pointed out that the very idea that consent is a requisite for the application of a customary rule contradicts the legal character of that rule. The third difficulty in the investigation of the existence of the secondary rule is that, in order to know whether the rule has been recognized by the law-makers, one would have to look into the position of all States on this matter. (This condition could only be withdrawn if in the course of the investigation, it is found that the opinion of States is divided regarding the existence of the rule or requirement. In that case, there is no need for looking into the position of every State, since a conclusion could already be drawn.) It is time now to turn to the possible instances of recognition or not of the secondary rule.

The position of newly independent States regarding traditional international law is not really relevant to this inquiry for two reasons. First, those States which defied traditional international law did not question its existence or validity, but rather its applicability as against them. Second, they did not question all international norms, but only some of them; at any rate, they did not challenge the 'primary systemic rules'.⁷⁸

Turning now to the Court, a pronouncement made by it in the *Lotus* case may be considered to be a recognition of the validity of such a rule. It observed that 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'.⁷⁹ This statement, however, makes a qualification when it says that the usages are generally 'accepted'. In the *Fisheries Jurisdiction* case, the Court used the expression 'generally accepted' again, as did some individual judges in this

and in other cases.⁸⁰ This expression may have been used with the idea of consent in mind, but one can not be certain about that. As to States, in the *Fisheries* case, both the United Kingdom and Norway noted that only the generality of States need 'accept' a general customary rule in order for it to come into being.⁸¹ Thus, there may be some indication as to the recognition of a rule which establishes that the consent of the generality of States is necessary for a general customary rule to be brought about. Does it follow that, according to this basic rule, a general customary rule could be created and applied as against the will of a particular State or group of States?

On this issue, there is no conclusive evidence. Yet there is some indication to the effect that on certain issues a majority of States would be prepared to claim the creation and application of a customary rule against a State or a group of States regardless of their express dissent. Take, for instance, the controversy surrounding the exploration and exploitation of the sea-bed or ocean floor beyond national jurisdiction. A group of States named the Group of 77 has expressed its legal position regarding the question on the basis of a report prepared by a group of legal experts. It stated, *inter alia*, that the principles set out in UN resolution 2749 (XXV) are expressive of a legally binding custom; and that 'more than 119 States have reaffirmed 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 *de facto* authority over all humanity'.⁸² If one regards the word 'support' as meaning 'consent', then 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.⁸³ A similar reasoning may (arguably) be seen in the *North Sea Continental Shelf* cases, where the Court, following the suggestion of Denmark and the Netherlands, left the impression that it could have applied to Germany a general customary rule to which German had expressed no consent, had one existed.⁸⁴ Similarly, the Governments of Australia and New Zealand seem

to have argued, in the *Nuclear Tests* cases, that a customary rule which prohibited the conduction of atmospheric nuclear tests applied to France, irrespective of whether the latter had consented to it or not.⁸⁵ Thus, one would tentatively gather that, on the basis of this additional indication, the basic rule would require only the consent of the majority of States for the creation of a general customary rule irrespective of any dissenting minority. This last conclusion, however, would hardly be endorsed by all States. Norway and United Kingdom, in the *Fisheries* case, and India in the *Right of Passage* case, though realizing the general consent requirement, also recognized the validity of a persistent dissenter rule.⁸⁶ The position of the United Kingdom, however, is also consonant with the line suggested above, since it pointed out that the right of a State to dissent from a customary rule 'was not absolute': it was inapplicable where a 'fundamental principle' was concerned.⁸⁷

There are also several instances of case-law where the judicial or arbitral bodies did not endeavour to demonstrate firstly the consent of the contending States to the creation of the general customary rule which was being applied to them.⁸⁸ This attitude can only serve to disprove the 'all consent' rule, and throws some doubt on whether consent is really recognized as a necessary step in the formation of a customary rule.

What conclusion should be drawn from this state of affairs? 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 secondary rule which could replace the 'all consent' rule. The situation is the following: while for some States a majority consent rule would not allow for dissent, at the very least in those cases where there is a fundamental customary rule at stake, for others a majority rule would only be acceptable on the condition that persistent dissenters to it would be excluded from its binding range, irrespective of the customary rule involved. Those two types of majority rules are plainly incompatible. Furthermore, none of them is clear about what they mean by the 'majority of States'. Do they refer to a 'representative majority' or to any majority? If any majority were adopted, then the existence of the required general

consent would be a matter of degree. But how many States should be required to express their consent? If, in turn, a 'representative majority' is accepted, it is still unclear what is meant by 'representative' and by 'majority'. Should a representative majority include, as Judge Lachs said, 'States with different political, economic and legal systems, States of all continents', or simply the most powerful States?⁸⁹ Even if representative majority is properly defined, should it apply, as defined, to all cases?

Bearing in mind everything that has been discussed above, a general conclusion could be drawn to the effect that the concept of State consent (as applied to the customary process) when examined in detail reveals both theoretical and practical shortcomings which throw some doubt as to its utility. This finding seems to be corroborated by the general way States behave in the customary process.

¹ See Vitoria, Francisco, Escritos Politicos (Buenos Aires, Ed. Depalma, 1961), p.300-301, 303, 307; Wolff, Christian, Methodo Scientifica Petractatum, The Classics of International Law (Carnegie Endowment for International Peace, James Brown Scott (ed.), Washington, Oxford University Press, 1934), Vol. II, pp.6, 11, 12, 17; Vattel, Emmerich De, The Law of Nations, (Philadelphia, T & J.W. Johnson & Co, 1982), Translator unknown, Preface, lxvi; Grotius, Hugo, De Juri Belli Ac Pacis Libri Tres, The Classics of International Law (Oxford, Clarendon Press, 1925), James Brown Scott (ed.), Vol. II, pp.9, 23-24, 44.

² See Accioly, Hildebrando, Tratado de Direito Internacional Publico (Rio de Janeiro, Imprensa Nacional, 1933), pp.9-10.

³ See Hart, H.L.A., The Concept of Law (Oxford, Clarendon Press, 1991), p.219.

⁴ See Lauterpacht, H., Private Law Sources and Analogies of International Law (London, Longmans, Green and Co., 1927), p.56.

⁵ In a world in which some States possess nuclear weapons, this would be unthinkable. See Waltz, Kenneth, Theory of International Politics (California, Addison-Wesley, 1979), p.96.

⁶ See Brierly, The Basis of Obligation in International Law (Oxford, Clarendon Press, 1958), pp.6-9.

⁷ See Rawls, John, A Theory of Justice (Oxford, Oxford Univ. Press, 1991), pp.244-245. See also Del Vecchio, Giorgio, The Crisis in International Law and the Law of Sociality, 13 International and Comparative Law Quarterly 1964, pp.262-264.

⁸ See Hobbes, Thomas, Leviathan (Cambridge, Cambridge Univ. Press, 1991), ed. by Richard Tuck, p.91.

⁹ *Ibid.*

¹⁰ *Ibid.*, pp.91-92.

¹¹ *Ibid.*, p.91.

¹² See Fitzmaurice, G., The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, 30 British Year Book of International Law 1953, pp.9-12.

¹³ See Sereni, Diritto Internazionale (Milano, Dott. Giuffrè, 1956), pp.98-99; Lauterpacht, Sir Hersch, Some Observations on the Prohibition of Non Liqueur and the Completeness of Law, Symbolae Verzijl (Haye, Martinus Nijhoff, 1958), pp.196-221.

¹⁴ For a critique of this view on the completeness of the legal order, including from the standpoint of judicial procedure and competence, see Stone, Julius, Of Law and Nations (New York, William S. Hein & Co., 1974), pp.71-118.

¹⁵ Indeed, the same article defines a rule of *jus cogens* as that which has been 'accepted and recognized by the international community as a whole'.

- ¹⁶ See *op. cit. supra* n.6, p.6.
- ¹⁷ See Raz, J., The Concept of a Legal System (Oxford, Clarendon Press, 1970), p.31.
- ¹⁸ See *op. cit. supra* n.3, p.218.
- ¹⁹ See Triepel, H., Les rapports entre le droit interne et le droit international, 1 Recueil des Cours de l'Académie de Droit International 1923, pp.82-87; Oppenheim, L., International Law (London, Longmans, 1955), ed. by H. Lauterpacht, 8th edition, pp.15-17, 25; Cavaglieri, A., Lezioni di diritto internazionale (Roma, Libreria della Sapienza), pp.7-8.
- ²⁰ See Strupp, K., Les règles générales du droit de la paix, 47 Recueil des Cours de l'Académie de Droit International 1934-I, p.291.
- ²¹ See Rousseau, Jean-Jacques, On the Social Contract (Cambridge, Hackett, 1987), Transl. by D. Cress, pp.7, 20.
- ²² *Ibid.*, p.24.
- ²³ *Ibid.*, p.26.
- ²⁴ This seems to be what Wolff had in mind when he propounded the existence of a *civitas maxima*. See *op. cit. supra* n.1, pp.5-17.
- ²⁵ In Hobbes' words: 'When long Use obtaineth the authority of a Law, it is not the Length of Time that maketh the Authority, but the Will of the Sovereign signified by his silence (for Silence is sometimes an argument of Consent)', *op. cit. supra* n.8, p.184.
- ²⁶ This idea was put forward by Suarez: 'For in a state of this kind, the sovereign is the whole commonwealth, and so, if a custom is accepted by such a people, the consent is necessarily given by the sovereign, since in this case the two are identical. See Selection from Three Works of Francisco Suarez, The Classics of International Law (Oxford, Clarendon Press, 1944), James Brown Scott (ed.), Vol. II (The Translation), p.553.
- ²⁷ See Chapter IV, p.86.
- ²⁸ See *op. cit. supra* n.21, p.23.
- ²⁹ See, for instance, Hermogenian, in The Digest of Justinian (Philadelphia, Univ. of Pennsylvania Press, 1985), Mommsen *et alii* (eds.), Dig., I.3.35.
- ³⁰ See Vitoria, *op. cit. supra* n.1, p.308; Wolff, *Ibid.*, pp.7, 19; Vattel, *Ibid.*, Preface, xv, lxx.
- ³¹ See Anzilotti, D., Cours de Droit International (Paris, Éd. Recueil Siréy, 1929), Premier Volume, Trad. Gilbert Gidel, p.46.
- ³² *Ibid.*, p.68.
- ³³ *Ibid.*, p.74.
- ³⁴ This possibility is clearly rejected nowadays. See Virally, M., The Sources of International Law, in Manual of Public International Law (London, Macmillan & Co Ltd, 1968), p.137.
- ³⁵ See arts 6 and 7 of the Vienna Convention on the Law of Treaties.
- ³⁶ See Strupp, *op. cit. supra* n.20, pp.313-315.
- ³⁷ See Anzilotti, *op. cit. supra* n.31, pp.75-76.
- ³⁸ See Chapter IV, pp.70-76.
- ³⁹ See Vienna Convention on the Law of Treaties, arts 46-52, and comments by the International Law Commission in Yearbook of the International Law Commission, 1966, Vol. II, pp.243-246. That point was raised by Anzilotti, who seemed to accept this possibility, *op. cit. supra* n.31, p.342-343.
- ⁴⁰ An error in *consensu* means that there is a misunderstanding between the parties. According to legal theory on the law of contracts, this error indicates that the parties 'have not intended the same thing', and as a result there is no agreement. See Salmond and Winfield, Principles of the Law of Contracts (London, Sweet and Maxwell, 1927), pp.176-177. For an application of the idea of fraud and error to treaty relations, see the comments by the International Law Commission on the relevant articles of the draft on the law of treaties, in Yearbook of the International Law Commission 1966, Vol. II, pp.243-245.
- ⁴¹ See Chapter II, pp.24-26.
- ⁴² On the Court's practice, see Colombian-Peruvian Asylum case, Judgement of November 20th, 1950: ICJ Reports 1950, pp.276, 316, 333, 370; Case Concerning Rights of Nationals of the United States of America in Morocco, Judgement of August 27th, 1952: ICJ Reports 1952, pp.199-200, 221; Case Concerning Right of Passage Over Indian Territory, Judgement of April 12th: ICJ Reports 1960, p.39. This has led some writers to defend the plausibility of the tacit pact theory in such cases. See Condorelli, Luigi, Custom, in International Law: Achievements and Perspectives (The Netherlands, Martinus Nijhoff, 1991), ed. by M. Bedjaoui, pp.206-207; Cohen-Jonathan, G., La coutume locale, Annuaire français de droit international, VII, 1961, pp.133, 140; Thierry, H. *et alii*, Droit international public (Paris, Éd. Montchrestien, 1984), pp.119-120.

⁴³ See *op. cit. supra* n.31, p.74. Later, Prof. Roberto Ago reproduced the same view, i.e., that customary law is a type of spontaneous law, by which he meant a law 'which is the product of spontaneous germination and not of will or of a laying down'. See Ago, R., *Positive Law and International Law*, 51 *American Journal of International Law* 1957, p.729. For a critique of this view, see Kunz, Josef, *The Changing Law of Nations* (Ohio, Ohio State Univ. Press, 1968), pp.396-404.

⁴⁴ See *op. cit. supra* n.31, p.339.

⁴⁵ For a more recent view similar to Tunkin's theory see Danilenko, G., *The Theory of International Customary Law*, 31 *German Yearbook of International Law* 1988, pp.11-14.

⁴⁶ This is the relevant text: 'Recognition or acceptance by a State of a particular customary rule as a norm of law signifies an expression of a state's will, the consent of a state, to consider this customary rule to be a norm of international law'. See Tunkin, G., *Theory of International Law* (London, George Allen & Unwin Ltd, 1974), Transl. by W. Butler, p.123.

⁴⁷ *Ibid.*, p.124.

⁴⁸ *Ibid.*, p.133.

⁴⁹ *Ibid.*, p.133. See also *International Law in the International System*, 147 *Recueil des Cours de l'Académie de Droit International* 1975-IV, pp.127-128.

⁵⁰ This is the meaning attributed by Heilborn to recognition. See Heilborn, P., *Les sources du droit international*, 11 *Recueil des Cours de l'Académie de Droit International* 1926-I, p.20.

⁵¹ In other words, a customary rule would apply against a State which had not previously recognized it.

⁵² See *op. cit. supra* n.49, p.128.

⁵³ As Ihering has pointed out, the 'act itself is never the purpose, but only a means to the purpose'. See Ihering, Rudolf von, *Law as a Means to an End* (New York, Macmillan, 1924), pp.8-10.

⁵⁴ See Hart, H.L.A., *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983), pp.96-97.

⁵⁵ See Ihering, *op. cit. supra* n.53, pp.1-2.

⁵⁶ The incompatibility here is between the real intention of the individual and the individual's intention as construed by others.

⁵⁷ For instance, in 1978 Israeli Defence Forces crossed Lebanese borders. Israel's representative before the Security Council stated that the aim of such action was not to incorporate any Lebanese soil but only to 'clear the PLO once and for all from the area bordering Israel'. Other countries, such as Jordan, viewed Israel's action as an 'armed aggression against the territorial integrity' of Lebanon designed to occupy yet another country. See UN Security Council Official Records, 2071st meeting, 17 March 1978, pp.7-9. This clear difference between Israel's manifested intention and Jordan's interpretation of Israel's intention indicates that either Israel's real intention has been disguised or that Jordan misread it (purposely or not).

⁵⁸ See Mendelson, M.H., *Practice, Propaganda and Principle in International Law*, *Current Legal Problems* 1989, pp.6-11.

⁵⁹ This possibility was raised by Hart in dealing with the issue of intention in *op. cit. supra* n.54, p.98.

⁶⁰ See Schachter, Oscar, *International Law in Theory and Practice* (The Netherlands, Martinus Nijhoff, 1991), p.12.

⁶¹ See, for instance, Anzilotti, *op. cit. supra* n.31, pp.68, 73-76.

⁶² See Art 75 of the Vienna Convention on the Law of Treaties. This case raises a number of questions, such as the determination of which State was really the aggressor, the means of redress available to the victim State, and so forth. See Stone, *op. cit. supra* n.14, pp.231-251. One could also think of cases in which the compulsion is not military. Consider, for example, a State which is forced to act by the threat of economic embargo.

⁶³ See *op. cit. supra* n.53, pp.10-15.

⁶⁴ See Fitzmaurice, G., *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 *The Modern Law Review* 1956, n.1, p.9.

⁶⁵ Especially in those cases where the State cannot possibly claim more than what it has claimed. For instance, some Mediterranean States claim no Exclusive Economic Zone, presumably for the reason that their geographical situation does not allow it. In this case, there is not much point in opposing more extensive claims.

⁶⁶ See Chapter IV, pp.91-93.

⁶⁷ See *op. cit. supra* n.42.

⁶⁸ For example, it could be said that coastal States as opposed to land-locked States are directly interested in the customary rule on the Exclusive Economic Zone. Land-locked States, however, may also have direct interests in that zone, such as the exercise of the rights of navigation and overflight.

⁶⁹ See Chapter IV, pp.97-105.

⁷⁰ See Oppenheim, *op. cit. supra* n.19, p.18.

⁷¹ See Sinha, P., *Perspective of the Newly Independent States on the Binding Quality of International Law, in Third World Attitudes Toward International Law* (Dordrecht, Martinus Nijhoff, 1987), F. Snyder and S. Sathirathai (eds.), p.24.

⁷² See Buirette-Maurau, P., *La participation du tiers-monde a l'élaboration du droit international* (Paris, Libr. Générale de Droit et de Jurisprudence, 1983), pp.72-84, 87-154. See also *Frontier Dispute, Judgement*, ICJ Reports 1986, pp.566-567.

⁷³ See Vellas, P., *Droit international public* (Paris, Libr. Générale de Droit et de Jurisprudence, 1967), pp.93-94.

⁷⁴ See the examples cited by Kelsen and his argument in *Principles of International Law* (New York, Rinehart & Co., 1952), p.312.

⁷⁵ See, *inter alia*, Monaco, Ricardo, *Diritto internazionale pubblico* (Torino, Unioni Tipografico, 1949), p.53; Lauterpacht, H., *op. cit. supra* n.4, pp.60-71, and *International Law* (Cambridge, University Press, 1970), Vol. I, pp.57-58. A typical example given by them is the acceptance by most States of the Court's Statute, which recognizes general principles of law amongst the applicable rules of international law.

⁷⁶ See Anzilotti, *op. cit. supra* n.31, p.44; Ago, *op. cit. supra* n.43, p.719-729.

⁷⁷ See Schwarzenberger, *A Manual of International Law* (London, Stevens & Sons, 1967), pp.65.

⁷⁸ See *op. cit. supra* ns.71 and 72. See also Schachter, *op. cit. supra* n.60, p.11.

⁷⁹ See *The SS Lotus case, Judgement n.9, September 7th, 1927, Permanent Court of International Justice, Series A, n.10, p.18.*

⁸⁰ See *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgement, I.C.J. Reports 1974, p.23, pp.119-120 (Separate Opinion of Judge Waldock), p.161 (Dissenting Opinion of Judge Petren), p.58 (Separate Opinion of Judge Dillard), and p.89 (Sep. Opinion of Judge De Castro); North Sea Continental Shelf cases, I.C.J. Reports 1969, p.103 (Separate Opinion of Judge Ammoun), p.242 (Dissenting Opinion of Judge Sørensen), p.229 (Diss. Op. of Judge Lachs); Dissenting Opinion of Judge Loder in the *SS Lotus case, op. cit. supra* n.79, p.34; *The SS Wimbledon case, Permanent Court of International Justice, Series A, n.1, 1923, p.36 (Dissenting Opinion of Judges Anzilotti and Huber); South West Africa, Second Phase, Judgement, I.C.J. Reports 1966, p.291 (Dissenting Opinion of Judge Tanaka).**

⁸¹ See *Fisheries case, Pleadings, Vol. I, p.381, para.255 (Norwegian Counter-Memorial), and Vol. II, p.427, para.161 (United Kingdom Reply). The United Kingdom, in particular, noted that since the *Lotus case* was decided, 'the trend in international relations has been towards an increased regard for majority opinion' (p.428).*

⁸² It has to be noted that this was not the only legal argument advanced in the report. See Letter dated 24 April 1979 from the Chairman of the Group of 77 to the President of the Conference, Doc. A/CONF.62/77, Documents of the Third UN Conference on the Law of the Sea, Eighth Session, pp.81-82. There is no known reaction by other States to this letter.

⁸³ Interestingly enough, this debate continued within the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. But the legal arguments centred exclusively on the applicability of the regime created by the 1982 Law of the Sea Convention on all States before the Convention comes into force. See United Nations Docs. LOS/PCN/78, LOS/PCN/74, LOS/PCN/73, LOS/PCN/72, LOS/PCN/71, LOS/PCN/53, LOS/PCN/49, and LOS/PCN/48.

⁸⁴ See *North Sea cases, op. cit. supra* n.80, pp.41-45. Prof. Weil is one distinguished authority who maintains this interpretation of the Court's Judgment. See Weil, P., *Towards Relative Normativity in International Law?*, 77 *American Journal of International Law* 1983, p.437.

⁸⁵ See *Nuclear Tests cases, Pleadings, Vol. I, pp.181-182, 184-194, 502-513 (esp. at 511), Vol. II, pp.8, 262-267.*

⁸⁶ See *Fisheries case, Pleadings, Vol. I, pp.380, and Vol. II, pp.428-429; I.C.J. Pleadings, Case Concerning Right to Passage Over Indian Territory, Vol. I, p.178.*

⁸⁷ *Ibid.*, p.428.

⁸⁸ See, *inter alia*, *The Case of Regolo Atilo and Other Vessels (1945), Reports of International Arbitral Awards*, United Nations, Vol XII, pp.8-9; *The SS Wimbledon case, op. cit. supra* n.80, p.28; *The Corfu Channel case, Judgement of April 9th, 1949: ICJ Reports 1949, pp.28 et seq.; Nottebohm case, Judgement of April 6th, 1955: ICJ Reports 1955, pp.22 et seq.; North Sea cases, op. cit. supra* n.80, pp.41, 46; *Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgement, I.C.J. Reports 1980, pp.33, 41.*

⁸⁹ See *North Sea cases, op. cit. supra* n.80, p.227.

CHAPTER IV

STATE PRACTICE

'State practice' is intended to comprise an act, series of acts, or a course of action or behaviour by a given State. As a matter of general definition, this may be satisfactory, but it still leaves unanswered two important questions, namely, what types of act or behaviour constitute State practice and which organs of the State are considered to represent the State in their actions, so far as the customary process is concerned. These issues are examined below, but only to a limited extent, since the evaluation of the role played by each organ, the weighing of each type of State practice, and the different manifestations and effects of State practice in the customary process will be dealt with in other chapters. The second part of this chapter purports to establish and distinguish the different categories of international custom on the basis of the range of the international practice concerned. The third part comprises a study of the qualities in the State practice which are thought essential for the establishment of an international custom. Finally, the impact of a special type of practice, that of a persistent dissenter State, is examined.

I. Definition of 'State Practice'

1. A Survey of National Digests of State Practice

In defining what is or can be considered to be a piece of State practice, a good guide could be found firstly in the official publications or documents emanating from States and recording what in their view is their practice. In addition, there are records of State practice that, though compiled by scholars in their private capacity, receive supervision or support from their respective Governments, including access to diplomatic archives, and so on and so forth. A survey of the contents of some of the existing digests of State practice, together with two Council of Europe Resolutions, is set out below.¹

a. The Council of Europe Resolutions

In examining measures with a view to encouraging the publication of digests of State practice in the field of public international law, the Committee of Ministers adopted Resolutions (64) 10 and (68) 17, which contained good indications as to what, in their opinion, constituted State practice. With regard to the organs of the State whose practice should represent the practice of the State, the Council expressed the view that all organs of the State are included, be it from the executive, legislative or judicial powers. In mentioning instances of official documents which illustrated State practice, the Council distinguished two levels. Firstly, it referred to diplomatic notes, letters of instruction, reports, opinions given by official legal advisers, internal memoranda, explanatory memoranda and texts of laws and regulations, parliamentary reports and discussions, and national judicial and arbitral decisions. At another level, mention was made of treaties and conventions to which the State concerned is a party, statements made before international organizations, proceedings of the organs of such organizations in so far as these call for action on the part of the State in question or concern it particularly, statements presented before international judicial or arbitral authorities but only in so far as they contribute to the formulation of public international law, and the practice of the State in its relations with international organizations.²

b. Répertoire de la pratique française en matière de droit international public

This is divided into two parts: Governmental and Parliamentary documents, and decisions of national courts. Documents from the first category include texts of laws and regulations and explanatory memoranda; reports of parliamentary committees; reports by Government officials to parliamentary committees; replies from Government officials to written questions posed by members of Parliament; letters of instruction; diplomatic notes; statements made at international conferences or international organizations; opinions given by official legal advisers; statements presented before international judicial or arbitral authorities; conventions to which France is a party; and press communiqués.³

c. Repertório da Prática Brasileira do Direito Internacional Público

This includes, *inter alia*, statements at international conferences or international organizations; press communiqués; joint communiqués; diplomatic notes; reports by Government officials to parliamentary committees; parliamentary debates; internal reports or memoranda; letters of instruction; and opinions given by official legal advisers.⁴

d. Répertoire suisse de droit international public

This includes, *inter alia*, diplomatic notes or aides-mémoire; statements at international conferences or international organizations; reports or statements by Government officials to the Parliament; decisions of the Federal Council; Governmental circulars to local governments (cantons); internal memoranda; opinions given by official legal advisers; and decisions of national courts.⁵

e. La prassi italiana di diritto internazionale

This includes, *inter alia*, documents relating to the conclusion of agreements (letters of ratification, full powers, etc.); letters of instruction; diplomatic correspondence; statements by Government officials before the Parliament; parliamentary debates; Governmental circulars, instructions, and orders (internal memoranda); legislative acts; and opinions given by official legal advisers.⁶

f. The Digest of United States Practice in International Law

It is made clear in the preface to the Digest that the notion of 'practice' had been treated as liberally as possible. The materials collected were treaties, executive agreements, legislation, Federal regulations, Federal court decisions, testimony and statements before Congressional and international bodies, diplomatic notes, correspondence, press conference statements, and internal memoranda.⁷

g. The Australian Year Book of International Law

This includes, *inter alia*, reports of Parliamentary committees; decisions of national courts;

statements or replies by Government officials to parliamentary committees or members of Parliament; press communiqués or articles from the Foreign Office published in the press; statements by representatives at international organizations; legislative acts and explanatory memoranda; and opinions given by official legal advisers.⁸

h. The Japanese Annual of International Law

This includes, *inter alia*, statements by Government officials to the Parliament or to parliamentary committees; statements at international conferences or international organizations; and press communiqués.⁹

i. The Canadian Yearbook of International Law

The instances of State practice are divided into separate headings, according to the branch of the organs of the State. Firstly, from the Department of External Relations the following materials are mentioned: internal memoranda; opinions given by official legal advisers; diplomatic notes and letters. From the Parliament: resolutions of the Parliament; statements by Government officials to the parliament. Finally, there is reference to conventions to which Canada is a party.¹⁰

j. Documents on Swedish Foreign Policy

This includes, *inter alia*, conventions; statements at international organizations or conferences; replies by Government officials to questions posed by members of Parliament; and press communiqués.¹¹

k. The South African Yearbook of International Law

All instances of State practice mentioned are confined to parliamentary statements, and statements by Government officials before the Parliament.¹²

l. The British Digest of International Law

In the general preface to the Digest, the Editor points out that it reveals the general attitude

of 'H.M. Government, or as the case may be the Foreign Office, Parliament, the courts and sometimes the writers...'. Instances of State practice include diplomatic notes; internal memoranda and reports; letters of instruction; opinions given by official legal advisers; decisions of national courts; texts of laws and regulations; parliamentary debates; statements by Government officials before the Parliament or Parliamentary committees; conventions; statements at international conferences; and statements presented before international judicial or arbitral authorities and extracts from the decisions of such authorities.¹³

2. A Survey of Case-Law

In addition to those digests, there is also a body of case-law in which the burden of proof regarding the existence of a customary rule made it necessary for contending States to present what in their view was a supportive State practice. In all these cases, there is no indication that the Court dismissed any of the evidences adduced on the ground that it was inadmissible as evidence of State practice. On the contrary, it examined them and, in some cases, mentioned some of them (or others not provided by the parties) in support of its finding regarding the existence of a given customary rule. Some of the cases are mentioned below.¹⁴

a. In the *Asylum* case, the Colombian Government attempted to prove the existence of a right of diplomatic asylum - including the right of unilateral qualification and the right to safe conduct - based on customary law, by making reference to multilateral and bilateral treaties, diplomatic correspondence, press communiqués, and a memorandum of the Diplomatic Corps.¹⁵

b. Later, in the *Right of Passage* case, Portugal presented the following instances of State practice in order to prove the existence of a general and a local customary right of passage through enclaves: treaties, diplomatic correspondence, and correspondence between organs of the Portuguese Government.¹⁶

c. In the *US Nationals in Morocco* case, the United States relied on varied instances of State practice such as diplomatic correspondence, treaties and Joint Declarations, practice of American consular courts and decisions of French judicial authorities.¹⁷

d. In the *North Sea Continental Shelf* cases, more detailed attention was given to proving a customary rule. There is reference to State practice by the three contending States. The Federal Republic of Germany mentioned legislative acts, presidential decrees, several boundary treaties and a Protocol to another boundary Treaty. The Common Rejoinder offered by Denmark and Netherlands cited boundary treaties and other agreements, a Presidential proclamation, an international arbitral decision, voting positions adopted by States at the Geneva Conference on the Law of the Sea, an aide-mémoire, legislative acts and explanatory memoranda, diplomatic correspondence, a press communiqué, presidential decrees, and a statement by a Government official in Parliament.¹⁸

e. In the *Nuclear Tests* case, Australia and New Zealand endeavoured to prove the development and existence of a rule of customary international law prohibiting the conduction of atmospheric nuclear tests by citing the following evidences: multilateral treaties, UN General Assembly resolutions and resolutions of regional bodies, a Declaration of the 1972 UN Conference on the Human Environment, statements by State representatives before UN organs and at the Geneva Conference on the Law of the Sea, a resolution adopted by the Geneva Conference on the Law of the Sea, Joint Declarations by Foreign Ministers and Heads of State, diplomatic and public protests, and a Report to the International Law Commission (by a member of that Commission) on the Law of Treaties.¹⁹

3. Analysis and Conclusions

Generally speaking, every State is regarded by other States, and acts on the international plane, as a unity. It has, though, a complex internal structure, composed of powers and derived organs which are regulated by its internal legal system. The organs or agents of the State have generally been defined as those which the State regards as such according to its

own internal legal system.²⁰ The acts and conduct of those organs or agents are capable of producing legal consequences at the international level, affecting, in particular, the formation of new rules or the discontinuation of old rules. Therefore, it is mainly through these organs and agents that the State participates in and influences the customary process. All this is more or less common ground, but in doctrine, those who hold a rigid consensualist view of the customary process and the nature of custom make an additional qualification. In their opinion, the organs of the State which take part in it should be only those which, according to the internal law of that State, could bind the State in a treaty.²¹ In other words, those organs which are responsible for the conduct of external relations.²² The main flaw in this view is that it disregards the fact that the customary process is essentially different from the treaty process, and custom does not represent a (tacit) treaty.²³ The prevailing view seems to acknowledge the potential role of any organ of the State in a given customary process, irrespective of whether its functions, as determined by the internal legal order, are of an international character or not.²⁴ Indeed, the survey above shows, firstly, that State practice relevant to the customary process could comprise the practice of organs from any of the three branches of the State, namely, the executive, legislative and judicial powers. This is further corroborated by the position assumed by the International Law Commission and the UN Secretariat in the elaboration of the Memorandum entitled *Ways and Means of Making the Evidence of Customary International Law More Readily Available*. The Memorandum lists, amongst the evidences of customary international law, treaties, decisions of nationals and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations.²⁵

The fact that the State organ or agent is engaged in internal activity as opposed to an external activity does not diminish its potential role in the customary process, provided that the act or conduct in question, either in isolation or as an element in a complex chain of related acts or conducts, actually touches upon a matter of international concern.²⁶ On many occasions, the acts or conduct of different organs from the branches of the State are - apart from contradictory internal practices - either consistent with the formulated policy of the

State or subsequently endorsed by it. A State ratifies the internal practice of its internal organs when the Executive organ responsible for external relations confirms its validity vis-à-vis other States. If the ultimate reason for the doctrinal debate over the determination of the 'normative' organs of the State centres upon the justifiability of extrapolating international legal effects from an otherwise internal act performed by an internal organ of the State, then one could argue that the subsequent endorsement of the action by the Executive imparts to the act the effects of an international act.

Although the concept of State act and conduct is of paramount importance to the legal process, it is to be borne in mind that acts and conducts of private persons, private companies and public corporations also play a role in the customary process, even when they behave in their private capacity, insofar as they help establish the **factual aspect** of a custom. For instance, when it is said that a State is exploring its natural resources off its coast or exploiting the outer space, it is known that this course of action is actually being undertaken by its nationals or its public or private corporations in a private activity. It is not difficult to envisage other situations where the conduct of non-State organs or entities has been regarded as relevant in the formation of a custom.²⁷ It should be clarified, however, that although acts of individuals or private companies in a private activity may contribute to the factual aspect of custom, their actual relevance to the formation of the resulting customary rule, that is, the normative effects of such acts, is produced only as a result of the direct or indirect participation of State organs.²⁸

Having said that, it is now appropriate to determine whether there is any distinction between the organs, persons or entities which can engage the responsibility of the State as a subject of international law and those which can participate in the customary process on behalf of the State. As the Report and Draft on State Responsibility prepared by the International Law Commission makes it clear, an act of State, for the purposes of international responsibility, is a somewhat narrower concept. For an act of State of this sort to be characterized, it must have been performed by an organ or agent of the State,

recognized as such by its internal legal order. Furthermore, this organ must have acted in that capacity only.²⁹ The Draft concedes the possibility that acts of private persons be attributed to the State, but they must be 'in fact performing public functions or in fact acting on behalf of the State'.³⁰ The reason for these stringent criteria is that for the purposes of State responsibility, the act of State is to be evaluated in the light of what the International Law Commission calls the 'objective element', that is, whether the act in question constitutes a failure by that State to comply with an international obligation incumbent upon it.³¹ This particular point is irrelevant to the customary process, since, as will be seen in more detail in Chapter VI, the fact that a given act of an organ of the State is or is not in conformity with what is required of it by an established customary rule does not necessarily impair its eventual influence on the customary process.

The hierarchical position of an organ in the State structure should not be a definite criterion for the assessment of its relevance to the customary process. One should bear in mind that the practice of a given State on a given matter entails not only the advancing of a claim or the performance of the acts which give expression to it, but also the enforcement or application of such claim. The latter may well be carried out by organs or officials of lower rank.³²

The question arises as to whether, in contrast to the treaty process, there is a division or specialization of functions amongst the State organs with reference to the customary process.³³ The answer is clearly in the negative. The functions and the competence assigned to each State organ by the internal legal order or by international law would not justify a distinction between law-creating and law-applying organs of the State (so far as customary law is concerned). Even if there were such distinction, it is known that, in practice, the function of the State organ does not always correspond to the legal effects produced by its acts in the exercise of that function.³⁴

Another conclusion which could be drawn from the survey above is that there is a wide variety of acts and documents which give expression to or record the practice of a State. The instances cited do not exhaust the list. Interestingly enough, the digests of State practice do not make any distinction between acts which represent, or documents which record, the 'material practice' of the State, and those which convey the *opinio juris* of the same State or simply are not its 'material practice'. In a word, a wider conception of State practice has been adopted, which embraces: 1) conceptually, both elements of the customary rule; 2) functionally, instances which have evidential value and instances which have a constitutive character; 3) not only actual (or physical) acts or conduct but also other formal and informal acts such as declarations, and so forth. A similar approach has generally been employed by States before international judicial and arbitral organs (*supra*), and also in the practice of the Court.³⁵

Some authors have opposed a broader notion of State practice on the ground that only the actual (or physical) conduct of States or their actual acts could be regarded as an expression of 'material practice' which have any bearing on the customary process.³⁶ The purpose is to exclude all acts which represent a mere claim or declaration from the notion of (material) State practice, classifying them as a manifestation of *opinio juris* (or 'legal articulation', in D'Amato's view). This seems to be solely a conceptual exercise, for in reality - as the methodology adopted by the Digests of State practice, and the practice of the Court shows - any attempt to isolate in a clear manner the two elements of a custom will prove to be a difficult task. The relevant instances of the practice of a State or the documents which contain evidence of the practice of a State are mostly those which at the same time indicate the *opinio juris* of the same State.³⁷ Moreover, even if it were possible to set out clearly the boundary between both elements, this does not mean that claims and declarations could not represent the material element. Prof. Parry has pointed out in this regard that sometimes there is very little difference between what a State does and what a State says, and when any difference is identifiable, the inter-relation between both may be so close as to render any distinction useless.³⁸ For example, there is no physical action or conduct in a diplomatic

protest, or diplomatic waiver from jurisdictional immunity: they usually take the form of a formal declaration. Yet, they are undoubtedly acts of State and represent a State's practice.³⁹ An example given by Prof. Parry concerns the recognition of State or Government, where, in his view, the relevant act is the recognition itself, usually in the form of a declaration, and not the exchange of diplomatic representatives.⁴⁰ There are also claims and declarations which are **complementary** to a physical conduct, in the sense that they contribute to its definition and description, and to that extent they should be regarded as composing the material element of custom. In the case of the Exclusive Economic Zone, for instance, it is known that, in contrast to the Continental Shelf concept, the EEZ has to be expressly claimed by a State before it can enjoy and assert the corresponding rights.⁴¹ What happens in most cases is that the Proclamation (in the form of Declaration, Presidential Decree or legislative enactment) serves as a guideline for all subsequent practice of the State.

Dr. Thirlway has made a distinction between a claim (as expressed in an act of State) associated with some 'specific dispute or potential dispute', and a 'mere assertion *in abstracto* of the existence of a legal right or a legal rule'. The former comprises the material practice of States, whereas the latter is merely supplementary evidence of State practice and *opinio juris*.⁴² Thus, he seems to use the notion of claim to distinguish between what he calls the material element of custom, which he considers to have a constitutive or law-making nature, and instances of State practice which are not material and have only an evidential role. It is difficult to understand why he defined the material element of custom by reference to a not material notion such as claim. After all, should not a material element be defined on the basis of external criteria? By appealing to the notion of claim he begs the question, since a definition of what he means by 'claim' is required. In addition to that, his distinction also refers to inter-State disputes as a criterion. This approach places too much emphasis on conflict-resolution as the way in which the customary process develops. A claim does not only raise disputes; it also receives the support of other States and may even be adopted by other States. But there are other questions which his distinction raises. Assertions *in abstracto* may well relate to a 'potential dispute', whether one understands 'potential dispute'

as meaning a situation that 'has not yet' arisen, or 'may eventually' or 'will probably' occur. The fact that a State asserts (*in abstracto*) the existence of a legal right does not preclude the possibility that this right be the subject of, or related to an inter-State dispute which arises later. Moreover, as Prof. Akehurst correctly pointed out, a claim which formally resembles an assertion *in abstracto* could well have been made with a particular dispute or potential dispute in mind.⁴³ It would seem from Thirlway's assertion, that a claim is related only to disputes involving the State which is claiming. It is possible, however, that a claim bears relation to disputes involving other States than the State which is claiming. This is especially true with regard to claims *in abstracto*. Finally, it seems unwarranted to say that an *opinio juris* is evinced only by assertions *in abstracto*. A State may well hold an *opinio juris* concerning a given customary rule which regulates an issue under dispute or potential dispute.

A stronger stance neglects altogether the role of claims in the customary process when they are unaccompanied by physical assertions. This position has some points in common with the view maintained by Thirlway, with the (notable) exception that it does not distinguish different types of claims. A statement of this stronger view has been made by Judge Read in the *Fisheries* case: 'Customary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships'.⁴⁴ The legal basis behind this proposition might be the concept of effectiveness, whereby only the effective exercise or protection of a claimed or recognized right could result in the validation and consolidation of such right.⁴⁵ The value behind this proposition is the recognition of the reality of power relations in the customary process. But does it underestimate the interplay of other legal factors?

The statement by Judge Read could be read as envisaging the situation where the State which makes an assertion can actually enforce it, but either fails to do so (and the claim would be ineffective) or gives effect to it (and the material act is what really matters). But

the legal force of 'actual assertions' should not be exaggerated. In this same Dissenting Opinion, Judge Read conceded two cases in which instances of seizures would be rendered irrelevant: 1) when they are met with 'immediate protest'; 2) when the asserting Government fails to 'justify and maintain' the seizures on the international plane.⁴⁶ Those instances show that overt actions are to be weighed in the light of all the circumstances of the case, and that acts other than actual conduct (such as 'paper protests' or verbal declarations) are also relevant to the customary process. Indeed, the occurrence or not of the latter may make, in Judge Read's view, the actual conduct ineffective.

Another danger in this type of view is that it may mislead others into thinking that a claim and the actual conduct of a State are always two different and separate things. Admittedly, there may be a plain discrepancy between a given claim and the corresponding material act(s) performed by the State. Apart from this situation, however, a claim is often associated with a corresponding act or behaviour by a State, either present, past or future. Indeed, a claim is in many cases inferred from an actual conduct. When the physical act performed by a State is the expression of or follows the claim advanced, there is a complementary function between both elements, each reinforcing the other.

There are situations which do not fit well into Judge Read's proposition. For example, in 1976 eight States claimed sovereign rights over the segments of the geostationary orbit which are located above their respective territories. They clearly had no capability, at that time, of implementing or enforcing their claims. Later, they changed their position, claiming only a legal regime which secured for them an equitable access to those segments.⁴⁷ The question is: should the change which occurred in their legal position be ascribed to their failure to enforce their claims, or rather to the lack of support from the other States, or both? Other variations give rise to new difficulties. There have been situations in which a State asserts its claim by seizing a trespassing foreign ship, but the actual resolution of the dispute is done in such a way that each party expressly reserves its legal position in that respect.⁴⁸ How could, then, the State which effectively asserted its claim by means of an overt action

invoke this precedent as against that other State in another future dispute of the same nature? Judge Read's proposition also seems to be unwarranted in regard to a number of bilateral agreements on fisheries which were concluded in the seventies, whereby a State granted to another State access to its fisheries resources off its coast, subject to some conditions. The State to which access had been granted usually recognized powers of boarding, searching and seizure to the authorities of the granting State, should any of its vessels act in violation of the agreement. Now, those treaties expressly maintained that they did not prejudice either party's juridical position concerning, for example, the extent of territorial seas or fisheries jurisdiction under international law.⁴⁹ It is questionable, therefore, whether any such seizure would have signified the recognition, by the State having access to the fisheries, of the other State's claim of jurisdiction and sovereignty beyond the limits accepted by it. A different matter is whether the fact that States opposing the extended coastal jurisdiction of another State had to conclude this sort of agreement strengthens the general position of the latter or undermines the rule defended by them.⁵⁰

To complicate things further, there are some general customary rules - like some of the rules relating to the exploration and exploitation of the outer space - which came into being when only very few States performed the actual practice. Likewise, there are two conflicting general rules or principles of customary international law which are declared by two groups of States to regulate the deep-sea mining, when what could be described as the actual practice (exploitation) has not even begun as yet. On the basis of what has been said above, one could conclude that prudence is necessary in assessing the overall importance of actual displays of behaviour in the formation of customary rules. All these circumstances bring into light the necessity of having a balanced view on the issue.

In view of the intensity of contemporary international interactions, the variety of means for acting, reacting and implementing, and the expanding nature of customary law, the general attitude of a State on a given matter should be ascertained from the ensemble of all types of relevant acts and positions assumed, internally and vis-à-vis other States.

II. Range of International Practice and Types of Custom

In 1950, Prof. Hudson submitted to the International Law Commission a working paper on the definition of the components of a custom, and one of the points put forward concerning the material element was the following:

Concordant practice by a number of States with reference to a type of situation falling within the domain of international relations ⁵¹

In reply to a question posed by another member of the Commission, regarding the definition of the expression 'number of States', Prof. Hudson stressed that he did not think that practice by a single State was sufficient to establish a custom.⁵² In other words, the text written by Prof. Hudson conceded the possibility of a custom being developed between a minimum of two States by means of a reciprocal practice. This has been recognized by the Court in the *Right of Passage* case, where it asserted that 'It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two'.⁵³

The number of States involved in a given practice may vary considerably, so that on the basis of this criterion one could identify several types of custom, namely, a bilateral custom, a sectional custom (comprehending a section of the States of the international system, sometimes from the same region), a general custom (involving the majority of States within the international system), and finally an universal custom (observed by all or nearly all States of the international system). Thus, in the *Asylum* case, where the existence of an alleged bilateral or sectional custom was in contention, the Court did not dismiss that possibility, although it held that such a custom had not been proved. In this same case, Judges Alvarez, Read, Azevedo, and Castilla explicitly acknowledged the existence of 'sectional' customs in the American Continent (as part of what has been named 'American international law').⁵⁴ In the *US Nationals in Morocco* case, the Court admitted, and the Joint Dissenting Opinion strongly emphasized, the existence of some customary rights arising out

of the regime of capitulations, possessed by a limited group of States (or section).⁵⁵ An example of the recognition, by the Court, of a general rule of customary international law (although it had been much disputed) is found in the *Nottebohm* case, where the Court inferred a rule by which nationality granted can give rise to a right of diplomatic protection only if there is a substantial relationship between the individual and the State.⁵⁶

The classification of different types of custom according to the number of States which take part in a given practice may be relevant for the determination of the features of each customary process and the operational range of each type of customary rule. With regard to bilateral customs and sectional customs, for instance, clear evidence of the participation of every State reputedly bound by it seems to be necessary.⁵⁷ In the *Asylum* case the Court stressed that the Colombian Government should prove that 'the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right... and a duty...'.⁵⁸ Two years later, in the *US Nationals in Morocco* case, the Court observed that there had not been 'sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco'.⁵⁹ Again, in the *Right of Passage* case the Court pointed out that it saw no reason why 'long continued practice accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States'.⁶⁰ This point was taken up by Germany in the *North Sea Continental Shelf* cases, when it rejected the argument that the equidistance method was a rule of regional customary law in the following terms: 'No regional customary law on the basic principles governing the apportionment of the submarine areas of the North Sea... can be established without the concurrence of France and Germany'.⁶¹ It follows also that the scope, *ratione personae*, of a rule derived from a bilateral or sectional custom would be limited to those States which are actually observing it, and in this sense it may partake the nature of a treaty.⁶²

A different type of custom, general custom, is established by a general practice. It is not easy to define what degree of generality is required by a general custom. There is consensus, however, regarding what is not required by a general custom: it is not necessary that the practice be followed by all States.⁶³ But beyond this common ground no precise definition of the number of States is possible. It is even uncertain whether such definition would be desirable, given the variety of situations out of which a custom may arise.⁶⁴ Some writers have used the term 'majority' to express the degree of generality, but that is still unsatisfactory. Is it 'any majority' or a 'large majority'? In any case, how large is a 'large majority'? In addition to that, one could try to qualify a type of majority on the basis of other criteria. For instance, one could refer to a 'representative majority'. Another way of qualifying the majority concerned is found in the opinion expressed by Judge Lachs in the *North Sea Continental Shelf* cases, which indicated that this type of custom should, in any case, involve the practice of the 'great majority of the interested States'.⁶⁵

It is generally acknowledged that the customary rule derived from a general custom is universally binding, with the arguable and qualified exception of those cases in which a State opposes it from its inception.⁶⁶ This far-reaching binding effect of a rule of general customary law is limited, however, by the fact that most rules of this type are regarded as *jus dispositivum*, being rules from which individual States may derogate by means of an agreement *inter partes*.⁶⁷ In this respect, the International Law Commission has made the following comment: 'The majority of the general rules of international law do not have the character of *jus cogens*, and States may contract out of them by treaty'.⁶⁸

Notwithstanding the wide acceptance of the proposition, perhaps not much thought has been given to its implications. 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. If the individual can derogate from the general rule whenever he wants, that is, if the application of the rule is subject to the interests of the individual, then one wonders whether this is really a legal rule.

Derogation from general law, on the international plane, would only make sense if all States participate in this act. The reason is simple: the law-makers seem to be entitled to derogate collectively from the law they have collectively created. But in this case, the general rule would have been abrogated or superseded; in other words, there would have been a permanent change in the law. It could be argued that this idea is justified by the existence of a kind of secondary rule which permits a derogation from general law as follows: 'Unless two or more parties agree otherwise, then general rule 'x' applies'. It is difficult to understand how a secondary rule could impart validity to a practice which is contrary to a general rule, and thus *prima facie* illegal. Only a contradictory 'legal system' could have a secondary rule which serves to undermine the effectiveness and even the existence of primary rules. Indeed, if a good deal of bilateral treaties are concluded the object of which constitutes a derogation from a general customary rule, then the 'survival' of the rule itself may be at stake. The existence of such secondary rule could perhaps be conceived if general law had the nature of a (multilateral) contract, and the parties to it had agreed that the object of the contract could be derogated from as between two or more parties by means of a particular agreement. There is no evidence that States regard general law in this way.

Apart from this argument on the secondary rule, the conception that general customary rules are derogable from by agreements *inter partes* may be thought to be justified on account of, for example, the principle *lex specialis derogat lex generalis*. This principle prescribes that treaties, which are particular law, derogate from general customs, which are general law, whenever they overlap.

There are also some practical difficulties. As has been noted above, the general understanding that States may contract out of general customary rules is subject to two qualifications: 1) that the general customary rule which is the object of the derogation does not represent *jus cogens*; 2) that the agreement does not affect third parties. The second condition seems to be grounded in the general rule that a treaty does not create either obligations or rights for a third State without its consent.⁶⁹ The problem arises when one

perceives that there are general customary rules which, by their nature and object, require equal application to and by all States, i.e., from which it is not possible to isolate the attitude of some States from the attitude of other States. In regard to those general rules, it could not reasonably be argued that the treaty was merely a *res inter alios acta*, because the operation of the treaty in question, even if intended by the parties to it to be restricted to themselves, would directly and necessarily affect the exercise of the rights of other States under the general customary rule. The nature of the treaty's object and of the general rule subject to derogation would make impossible any practical co-existence and legal compatibility between the legal régimes established by each of them. Suppose, for instance, that the testing of nuclear bombs in the atmosphere is prohibited by a general rule of customary law. Suppose, further, that State 'A' and State 'B' concluded a treaty by which State 'A' would test a nuclear device in an island which belongs to State 'B'. How could a particular derogation from this general rule be effected without affecting the rights of other States? In this case, the effects of the derogation of the customary rule will not be limited to those two States but will be felt by other States. To cite another example, the parallel operation of a treaty which purports to derogate from the freedom of the high seas customary principle, by establishing, say, the appropriation of some agreed areas of the high seas would be inconceivable. One should bear in mind that a claim to sovereignty or sovereign rights over a given area is necessarily a claim *erga omnes*. There is no such thing as an assertion or exercise of sovereignty as against one State only. Other situations may be contemplated in which the exercise of the 'right' to derogate from general customary rules is subject to limitations. If the concept of *jus cogens* is set aside, the operation of a derogatory treaty which does not affect the exercise of the rights of other States under a general customary rule may still face strong resistance on the part of those other States if the general rule regulates values which they regard as fundamental. Finally, one could contemplate a more complex situation. Suppose that there is a general customary rule on a matter which is also regulated by a multilateral (codifying) treaty. Suppose, further, that State 'A' and State 'B' are parties to the multilateral treaty. Could those States purport to derogate from the general customary rule

by a bilateral treaty without incurring in a breach of the obligations arising out of the multilateral treaty?

A universal custom could theoretically be identified whenever all or virtually all States of the international system are involved in it. For its formation, the participation or support of all or nearly all States would seem to be indispensable, and once formed it would normally present the same binding effect and nature as a general custom.⁷⁰ There are not many universal customs and customary rules. The Court seems to have classified as such, for instance, the rules on diplomatic and consular relations in saying that: 'The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules... accepted throughout the world by nations of all creeds, cultures and political complexions'.⁷¹ According to Prof. Verdross, the fundamental principles of the Charter also represent 'a universal customary rule of international law'.⁷² In the Preamble to the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organizations, reference is made to the *pacta sunt servanda* rule as being 'universally recognized'.

The arrangement of distinct classes of custom as above has been based solely on the number of States involved in the practice. The Court and the International Law Commission, however, have initiated a different approach with regard to the second and third classes (general and universal custom, respectively). According to this approach, those two categories are not formally distinguished from each other and their rules are deemed to comprise a single set of customary rules under the heading 'general rules of international law' or 'rules of general international law'.⁷³ The general acceptance of this terminology is testified by the fact that, in contrast to some previous UN multilateral conventions, which expressly used the phrase 'rules of customary international law', the Preamble to the 1982 UN Convention on the Law of the Sea states that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.⁷⁴

The Court might have employed a single terminology because it felt that in reality it would be very difficult to differentiate between both categories. For instance, how can one distinguish with certitude between the expressions 'nearly all States' and 'a large majority of States'? Or, to take another example, if all coastal States adopt a territorial sea of 12 miles, how should one characterize this practice? It is a universal practice if one takes into account the coastal States only, and a general practice if the land-locked States are considered as well.

Be that as it may, the principal reason for this attitude of the Court seems to be its view as to the binding effect or normative value of both types of custom. As Prof. Weil pointed out, both general customs and universal customs appear to be able to give rise, in the view of the Court, to the same range of legal obligations.⁷⁵ This is the reason why the International Law Commission would rather determine the specific normative graduation of a customary rule by reference to the subject-matter rather than its form (i.e., whether it is a general rule or a universal rule).⁷⁶ This unified concept of general and universal customary rules, in the way it has been used by the Court, means that in some cases there could be a 'normative upgrading' of some general customary rules, making them binding on all States, regardless of active dissent or differing practices, just as much as if they were universal rules which had received universal acceptance. It remains to be seen whether this unified concept and its corollaries have been adopted in this sense by States themselves. In theoretical terms, however, if the category of universal customs is acceptable, the tendency towards the enhancement of the normative value and transmutation of the nature of some customary rules into a type of superior norm should normally be associated with this category, for the obvious reason that they reflect a wider participation or support by the States. Indeed, this seems to be the case with many (if not all) customary rules which have been raised as possible candidates for the category of rules of *jus cogens*.⁷⁷

III. Qualities of State Practice

In customary law theory, there are some recognized parameters which help determine

whether a given international practice is established, thus capable of becoming a custom. Being a test for an established customary rule, however, they should not be regarded too rigidly in the formative stages of the customary process. They are examined below.

1. General Uniformity

Turning back to Prof. Hudson's paper, it first refers to a 'concordant practice' as a characteristic of the material element. This requirement has been repeatedly mentioned by the Court.⁷⁸ It might have been regarded as a relevant criterion because if a bulk of State practice on a given matter displays no uniformity, it is impossible to attest the content of the customary rule, or even its existence.

The first thing to note is that uniformity as a quality refers to the aggregate of the individual practices of States, that is, to an international practice. A given international practice is uniform when it has been continuously reaffirmed by a homogeneous pattern of behaviour. It presupposes the occurrence or recurrence of the same situation or set of circumstances, and that whenever the situation arose States behaved in a similar manner. But to what degree must an international practice be uniform? Judge Padilla Nervo, for instance, seems to understand uniformity as almost complete identity, as could be inferred from the following assertion: '...nor does that practice show a uniform, strict and total application of the equidistance line in such cases, so as to be qualified as customary'.⁷⁹ As to the Court, in two cases it apparently regarded the uniformity criterion in a very strict manner as well. In the same *North Sea Continental Shelf* cases, the Court indicated that an international practice should be '... virtually uniform in the sense of the provision invoked'.⁸⁰ Earlier, in the *Fisheries* case, the Court affirmed that '...although the ten-mile rule has been adopted by certain States... other States have adopted a different limit'.⁸¹ There is, however, a very definite contrasting opinion expressed by the Court in the *Nicaragua* case. It affirmed that:

It is not expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force...The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute

conformity with the rule... the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules...⁸²

In fact, when Prof. Hudson introduced his working paper, he was careful enough to observe that the French version should read 'de manière concordante' in place of 'de manière identique'.⁸³ Therefore, minor inconsistencies should not negate a custom. But it is to be borne in mind that both the Court and Prof. Hudson were thinking of rules of **general international law** when they set forth the elastic requisite of a mere general pattern of consistency. The question remains as to whether this should be applied to bilateral or sectional customs, which appear to be of a stricter nature.

A further point which demands clarification is whether the uniformity criterion should refer to the general aspects of the rule or extend to all its corollaries or definitions. For a legal rule is often a complex statement. Take, for instance, the Exclusive Economic Zone as defined by the 1982 UN Convention on the Law of the Sea. It contains provisions on the breadth of the zone, on the exploration, exploitation and conservation of its living resources, on its legal nature, on the rights of land-locked States, and so forth. How many of those aspects are present in the customary rule related to the Exclusive Economic Zone? The simple answer is that only those aspects which are found to be uniformly represented in the international practice are present in the customary rule. This is the reason why, in applying this criterion, one may end up with a legal rule which lacks definition. For instance, one of the contentions of Norway in the *Fisheries* case was that the alleged 10-mile rule was not a rule of customary law, because the respective practice was not uniform. The United Kingdom admitted that there had been inconsistency in fixing the precise unit, but stressed that there was 'ample continuity in the practice showing the existence of a rule of customary international law restricting the width of territorial bays'.⁸⁴ In other words, the general scope of the rule (that the width of territorial bays is restricted) could have been uniform but its definition (10-mile width) was not, and as the United Kingdom argued that both elements comprised the rule, the Court felt bound to reject it.⁸⁵

The complexity of a customary rule may also entail the consequence that one of its alleged aspects is discarded for lack of uniformity. For instance, according to the Court in the *Nicaragua* case, the principle of non-intervention basically consists in the prohibition to States or groups of States against intervening directly or indirectly in the internal or external affairs of other States.⁸⁶ This rule, which was said by the Court to be a rule of customary law, demands additional construction as to the several possible instances or types of intervention. The Court mentioned in particular the support for subversive or terrorist armed activities within another State, and the use of coercion regarding the choice by another State of a political, economic, social and cultural system, and the formulation of foreign policy.⁸⁷ It might have been argued that one of those types should not be included within the customary model for reasons of lack of uniformity in the practice. Thus, the general scope of the rule (non-intervention) would be proved, but one of its definitions would be discarded for lack of uniformity in the international practice in this respect. Maybe one should then make a distinction, prior to the ascertainment of uniformity in some practices, between the primary content of a customary rule and possible expressions given to it in its definition or application. This should be the case when the customary rule at stake offers only general guide-lines which require further construction and adaptation to the particular circumstances of the case. The Chamber of the *Gulf of Maine* case, for instance, stated that, with regard to delimitation of maritime boundaries, customary law provided 'only a few basic legal principles, which lay down guide-lines to be followed with a view to reaching an essential objective'.⁸⁸

2. Individual Consistency

In contrast with uniformity, consistency is a quality which refers to the individual practice of each State and not to the international practice. Consistency is a preliminary condition of the uniformity criterion, for if individual practices are inconsistent then the international practice will necessarily lack uniformity. But the reverse does not apply: if the individual practices are found to be consistent, the international practice may yet lack uniformity. A consistent practice is characterized when a State is found to behave in a similar manner

whenever the same situation or set of circumstances recurs. The *Asylum* case seems to be a good illustration of a case in which inconsistency of individual practices was considered to disprove the existence of an uniform international practice.⁸⁹

How consistent must the practice of a State be? In the *Fisheries* case, the Court made it clear that it was concerned only with a general consistency in the Norwegian practice, stating that: 'The Court considers that too much importance need not to be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice'.⁹⁰ This view may give rise to the following objection: if the individual practices are required to be only generally consistent, and if the 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. On the other hand, a general consistency is justified in order to discard the value of a conduct which deviates from a regular pattern of behaviour by reason of a clear political motive. Thus, in the *Asylum* case Judge Azevedo challenged the view of the Court because he thought that the examples of interruption in the practice were not only relatively few, but had occurred after a consistent pattern of past practices; besides, while Peru was reluctant to recognize the measures taken by a foreign diplomat, it continued 'to grant asylum in other countries'.⁹¹ If Judge Azevedo was right in his assessment of the practice (that there were only minor interruptions to an otherwise settled practice), then one could conclude that the Court might have thought that a mere general consistency in that practice was not sufficient: it had to be entirely consistent. But it is to be presumed, from the language employed by the Court, that it meant simply that there was not even a general consistency in the practice. This interpretation is more in line with the pronouncement made in the *Fisheries* case.

An interesting point was made by Judges Forster, Bengzon, Aréchaga, Nagendra Singh and Ruda in their Joint Separate Opinion in the *Fisheries Jurisdiction* case. They stressed that

this criterion should apply primarily or more strictly to those States which are said to be following or establishing the custom.⁹²

3. Continuity and Repetition

Since the late Roman Jurisconsults, the legal notion of custom has been associated with a marked time element.⁹³ It was common ground amongst the classic writers, for example, that an international custom was established by a 'long' use or usage.⁹⁴ Indeed, the Court or its individual judges have found in some cases the existence of a long established custom.⁹⁵ But in contemporary legal theory, the idea that a given international practice should necessarily pass the test of time before it may be regarded as a custom is no longer dominant. A new approach to this issue has emerged which takes into account the growing pace of contemporary international relations, and the innovative mechanisms for creating and developing norms of international law.

At the very beginning of its existence, the International Law Commission discussed this question. The 1950 paper submitted by Prof. Hudson on the definition of the customary rule contained the following requisite: 'Continuation or repetition of the practice over a considerable period of time'.⁹⁶ Opposition to the wording of the text led Prof. Hudson to agree to deleting the word 'considerable' and replace it by the word 'some', but the repetition (or continuation), he added, should be maintained.⁹⁷ One wonders then whether there was any purpose in maintaining this criterion, since the length of time was left undefined, being able to encompass both short and long periods.

The time element may be ultimately relative: it may be either short or long, depending on many variables, including the nature of the matter involved, the peculiar features of the respective legal process, and so forth.⁹⁸ What really matters is that the other elements of an established customary rule are conclusively verified (general, uniform and consistent practice, *opinio juris*).⁹⁹ This major development has taken place because the means and opportunities for international interaction have increased and diversified dramatically in this

century, not to mention the advent of new subjects of international law.¹⁰⁰ Thus, in 1969 the Court could state, with regard to the formation of customary rules derived from conventional provisions, that 'the passage of only a short period of time is not necessarily, or of itself, a bar...'.¹⁰¹

It is not denied, naturally, that if an established practice remains in operation for a long period of time, the strength of the custom is enhanced. This is indeed the main role of the time element.¹⁰² In the *US Nationals in Morocco* case, the Joint Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro, and Rau laid emphasis on this aspect in order to prove that France could not dispute the existence of what was a long established custom, saying that '...usage has been continuously at work... during a period of nearly a hundred years, if not longer, and, therefore, what has been happening since 1937 is evidence of a continuous process which began nearly a century before that date'.¹⁰³ In the same vein, the system of delimitation applied by Norway was found by the Court, in the *Fisheries* case, to have been 'consolidated by a constant and sufficiently long practice'.¹⁰⁴ The time element, however, could not be regarded as being *per se* an essential element in the formation of a custom; it merely serves to corroborate and evidence the established practice. For this reason, some authors have questioned whether one should continue to treat the phenomenon as custom, since, strictly speaking, it has been expanded to embrace rules which are not customary in the ordinary sense of the word.¹⁰⁵

The requisite of continuity may be understood as the condition that the general practice under scrutiny should not have suffered major interruptions whilst evolving, otherwise the development of a general rule may have been barred. In this sense, this requisite and another requisite, uniformity, are alike. Repetition in the practice, in turn, would seem to be connected with the individual practices of States. Its application to the formation of custom raises some questions. For example, should one expect that every individual State performs the same act repeatedly? That would be a difficult criterion to satisfy, for there may be situations in which some States have no occasion or need for, or interest in, acting or

reacting again over a given matter.¹⁰⁶ Also, given the fact, already discussed, that the practice of a State on a given matter is often constituted by a number of different acts and conducts, the problem may arise as to which act(s) the repetition criterion is applicable to.

IV. Special Type of Practice: The Dissenter State

The practice of dissenting States may be viewed from two different (but related) standpoints: a) as to the general effects it has upon the customary process, and b) the binding range of a given custom in relation to the dissenter State(s). The former is apparently a very simple issue, and could be briefly described in the following way: the objection of a State or some States to a customary practice in the early stages of development may prevent it from further evolution. As regards the second point, its controversial aspects deserve careful consideration.

There is ample agreement in contemporary doctrine with the view that a State which consistently opposes a custom from its inception may prevent the operation of the resulting customary rule against it.¹⁰⁷ In support of their opinion, those writers often invoke two judicial precedents, namely, the *Fisheries* case and the *Asylum* case. It is submitted, however, that these cases fail to prove the case as advanced by the writers.

In the *Fisheries* case, for instance, the Court made it clear that it did not perceive in the Norwegian practice any opposition or breach to the general rule itself but rather a particular application of the rule, as one may gather from this assertion:

Consequently, the Court is unable to share the view of the United Kingdom Government, that 'Norway, in the matter of base-lines, now claims recognition of an exceptional system'. As will be shown later, all that the Court can see therein is the application of general international law to a specific case.¹⁰⁸

True, the Court also examined whether the Norwegian system of delimitation would be valid supposing that the alleged 10-mile rule had become a general rule of international law. But it is uncertain whether the conclusions reached by the Court were part of the *ratio*. At

any rate, the Court considered Norway's opposition to the rule as one element among others. Thus, it concluded that the rule would have been inapplicable as against Norway not only because she had 'always opposed any attempt to apply it to the Norwegian coast', but also for the reason that there was no opposition on the part of other States to its distinctive practice, and in particular from the United Kingdom Government.¹⁰⁹ In addition, the Court laid emphasis on the fact that the Norwegian practice was both consistent and lengthy.¹¹⁰ All these features of the Norwegian practice were considered as a whole in order to justify the validity of Norway's practice 'even if the alleged 10-mile rule had become a general rule of international law'.

Summing up, what the Court found was not a case of persistent objection but simply a special application of a general rule. Thus, it is doubtful whether any conclusion might be drawn from this case which would be applicable to the persistent objector 'rule' as it has been generally exposed. Nevertheless, if one argues that there are in the *Fisheries* case some indications as to this theory, or that the conclusions arrived at apply *mutatis mutandis* to the case of a persistent objector, then it may be submitted that, from this case, the following criteria should be fulfilled by the State which claims to be in such position: 1) Clear, consistent and sufficiently long opposition (as reflected in its individual practice) to the customary practice from the outset; 2) General acquiescence by other States in this differing practice.

The other supportive case cited by some writers, the *Asylum* case, also seems to furnish not much ground for this claim. The relevant pronouncement reads as follows: 'Even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked as 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'.¹¹¹ This conjecture posed by the Court seems to presuppose that the Montevideo Conventions were declaratory of a pre-existing custom and that Peru

would have repudiated such custom by not ratifying them. If indeed this is the correct interpretation of the Court's assertion, then there is no justification for the persistent objector rule in this case. The reason is simple: in this case, Peru could not be said to have been opposing the custom since its commencement. Peru would have rejected an already established customary rule. Incidentally, it is questionable that the failure to ratify a declaratory treaty could exclude the State from the binding range of the customary rule which is being declared.¹¹²

It is also difficult to conceive how can one infer from a single act (or, to be more precise, an omission) a **pattern** of persistent objection to a rule. The Court's view could only be explained if one accepts that the Court endorsed throughout the case the consensualist view that these types of custom (bilateral or sectional) required the consent of each State allegedly involved in it. Having this in mind, the *dictum* of the Court may be regarded as purporting to demonstrate that Peru had not positively consented to the alleged custom; but this is very different from a finding that Peru had actively dissented from the alleged custom. Thus, on the basis of the Court's assertion and the circumstances of the case one could not extrapolate the notion of a persistent dissenter.

Even if the Court had relied on the general attitude of Peru towards the alleged rule, and not only on the failure to ratify the Conventions, a case for persistent objection would be difficult to prove. Throughout the case, the evidence afforded by the parties showed that there was a body of Peruvian practice which made it very difficult to prove that Peru had been consistently objecting to the alleged rule or even consistently following it. As already mentioned, the Court found a striking absence of uniformity in the instances of practice cited by Colombia.

If, as already discussed, bilateral and sectional customs are considered to be of a stricter nature, the persistent dissenter theory would be meaningful only to general customs. Prof. D'Amato has advocated the opposite.¹¹³ To say that a State may opt out of an emerging

bilateral or sectional custom by means of a persistent dissension seems to be a needless (theoretical) addition to an existing means, since this State could prevent the application of the rule against itself by simply not taking part in (or supporting) the practice concerned, regardless of the existence or not of acquiescence on the part of other States in its differing practice.

Furthermore, if the requisite of consistent objection to a custom **in the process of formation** is to be fulfilled, then it would be applicable only to evolving general customs and not to established general customs. In other words, a State could not claim a special right derived from an alleged persistent objection to an established general customary rule. Otherwise, there would be a return to pure voluntarism, which has been generally rejected both in theory and practice.¹¹⁴ This additional qualification of the theory would make its successful application very unlikely or at least restricted to a few cases, for there are not many rules which may be considered to be in the formative stage.

Some have suggested that examples of prospective candidates for the persistent dissenter role are France and South Africa. The French delegation in fact clearly opposed the definition given to *jus cogens* in the draft finally adopted by the Vienna Convention on the Law of Treaties, and this is said to be the main or sole reason for its refusal to sign the resulting Convention.¹¹⁵ The records of the Conference, however, show that France did not oppose the idea of *jus cogens*. On the contrary, the French representative even suggested its substance.¹¹⁶ But if, *arguendo*, France had consistently objected to the concept of *jus cogens*, could it successfully argue that a given rule should not be labelled as a rule of this character and that this rule may not be applied as such against it? This will be considered below.

As to South Africa, although it has admitted some discriminatory practices as part of the 'historical evolution' of the country, it has negated any breach of the 'ideals set out in the Charter', and has stated that it 'does not condone discrimination purely on the grounds of

race or colour'.¹¹⁷ One could argue, therefore, that South Africa does not openly and consistently defy the rules on *Apartheid* or against racial discrimination, even though the application or interpretation it gives to them in its actual practice may indicate the opposite. But even if it had been a characteristic persistent objector to those rules, the community of States as a whole has responded to its attitude with strong and uniform condemnation, so that in the end there is no possibility that South Africa will ever be able to claim, exercise or have recognized any alleged right.

The requisite of general acquiescence in the dissenting practice seems to conform to the reality of inter-State relations. This is so with regard to those recognized rules of general customary law which protect social values or interests which are regarded as fundamental by the international community of States (some of them might also be rules of *jus cogens*). The Court, for example, seems to have subsumed under this category the following rules: rules outlawing genocide, slavery, racial discrimination, the illicit use of force and intervention, and rules on diplomatic and consular relations.¹¹⁸ It may be right to say that if such type of rule is ever to be openly challenged by a State on the ground of persistent and consistent objection, it will encounter strong opposition by the other States, and hence it would be very difficult for the former to assert any special 'right'. Hence, in the *Fisheries* case, the Counsel for the United Kingdom Government put forward, as one of the exceptions to the persistent dissenter principle, that '...where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle'.¹¹⁹ As the example of South Africa shows, even in those cases where the dissenting practice concerns what had traditionally been accepted as the reserved domain of States (the treatment of its own nationals), the other States have been prepared to exert pressure on the dissenting State to see the general rule respected.¹²⁰ The general acquiescence of other States, therefore, seems to be essential for the application of the persistent rule in those cases. But where the exercise of the right of a persistent dissenter is subject to the acquiescence or acceptance of the other States, the legal nature of the right is open to question.

The requisite of acquiescence could be seen to apply also to other less than fundamental rules. This may be explained as follows. In some cases, the right which is being claimed by a dissenting State affects directly the exercise, by other States, of their own rights as recognized by a generally accepted rule. When that occurs, it is difficult to conceive how the dissenter could exercise its claimed right if not by the previous or concomitant consent or acquiescence of the other State(s). Take, for instance, a State which has persistently dissented from any claim of exclusive rights over the continental shelf which extends beyond 50 miles. Although it could (to its own disadvantage) maintain its claim of 50 miles, it could not legally and pacifically exploit the continental shelf of other countries located beyond the 50 mile-limit when the claims of those other countries are in accordance with a generally accepted rule, unless they allow it one way or another. A similar situation actually happened to some States which opposed, for some time, the extension of the territorial sea beyond the three-mile limit. They had to conclude several agreements to obtain permission from other coastal States for fishing off their coasts, while the latter could freely exploit their natural resources beyond the three mile-limit.¹²¹

One should not forget that the successful application of the persistent objector principle would simply mean that a potentially unilateral deviation has been recognized and runs parallel to an otherwise conflicting general customary rule. Once the deviation is allowed it becomes an exception to the general rule. And as Prof. Shabtai Rosenne pointed out, it is likely that a recognized and accepted dissenting position will simply create a particular legal regime between the dissenting State and the States which acquiesced in its position.¹²² In the *Fisheries* case, Judge Read developed an argument which is broadly along these lines, in regard to the Norwegian system of delimitation. He conceded the possibility of it becoming 'the doctrine of international law' either as special or regional law, thus denoting the particular character of the legal regime.¹²³

A discussion centred solely on the practical difficulties arising from the notion of the persistent objector would leave untouched the significant political aspect of the question nowadays. It is known that new developments in the procedures and means for creating rules of international law, together with the operation of the decolonization process, have switched away from the Western countries the initiative and power in international law-making.¹²⁴ As one observer accurately pointed out, there is nowadays a 'disjunction between control over the new law-making processes and the distribution of power'.¹²⁵ Naturally, as the Third United Nations Law of the Sea Conference shows, sometimes the majority may change according to the interests at stake, but in many fields the majority has been formed by the same identifiable group of countries. The so called Third World, sometimes together with the former Socialist World, have striven for the creation of a new body of law which could replace the undesirable rules of the old international law or else fill in the legal gaps resulting from the new perceived social needs.¹²⁶ Bearing all this in mind, some authors have argued that the formulation and application of this principle would promote the stability and balance of the international system and the international legal system by countering the overwhelming law-making power of a majority of States with a escape route for the minority to safeguard their interests.¹²⁷ The first clarification to be made is about the term 'minority'. How many States and what relative power should they have in order for them to be described as a minority? This is an important question because if, for example, there is a substantial minority, composed of powerful States which have direct interest in the matter under regulation, it would be very difficult to assert that a corresponding general customary rule exists and is in operation. There would be no need for any recourse to the persistent objector principle. If, however, the dissension is slowly eroded and only a very few States remain (or even one alone), then the principle would be relevant for them. But if the principle is applicable, stability is not necessarily achieved; on the contrary, despite resolving the 'confrontational attitude' of the minority towards the rule or the majority, there would remain the opposition of the majority to the minority's position. It could be argued that stability would reign if the persistent dissenter rule is generally recognized; but this

argument could be countered by saying that stability is also achieved if the majority rule is generally recognized.

The persistent objector rule has also been described as a healthy device without which the sovereign equality of States in the legal process would be at peril.¹²⁸ The argument disregards the fact that in the customary process the sovereign equality of States is very relative, for some States usually have a more decisive participation and influence in it than others.¹²⁹ Moreover, once a general customary rule is formed, its wide ranging binding effect - embracing even States which have never expressly manifested their consent to, or dissent from it (the fictitious 'tacit consent') - is another limitation imposed on the sovereignty of States.¹³⁰ Unless there is a change in customary law theory and practice, toward the old voluntaristic approach which gave prominence to a concept of absolute sovereignty and its corresponding autolimitation theory, the place assumed by the sovereign equality principle in it is in fact subject to the limitations above described. There is also an argument which invokes the support of the consent theory of international obligation in order to justify the soundness of the persistent objector principle. The role of consent in the customary process has already been examined in Chapter III, and the considerations made in that chapter are also applicable here.

Prof. Stein has argued that the persistent objector principle recognizes 'the special equities of vested or acquired rights and interests'.¹³¹ This touches upon a matter of great controversy: a previously legal situation which subsequently becomes, by virtue of the development of the law on the issue, illegal. In a sense, this is a problem of inter-temporal law. In the *Island of Palmas* case, Prof. Max Huber stated the following principle:

The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.¹³²

In the light of this principle, the validity of the original right of the dissenter (if it possessed such right) would be conditioned by the evolution of the general law on the matter. The practice of the Court shows a tendency to support the new development of a law instead of preserving past legal situations.¹³³ Some could raise the issue of the need for stability (as opposed to change) in the law, in order to justify the preservation of the old law which favoured the interests of the persistent dissenter. But this is not at stake; there is no question of a choice between two valid laws as if the general state of the law on the matter were unsettled; the persistent objector theory assumes that the law is established and the objector State is claiming a right to be excluded from the application of that law.

If the persistent dissenter principle were to have the justification or end advanced by Prof. Stein (recognition of acquired rights), then it would be hard to differentiate it from a historical right. In fact, when the United Kingdom Government, in the *Fisheries* case, argued that a State could acquire an exceptional position with regard to some general rule of customary international law, it made it clear that the State would do so 'by some process which is analogous to that of acquiring an historic title'.¹³⁴ The consecration of a historic right, however, is described by an authority as a prescriptive process in the face of existing law.¹³⁵ If this were to be so, then the persistent objector would have no original right ('acquired right', in Prof. Stein's words) but rather a right acquired after the establishment of the general law, and this right - it should be recalled - has to be acquiesced in or recognized by the other States as an exception to the prevailing general rule.

The fact that the successful application of the persistent objector principle is ultimately dependent on the acquiescence or acceptance of other States throws some doubt on its validity. If, however, the principle as espoused in some quarters of the doctrine gains wider recognition, particularly by the States themselves and in arbitral and judicial courts, and is effectively invoked and applied, then the inhibiting factors already discussed would be no longer valid.

¹ A number of explanatory points should be made. In the description of the contents of the digests, uniform and general terms and expressions have been used as far as possible. The words 'Government' or 'Governmental', for instance, cover all organs of the Executive, and not only the Foreign Office or Ministry for Foreign Affairs. In the same vein, diplomatic notes or diplomatic correspondence comprehend not only correspondence between a given Foreign Office and its diplomatic or consular representatives, but also correspondence of the same Foreign Office with foreign diplomatic and consular representatives, or with high officials of a foreign Government (such as the Head of the Government or the Head of State). Finally, the survey covers only some of the existing digests, for it is intended to provide a brief illustration. Most of them were selected by their degree of Governmental connection. In some cases, there was more than one digest from the same country, and a choice was made on the basis of the official link criterion and/or the date of publication (preference being given to the more recent one).

² Council of Europe, Publications of Digests of State Practice in the Field of Public International Law (Strasbourg, Council of Europe, 1970), pp.9-13. It should be noted that the Council's Resolutions did not set out the criterion used for differentiating between those two levels of State practice. One could think that the first level is comprised mostly of acts *interna corporae* (with the exception of diplomatic notes), while the second level consisted of acts on the international plane.

³ Kiss, Alexandre-Charles, Répertoire de la pratique française en matière de droit international public (Paris, Éditions du Centre National de la Recherche Scientifique, 1962), p.xiv.

⁴ Cançado Trindade, A.A., Repertório Brasileiro da Prática do Direito Internacional Público, Período 1961-1981 (Brasília, Fundação Alexandre de Gusmão, 1984). Decisions of national courts were not included.

⁵ Guggenheim, Paul *et alii*, Répertoire suisse de droit international public, 1914-1939 (Geneva, Eds A.Bale), Vol I, pp.vii, ix.

⁶ Ago, Roberto and Mario Toscano, La Prassi Italiana di Diritto Internazionale, Prima Serie (1861-1887), Vol I, Società Italiana per l'Organizzazione Internazionale, Consiglio Nazionale delle Ricerche (Oceana Publ., 1970), pp.xxxvi-xxxix. Decisions of national courts were not included because they were the subject of a separate collection.

⁷ Rovine, A., Digest of United States Practice in International Law (Washington, Department of State, 1973), p.v.

⁸ Greig, D.W (ed.), The Australian Year Book of International Law, 1981-1983 (Canberra, Faculty of Law, The Australian National University), vol. 10.

⁹ The Japanese Annual of International Law (Tokyo, The International Law Association of Japan, The Japan Times), ns.29, 31-32 (1986, 1988-89). Decisions of national courts are reproduced under a separate heading.

¹⁰ The Canadian Yearbook of International Law (Vancouver, UBC Press, 1991), Vol xxviii, Tome xxviii, 1990. Decisions of national courts are reproduced under a separate heading.

¹¹ Documents on Swedish Foreign Policy, Ministry for Foreign Affairs, 1987-89, New Series I:C:37-39. The classification of the material collected is divided into different but related headings such as international law, the United Nations, Antarctica, Human Rights, Europe, and so forth. This leads to some confusion; for instance, one could understand that all the instances cited under a heading other than 'international law' represent primarily policy considerations. At any rate, the investigation centred upon the instances mentioned under the heading 'international law'.

¹² South African Yearbook of International Law (University of South Africa, ed. VerLoren van Themaat Centre for International Law), Vol 15, 1989-90.

¹³ Parry, Clive (ed.), A British Digest of International Law (London, Stevens & Sons, 1967).

¹⁴ The purpose is to present a brief illustration of the types of evidence advanced by States before the Court to prove their case. The examples have been selected on account of the density of the body of evidence brought forward. The *Nuclear Tests* case was the only one in which the Court did not proceed to examine the evidences produced, because the case did not reach the merits.

¹⁵ I.C.J. Pleadings, Colombian-Peruvian Asylum case, Vol I, pp.36, 39-40, 91, 347-348, 358-364; and Vol II, pp.37-40, 82, 95-96, 98, 100.

¹⁶ I.C.J. Pleadings, Case Concerning Right to Passage Over Indian Territory, Vol I, pp.753-800; and Vol II, pp.411, 856-875.

¹⁷ I.C.J. Pleadings, Case Concerning Rights of Nationals of the United States of America in Morocco, Vol I, pp.292, 387-390; and Vol II, pp.284-285.

¹⁸ I.C.J. Pleadings, North Sea Continental Shelf cases, Vol I, 1968, pp.58-61, 190-197, 410-413, 488-503.

¹⁹ See *Nuclear Tests* cases, Pleadings, Vol II, pp.8, 262-267, Vol I, pp.181-182, 184-194, 502-513.

²⁰ See, *inter alia*, Art 5 of the International Law Commission's Draft on State Responsibility and comments in Yearbook of the International Law Commission, 1971, Vol II, Part One, pp.233-238; Kelsen, Hans, Principles of International Law (New York, Rinehart & Co., 1952), pp.117-118; Verdross, A., Règles générales du droit international de la paix, 30 Recueil des Cours de l'Académie de Droit International 1929-V, pp.335-336.

²¹ See Strupp, K., *Les règles générales du droit de la paix*, 47 *Recueil des Cours de l'Académie de Droit International* 1934-I, pp.313-315; Anzilotti, D., *Cours de Droit International* (Paris, Éd. Recueil Siréy, 1929), Premier Volume, Trad. Gilbert Gidel, pp.74-75. Needless to say, their view is a corollary of their understanding of custom as a form of tacit pact.

²² An enumeration of such organs may be found in Art. 7(2) of the 1969 Vienna Convention on the Law of Treaties.

²³ Even Tunkin, who holds a very consensualist view in his co-ordination of wills' theory, notes the difference between the customary and the treaty process. See Tunkin, Grigory, *International Law in the International System*, 147 *Recueil des Cours de l'Académie de Droit International* 1975-IV, pp.128-129. On the tacit pact theory as applied to custom, see Chapter III, pp.39-46.

²⁴ See, *inter alia*, Lauterpacht, Hersch, *International Law* (Cambridge, University Press, 1970), Vol I, p.67; Parry, Clive, *The Practice of States*, 44 *The Grotius Society* 1958-59, p.170; Sørensen, Max, *Les sources du droit international* (Copenhagen, Einar Munksgaard, 1946), pp.88-94; Guggenheim, Paul, *Traité de droit international public* (Genève, Libr. de l'Université, 1953), pp.50-52; Ferrari Bravo, Luigi, *La coutume internationale dans la pratique des Etats*, 192 *Recueil des Cours de l'Académie de Droit International* 1985-III, pp.257-258.

²⁵ See Ways and Means of Making the Evidence of Customary International Law More Readily Available, Memorandum submitted by the Secretary-General, United Nations, Lake Success, New York, 1949, Doc A/CN.4/6.

²⁶ Judge Nyholm, it is to be acknowledged, held a different view, namely, that the acts of State must have been accomplished 'in the domain of international relations...'. See The SS Lotus case, Judgement n°9, September 7th, 1927, Permanent Court of International Justice, Series A, p.59.

²⁷ For instance, in the *Namibia* case, Judge Ammoun has maintained the view that the struggle of peoples has been the primary factor in the formation of the customary rule which recognizes the right of peoples to self-determination. He equated it with 'general practice' in the meaning of Art 38, 1(b) of the Court's Statute. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order n.1 of 26 January 1971, I.C.J. Reports 1971, pp.70, 74 (Separate Opinion).

²⁸ For example, when the State ratifies or authorizes the acts of private persons. See Fisheries case, Judgement of December 18th, 1951: I.C.J. Reports 1951, p.184 (Diss. Opinion of Sir Arnold MacNair), and p.157 (Sep. Opinion of Judge Hsu Mo).

²⁹ See *op. cit. supra* n.20, pp.233-262.

³⁰ *Ibid.*, pp.262 *et seq.*. According to the Report of the International Law Commission, in such exceptional case the individual is acting as a '*de facto* official', for he is performing a function 'which should normally be performed by an organ of the State administration or of one of the other public institutions or entities, or is called upon to provide a service or perform a specific task on behalf of the State'.

³¹ See *Yearbook of the International Law Commission*, 1976, Vol II, Part Two, pp.75-79.

³² This is particularly true with regard to a State regulation over spaces under its sovereignty or jurisdiction. Sometimes the practice of a State embraces a set of acts by different organs of the same State, performed by officials of diverse rank. For instance, an Exclusive Economic Zone may be established by means of a Presidential Proclamation or an Act of Parliament, and be further regulated by a Presidential Decree or an administrative Act, and then be observed by the maritime police or enforced by a judge in a judicial proceeding.

³³ In the treaty process, the organs or agents of the State which are empowered to formally express the State's consent are normally those defined in Art 7 of the Vienna Convention on the Law of Treaties.

³⁴ Within the internal legal order, an organ whose function is to apply the law may well, in performing its tasks, be creating it at the same time. This happens because the creative process is inherent in the application of the law, since it involves the choice of law, the interpretation of the applicable norms and their adaptation to the circumstances of the case. The boundary between application of the law and its creation is therefore very thin, what perhaps calls for the abandonment of such distinction.

³⁵ In the *North Sea* cases, for instance, the Court said that 'the acts 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'. Thus, it looked for both elements of the customary rule in the same material. See *North Sea Continental Shelf* cases, I.C.J. Reports 1969, p.44. Similarly, in the *Gulf of Maine* case, the Chamber of the Court pointed out that customary international law comprised '...a set of rules whose presence in the *opinio juris* of States can be tested by induction based on analysis of sufficiently extensive and convincing practice...'. See *Gulf of Maine* case, Judgement, I.C.J. Reports 1984, p.299.

³⁶ See, for instance, D'Amato, Anthony A., *The Concept of Custom in International Law* (Ithaca, Cornell Univ. Press, 1971), pp.88-89; Van Hoof, G.H., *Rethinking the Sources of International Law* (Netherlands, Kluwer

Law and Tax. Publ., 1983), pp.107-108; Fitzmaurice, Sir Gerald, The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, 30 British Year Book of International Law 1953, p.68.

³⁷ See also Stern Brigitte, La coutume au coeur du droit international: quelques réflexions, Mélanges offerts à Paul Reuter (Paris, Éd. A.Pedone, 1981), p.482.

³⁸ See Parry, Clive, The Sources and Evidences of International Law (Manchester, Manchester Univ. Press, 1965), pp.63-67.

³⁹ On diplomatic waiver, see Art 32 of the 1961 Vienna Convention on Diplomatic Relations.

⁴⁰ It could be added that sometimes there is recognition by a State of another State or Government without the corresponding establishment of diplomatic relations, in which case the declaration or note will certainly be the sole relevant act. See, in this respect, Blix, H.M., Contemporary Aspects of Recognition, 130 Recueil des Cours de l'Académie de Droit International 1970-II, p.600. A good example is the early recognition, by Israel, of the Communist Government of (Continental) China, which was granted unilaterally, without an exchange of diplomatic representatives taking place until very recently.

⁴¹ See Art 77 (3), of the 1982 United Nations Convention on the Law of the Sea and Art 2(3), of the 1958 Geneva Convention on the Continental Shelf.

⁴² Thirlway, H.A., International Customary Law and Codification (Leiden, A.W. Sijthoff, 1972), p.58.

⁴³ Akehurst, Michael, Custom as a Source of International Law, British Year Book of International Law 1974-1975, p.4.

⁴⁴ See *op. cit. supra* n.28, p.191 (Dissenting Opinion of Judge Read). He may have had in mind, of course, that this was particularly true of regulations over sovereign spaces, which was the case *sub judice*.

⁴⁵ See Case Concerning Right of Passage Over Indian Territory, Judgement of April 12th: I.C.J. Reports 1960, Dissenting Opinion of Judge Armand-Ugon, p.82.

⁴⁶ The relevant excerpts read as follows: 'Here, it is necessary to rule out seizures made by Norway at and since the commencement of the dispute. They met with immediate protest by the United Kingdom, and must, therefore, be disregarded'; 'No instance has been cited by either Party in which a coastal State has seized a foreign ship and justified and maintained the seizure, on the international plane... There have been instances in which unsuccessful attempts have been made to justify seizures...'. See *op. cit. supra* n.28, pp.191-192.

⁴⁷ See UN Doc A/AC.105/320, pp.9-10, and UN Doc. A/AC.105/C.2/2/142.

⁴⁸ See, for example, Tsamemyi, B. Martin, The Jeannette Diana Dispute, 16-17 Ocean Development and International Law 1986, pp.353-367.

⁴⁹ See Brazil and United States of America, Agreement concerning shrimp, UN Treaty Series, Vol 894, 1973, pp.35-39; United States of America and Republic of Korea, Agreement concerning cooperation in fisheries, *Ibid.*, Vol 898, 1973, p.103.

⁵⁰ The States which granted access to their extended coast could argue later that the agreement was a particular (and permissible) derogation of a general customary rule and therefore an evidence of the existence of the same rule.

⁵¹ See UN Doc. A/CN.4/16, Yearbook of the International Law Commission, 1950, Vol II, p.26.

⁵² See Yearbook of the International Law Commission, 1950, Vol I, p.5.

⁵³ *Op. cit. supra* n.45, p.39.

⁵⁴ See Colombian-Peruvian Asylum case, Judgement of November 20th, 1950: I.C.J. Reports 1950, pp.276, 294, 316, 333, 370.

⁵⁵ See Case Concerning Rights of Nationals of the United States of America in Morocco, Judgement of August 27th, 1952: I.C.J. Reports 1952, pp.199-200, 221. See also North Sea Continental Shelf cases, *op. cit. supra* n.35, p.63 (Separate Opinion of President Bustamante y Rivero), and pp.111, 113 (Sep. Op. of Judge Ammoun); Military and Paramilitary Activities in and against Nicaragua case, Merits, Judgement, I.C.J. Reports 1986, p.535 (Diss. Op. of Judge Jennings), and p.184 (Sep. Op. of Judge Ago).

⁵⁶ See Nottebohm case, Judgement of April 6th, 1955: I.C.J. Reports 1955, p.23.

⁵⁷ See Francioni, F., La consuetudine locale nel diritto internazionale, 54 Rivista di Diritto Internazionale 1971, pp.415-421.

⁵⁸ See *op. cit. supra* n.54, p.276. Earlier, the Court had noted that the party 'which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party' (Emphasis added). *Ibid.*

⁵⁹ See *op. cit. supra* n.55, p.200.

⁶⁰ See *op. cit. supra* n.45, p.39.

⁶¹ See *op. cit. supra* n.18, p.60. In this very case, Judge Ammoun made a point to the same effect: 'For while a general rule of customary international law does not require the consent of all States... 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'; see *op. cit. supra* n.35, pp.130-131. Likewise, India put forward, among others, a similar proposition, in the Rann of Kutch Arbitration; see The Indo-Pakistan Western Boundary Case Tribunal, Award of 19 February 1968, Reports of International Awards, United Nations, Vol xvii, p.249. See also the viewpoint of the Norwegian Government in the Fisheries case, Pleadings, Vol I, p.380, para.254.

⁶² It is to be noted that in the *Right of Passage* case, India argued that the formation of a bilateral custom is not feasible, by virtue of the collective character of any customary rule. India conceded, however, that the bilateral practice could have given rise to a 'tacit convention - under Article 38, paragraph I(a) of the Statute...'. See Rejoinder of India, Pleadings Vol III, p.284, paras.584-585. See also Cohen-Jonathan, G., *La coutume locale*, Annuaire français de droit international, VII, 1961, pp.133, 140; Thierry, H. *et alii*, Droit international public (Paris, Éd. Montchrestien, 1984), pp.119-120; Akehurst, *op. cit. supra* n.43, p.29; Restatement of the Law Third, The American Law Institute, Vol I, 1987, § 102, Comment *e*. Judge Alvarez put forward the view, in the *Asylum* case, that 'American international law is binding upon all the States of the New World'. This statement leaves the impression that he thinks that this body of customary law is binding *erga omnes* within the region, even to those States which never participated in it. This may have been what he meant. His view, however, has not encountered support. See *op. cit. supra* n.54, p.294.

⁶³ Thus, the Court pointed out, in the *Fisheries* case, that, for the purpose of measuring the breadth of the territorial sea, 'it is the low-water mark... which has generally been adopted in the practice of States' (emphasis added). See *op. cit. supra* n.28 p.128. In the same case, Norway and United Kingdom expressly recognized this interpretation. See *ibid.*, para.161. A general custom on innocent passage through straits had been earlier recognized by the Court in the *Corfu Channel* case: see The *Corfu Channel* case, Judgement of April 9th, 1949: I.C.J. Reports 1949, p.28. See also *North Sea* cases, *op. cit. supra* n.35, p.104 (Separate Opinion of Judge Ammoun), pp.241-242, 244 (Dissenting Opinion of Judge Sørensen), and pp.224-225, 229 (Dissenting Opinion of Judge Lachs), in which reference is made to 'generally recognized' or 'generally accepted' rules of customary law, or simply 'the generality of States'. See also the Dissenting Opinions of Judges Loder and Nyholm in the *Lotus* case, *op. cit. supra* n.26, pp.34, 60. As already pointed out, this seems to be also the original understanding held by the Drafting Committee of Art 38 of the Statute of the PCIJ (see Chapter II, pp.23-27)

⁶⁴ For example, in the *Wimbledon* case the Court inferred a general customary rule - by which the passage of a belligerent warship through an international canal was not inconsistent with neutrality - from only two cases, because, arguably, there was not much material on which the Court could rely. See The *SS Wimbledon* case, Permanent Court of International Justice, Series A, n.1, 1923, p.25. See Skubiszewski, H., *Elements of Custom and the Hague Court*, 31 Zeitschrift Für Ausländisches Öffentliches Recht und Völkerrecht 1971, p.827-830.

⁶⁵ See *op. cit. supra* n.35, p.229; also, to the same effect, p.227 (Diss. Op. of Judge Lachs). See Rousseau, Charles, Droit international public (Paris, Éd. Sirey, 1970), Tome I, p.319.

⁶⁶ See, *inter alia*, Virally, Michael, *The Sources of International Law*, in Manual of Public International Law (London, Macmillan & Co Ltd, 1968), ed. Max Sørensen, p.132; Waldock, Sir Humphrey, *General Course on Public International Law*, 106 Recueil des Cours de l'Académie de Droit International 1962-II, pp.50-51; Calvaré, L., Le droit international public positif (Paris, Éd. A.Pedone, 1967), pp.221-222; Akehurst, *op. cit. supra* n.43, p.29; Kelsen, Hans, Principles of International Law (New York, Rinehart & Co. Inc., 1952), pp.312-313; Guggenheim, Paul, *op. cit. supra* n.24, p.49; Barberis, Julio, *Reflexions sur la coutume internationale*, Annuaire Française de Droit International, Vol xxxvi, 1990, pp.38-39; Carrión, A.R., Lecciones de Derecho Internacional Publico (Madrid, Ed. Technos, 1987), p.181. See also *North Sea* cases, *op. cit. supra* n.35, p.242 (Dissenting Opinion of Judge Sørensen), p.224 (Diss. Op. of Judge Lachs); *Gulf of Maine* case, *op. cit. supra* n.35, p.293. The persistent dissenter rule is dealt with more fully at pp.96 *et seq.*

⁶⁷ See, *inter alia*, Schwarzenberger, Georg and E.D. Brown, A Manual of International Law (Oxford, Professional Books Ltd, 1976), 6th ed., pp.24-25; Verdross, Alfred, *Jus Dispositivum and Jus Cogens in International Law*, 60 American Journal of International Law 1966, p.58; 'Customary International Law', Encyclopedia of Public International Law (Amsterdam, North-Holland, 1984), Vol 7, p.65. The following assertion of the Court in the *North Sea Continental Shelf* cases clearly identifies this principle: 'Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties...'. See *op. cit. supra* n.35, p.42, para.72. See, in this same case, Dissenting Opinion of Judge Lachs, p.229.

⁶⁸ See Yearbook of the International Law Commission, 1966, Vol II, p.248. See also Dissenting Opinions of Judge Sørensen (p.248) and Judge Lachs (p.229), in the *North Sea* cases, *op. cit. supra* n.35.

⁶⁹ See arts 26, 34 of the Vienna Convention on the Law of the Treaties.

⁷⁰ There is, of course, the possibility that some of such customary rules may be regarded as having the character of *jus cogens*.

⁷¹ See Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgement, ICJ Reports 1980, p.24, para.45. See also Reservations to the Genocide Convention, Advisory Opinion, 1951, p.23. See also Separate Opinion of Judge Ammoun in the *North Sea* cases, where he mentions that the freedom of the high seas is a 'universally accepted' custom of international law, *op. cit. supra* n.35, p.103. In the Namibia case, the same Judge placed the right of peoples to self-determination under the same category of universal customary right; *op. cit. supra* n.27, p.75.

⁷² See Verdross, Alfred, *op. cit. supra* n.67, p.62.

⁷³ See Fisheries case, *op. cit. supra* n.28, p.131; Barcelona Traction, Light and Power Company Ltd, Judgement, I.C.J. Reports 1970, p.32; North Sea Continental Shelf cases, *op. cit. supra* n.35, p.28 (Judgement) and p.225 (Dissenting Opinion of Judge Lachs), and p.198 (Dissenting Opinion of Judge Morelli); Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p.184 (Separate Opinion of Judge Sette-Camara); United States Diplomatic and Consular Staff case, *op. cit. supra* n.71, pp.31-33, 41; Gulf of Maine case, *op. cit. supra* n.35, p.294 (para.94), p.299 (paras.111, 112), p.302 (para.122); Aegean Sea Continental Shelf, Judgement, I.C.J. Reports 1978, p.32; Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1988, p.85; Case Concerning the Delimitation of Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic, Reports of International Arbitral Awards, United Nations, Vol xviii, p.42 (para.62), p.56 (para.95), p.57 (para.96); Yearbook of the International Law Commission, 1966, Vol II, p.248.

⁷⁴ See also Art 53 of the Vienna Convention on the Law of Treaties, which speaks of 'peremptory norm of general international law'. The discussions in the International Law Commission reveal that the members were referring to rules of customary law when they adopted this expression. But it should be pointed out that it is not clear whether the expression 'general international law' has been used in these Conventions to denote both general and universal customs or only general customs.

⁷⁵ See Weil, Prosper, Towards Relative Normativity in International Law, 77 American Journal of International Law 1983, pp.428-437.

⁷⁶ See *op. cit. supra* n.73, p.268.

⁷⁷ The customary rules regarding the non-use of force and non-intervention, for instance, are universally established and have been recognized as rules of *jus cogens*. See Nicaragua case, *op. cit. supra* n.55, pp.100-101, para.190 (Judgement), p.199 (Separate Opinion of Judge Sette-Camara), and p.153 (Separate Opinion of Judge Nagendra Singh); Yearbook of the International Law Commission, 1966, Vol II, p.247.

⁷⁸ See, *inter alia*, Asylum case, *op. cit. supra* n.54, p.276; Right of Passage case, *op. cit. supra* n.45, p.40 (Judgement) and p.99 (Dissenting Opinion of Judge Spender); Nottebohm case, *op. cit. supra* n.56, p.30 (Dissenting Opinion of Judge Klaestad); North Sea Continental Shelf cases, *op. cit. supra* n.35, p.43 (para.74); Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgement, I.C.J. Reports 1974, p.50 (Joint Separate Opinion), and p.90 (Sep. Opinion of Judge De Castro).

⁷⁹ See North Sea Continental Shelf cases, *op. cit. supra* n.35, p.86 (Separate Opinion of Judge Padilla Nervo).

⁸⁰ *Ibid.*, p.43 (para.74).

⁸¹ See *op. cit. supra* n.28, p.131. Arguably, in this particular case the Court could not depart from a rigid stand, because the alleged customary rule was too precise (10-mile).

⁸² Emphasis added. See *op. cit. supra* n.55, p.98 (para.186).

⁸³ See *op. cit. supra* n.52, p.4.

⁸⁴ See Fisheries case, Pleadings, Vol II, p.501.

⁸⁵ Consider the following passage: 'It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law' (Emphasis added). See *op. cit. supra* n.28, p.132.

⁸⁶ See *op. cit. supra* n.55, p.108 (para.205).

⁸⁷ *Ibid.*, p.108 (para.205).

⁸⁸ See *op. cit. supra* n.35, p.290 (para.81). This statement was quoted with approval by the *Ad Hoc* Tribunal in the Guinea-Guinea Bissau case, see Guinea-Guinea Bissau Arbitration Award, *Ad Hoc* Tribunal, reproduced in International Legal Materials 1986, Vol. XXV, p.289 (para.88).

⁸⁹ See *op. cit. supra* n.54, pp.276-277.

⁹⁰ See *op. cit. supra* n.28, p.138. It is true that the argument centred around a possible historical title of Norway, and not properly on the evaluation of an alleged custom, but one sees no reason why it should not apply, *mutatis mutandis*, to the latter.

⁹¹ Hence these interruptions should be considered as breaches of a customary rule previously accepted. See *ibid.*, p.336 (Dissenting Opinion of Judge Azevedo).

⁹² See *ibid.*, p.50.

⁹³ See The Digest of Justinian (Philadelphia, Univ. of Pennsylvania Press, 1985), Mommsen, Krueger, and Watson (eds.), *Dig.*, I.3.32 and I.3.35.

⁹⁴ See Grotius, Hugo, De Juri Belli Ac Pacis Libri Tres, The Classics of International Law, ed. James Brown Scott (Oxford, Clarendon Press, 1925), Vol II, pp.17,44; Wolff, Christian, Methodo Scientifica Pettractatum, The Classics of International Law, ed. J.B. Scott (Washington, Oxford University Press, 1934), Vol II, pp.18-19; Vattel, Emmerich de, The Law of Nations (Philadelphia, T. & J.W. Johnson & Co, 1982), translator unknown, Preface, lxv, lxvi.

⁹⁵ See Asylum case, *op. cit. supra* n.54, p.321 (Dissenting Opinion of Judge Read), and p.370 (Dissenting Opinion of Judge Castilla); Right of Passage case, *op. cit. supra* n.45, pp.39-40; US Nationals in Morocco case, *op. cit. supra* n.55, pp.220-221 (Joint Dissenting Opinion).

⁹⁶ See *op. cit. supra* n.51.

⁹⁷ See *op. cit. supra* n.52, p.5.

⁹⁸ As to the peculiarity of the legal process, it is submitted, for instance, that the occurrence of a multilateral codification conference may speed up the legal process. See, for instance, Dissenting Opinion of Judge Tanaka, North Sea cases, *op. cit. supra* n.35, p.175.

⁹⁹ Mr Sandstrom, in commenting on Prof. Hudson's paper, noted that the occurrence of 'positive recognition by States' could shorten the formative period of a customary rule. See *op. cit. supra* n.52, p.6.

¹⁰⁰ See North Sea cases, *op. cit. supra* n.35, p.177 (Dissenting Opinion of Judge Tanaka), p.230 (Dissenting Opinion of Judge Lachs).

¹⁰¹ See *op. cit. supra* n.35, p.43 (para.74). See also, in the same case, the Dissident Opinion of Judge Tanaka (p.177), Judge Lachs (p.230) and Judge Sørensen (pp.243-244).

¹⁰² This was clearly stated by Judge Armand-Ugon in these terms: 'The continual repetition of an act over a long period does not weaken this usage; on the contrary, it strengthens it...'. See Right of Passage case, *op. cit. supra* n.45, p.82.

¹⁰³ See *op. cit. supra* n.55, p.221.

¹⁰⁴ See *op. cit. supra* n.28, p.139.

¹⁰⁵ When a custom is no longer represented by a long practice, is it really a custom? See, for example, Jennings, Robert Y., The Identification and Identity of International Law, in Cheng, Bin (ed.), International Law: Teaching and Practice (London, Stevens & Sons, 1982), p.6.

¹⁰⁶ In the North Sea cases, Judge Lachs (Dissenting Opinion) correctly pointed out that frequency may be invoked 'only in situations where there are many and successive opportunities to apply a rule', *op. cit. supra* n.35, p.229.

¹⁰⁷ See, *inter alia*, Brownlie, Ian, Principles of Public International Law (Oxford, Clarendon Press, 1990), 4th ed., p.10; Villiger, Mark, Customary International Law and Treaties (Dordrecht, Martinus Nijhoff Publ., 1985), pp.15-17; Fitzmaurice, Sir Gerald, The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, The British Year Book of International Law 1953, pp.24-26. See also Dissenting Opinion of Judge Sørensen in the North Sea cases, *op. cit. supra* n.35, pp.247-248.

¹⁰⁸ See *op. cit. supra* n.28, p.131.

¹⁰⁹ Thus, the Court mentions that the Norwegian system of delimitation '...encountered no opposition on the part of other States' (*ibid.*, p.137), and that its application did not 'give rise to any opposition on the part of foreign States' (*ibid.*, p.138). It also refers to the 'general toleration of the international community' and the United Kingdom 'prolonged abstention' (*ibid.*, pp.138-139).

¹¹⁰ Hence, the Court points out that the Norwegian system was 'well-defined and uniform' (*ibid.*, p.138), 'consistently applied' (*ibid.*, p.137), and that it had been consolidated by a 'constant and sufficiently long practice' (*ibid.*, p.139).

¹¹¹ See *op. cit. supra* n.54, p.278.

¹¹² This assumption is indeed questionable since it does not envisage the possibility that Peru failed to ratify the Conventions for reasons other than disagreement with their relevant provisions. A study made by UNITAR on a number of UN Multilateral Treaties confirms that in many cases other reasons were actually behind the non-ratification of those treaties. See Schachter, O. *et alii*, Toward Wider Acceptance of United Nations Treaties (New York, Arno Press, 1971). See Lauterpacht, Sir Hersch, The Development of International Law by the International Court (London, Stevens & Sons Ltd, 1958), p.376. See also Dissenting Opinion of Judge Azevedo, *op. cit. supra* n.54, pp.337-338.

¹¹³ See *op. cit. supra* n.36, pp.252-254.

¹¹⁴ Although an objection by a State to an established general customary rule could undermine it to some extent, and, if followed by other States, set into motion a new customary process, it would normally (or initially) be understood by other States as a breach of that rule.

¹¹⁵ See United Nations Conference on the Law of Treaties, Official Records, First Session, Meetings of the Committee of the Whole, New York, 1969, pp.309-310, 388.

¹¹⁶ In the words of the French representative: 'The substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person'. *Ibid.*, p.309.

¹¹⁷ See United Nations Security Council Official Records, 29th Year, 1800th Meeting, 24 October 1974, pp.11, 15.

¹¹⁸ See Barcelona Traction case, *op. cit. supra* n.73, p.32 (para.34); Nicaragua case, *op. cit. supra* n.55, p.98 (para.185); US. Diplomatic and Consular Staff case, *op. cit. supra* n.71, p.24 (para.45).

¹¹⁹ See Fisheries case, Pleadings, Vol II, p.429.

¹²⁰ The practice of the UN organs in their interpretation of article 2(7) of the UN Charter, and related State practice, have evidenced the limited (and, to some extent, ever-diminishing) role of the reserved domain of States. See Cançado Trindade, A.A., *The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations*, 25 *The International and Comparative Law Quarterly* 1976 (part 4), pp.715-765.

¹²¹ See the references provided by Jonathan Charney in his article, *The Persistent Objector Rule and the Development of Customary International Law*, *The British Year Book of International Law* 1985-LVI, pp.12-14. See also Agreement concerning Cooperation in Fisheries between the United States and the Republic of Korea, *United Nations Treaty Series*, Vol 898, 1973, p.103.

¹²² In his words: 'Customary law is in principle binding upon all States unless a State by its consistent conduct has manifested unwillingness to have that rule applied to itself and that position has not encountered opposition from other States having an interest in the matter. Acquiescence over a period of time in an apparently exceptional position will lead to the result that the exceptional position will become opposable to those States acquiescing in it'. See Rosenne, Shabtai, *Practice and Methods of International Law* (New York, Oceana Publ., 1984), p.66. It is to be noted the stress laid by the learned author on the acquiescence by other States in the dissenting practice.

¹²³ See *op. cit. supra* n.28, p.194. Incidentally, he also recognizes the need for acquiescence by the international community in the diverging practice.

¹²⁴ For a good discussion on the issue, see Cassese, A. and Joseph Weiler (eds.), *Change and Stability in International Law-Making* (Berlin, de Gruyter, 1988), pp.102-136.

¹²⁵ See Stein, Ted, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *Harvard International Law Journal* 1985 (n.2), p.468.

¹²⁶ See, in this regard, Rama Rao, T.S., *International Custom*, 19 *Indian Journal of International Law* 1979, pp.515-519.

¹²⁷ See Weil, Prosper, *op. cit. supra* n.75, p.418-434.

¹²⁸ See Danilenko, Gennady, *The Theory of International Customary Law*, 31 *German Yearbook of International Law* 1988, p.43. See also Separate Opinion of Judge De Castro in the Fisheries Jurisdiction case, *op. cit. supra* n.78, p.92.

¹²⁹ This is so mainly because what counts in the customary process is State practice, which varies in forms and effects, whereas in the treaty process the formula one State one vote for the conclusion of the agreement formally secures the equal participation of States, thus reflecting more the sovereign equality principle. See de Visscher, Charles, *Théories et réalités en droit international public* (Paris, Éd. A.Pedone, 1953), p.184.

¹³⁰ See Charney, Jonathan, *op. cit. supra* n.121, pp.16-19.

¹³¹ See *op. cit. supra* n.125, pp.477-478.

¹³² See *Reports of International Arbitral Awards*, United Nations, Vol II, p.845. See also the Resolution adopted by the Institute of International Law on the 'Intertemporal Problem in Public International Law', in 56 *Annuaire de l'Institut de Droit International* 1975, pp.537-540.

¹³³ See, for instance, Namibia case, *op. cit. supra* n.27, pp.31-32; Fisheries Jurisdiction case, *op. cit. supra* n.78, p.23. In the Tunisia/Libya Continental Shelf case, the Compromis of Arbitration encompassed, as part of the applicable law, the 'new accepted trends' in the Third UN Conference on the Law of the Sea. Counsel for Tunisia explained that the parties intended, by that provision, to invite the Court to 'reinterpret the existing rules in the light of these new trends in order to remain in step with the evolution of the law'. See Continental Shelf case (Tunisia v. Libya), I.C.J. Pleadings, Vol IV, pp.431-432.

¹³⁴ See Fisheries case, Pleadings, Vol II, p.429.

¹³⁵ See Fitzmaurice, *op. cit. supra* n.36, p.28.

CHAPTER V

THE SUBJECTIVE ELEMENT

The subjective element of a customary rule, originally called *opinio juris sive necessitatis* or simply *opinio juris*, is perhaps the most controversial issue in customary law theory. The doctrinal disagreement may be partly attributed to different conceptions that writers hold about international law as a whole, or even to their general conception of law. This will be acknowledged when necessary. In some occasions, however, the treatment of the question seems to neglect the evolutionary character of the customary process. In the ensuing study, the analytical method adopted consists, firstly, in exploring the definitions given to the subjective element by two main groups of theories. The first group comprehends those theories in which the subjective element relates solely to an established customary rule. The starting point is the case-law of the Court, not only by virtue of its enriching approach to the issue, but also because many theories of this first group reflect it. The second group comprises theories which have been developed to account for the moving picture of the customary process. Then, as a second part, this study focuses on the relationship between the subjective element and the material element. Finally, a tentative definition of the subjective element is submitted, which takes into account the conclusions formulated in preceding parts.

I. Theories related to an Established Customary Rule

1. The Case-Law of the Court

The pronouncements of the Court on the issue offer a great deal of information. The Court has made clear on several occasions that it considers the two elements (State practice and *opinio juris*) as combined and essential to the composition of a customary rule.¹ To say that the Court recognizes the need for the subjective element in any established customary rule does not mean, however, that it has uniformly, exhaustively and unequivocally set forth its definition or content. The significance of the Court's practice lies in the varied picture it

presented of the subjective element. The instances cited below provide a variety of formulations (though some of them overlap considerably) which together may serve to explain the nature and content of the subjective element as understood by the Court. Each item contains only a brief reference to the relevant pronouncements of the Court. After this enumeration, however, the formulations are explained and examined in more detail. In doing so, the legal theories associated with each formulation will be taken into account.

a. The subjective element as a belief in a set of legal correlatives

The reasoning of the Court in the *Right of Passage* case shows that it looked for evidence of a right and a corresponding duty in the practice under scrutiny, in order to be satisfied that the said practice corresponded to a custom. In a preliminary and general statement regarding the possibility of a bilateral custom, the Court said that this custom, once accepted by the parties as regulating their relations, formed the basis of 'mutual rights and obligations'.² When the Court came to examine the practice of private persons, civil officials and goods in general, it found that it had given rise to 'a right and a correlative obligation'.³ In other words, the subjective element was expressed as a belief by the State that it had a right and the other State had a corresponding duty. The legal relation thus involved was considered by the Court to be one of mutuality and correlativity, which means that the ascertainment of one of them resulted in the automatic determination of the other. Therefore, when the Court concluded that there was no right of passage in respect of armed forces, armed police, and arms and ammunition, it accordingly excluded the existence of a 'correlative obligation'.⁴ One could then draw the conclusion that, in this case, the subjective element represented a belief in the existence of a legal relationship which was manifested in the form of a set of legal correlatives (legal right—legal obligation).

The same reasoning appears to have been adopted in the previous *Asylum* case, where the Court had held that, for the alleged customary rule be regarded as established, the usage should be the expression of 'a right appertaining to the State granting asylum and a duty incumbent on the territorial State'.⁵ The *US Nationals in Morocco* case was another example

of such understanding by the Court. After citing the relevant passage of the *Asylum* case, it then affirmed that there was not sufficient evidence that a 'right... has been established in such a manner that it has become binding on Morocco'.⁶

b. The subjective element as a belief in a legal duty

In the *North Sea Continental Shelf* cases, the subjective element is described by the Court as a belief, by the States, that in behaving in a certain way they are applying a 'mandatory' customary rule; or as a belief, by the States, in the obligatory character of the practice in which they are involved.⁷ These and other statements made by the Court in this respect make it clear that, in looking for the subjective element, it reduced the subjective element to the legal obligation established by the customary rule. In contrast to the *Right of Passage* case, there was no mention of a right and a correlative obligation, but only of a legal obligation. This same approach to the question had been relied on by the Court in the *Lotus* case in order to dismiss the French contentions concerning the existence of a customary rule. In that case, reference was made to a 'sense of a legal duty'.⁸ The term has also been used in many individual opinions.⁹

c. The subjective element as a belief in a legal right

In the *Nicaragua* case, the Court explored the possibility of a customary rule allowing intervention by States in support of an internal opposition in another State. It accordingly enquired into the existence of a '...belief in a kind of general right for States to intervene, directly or indirectly...'.¹⁰

d. The subjective element as a recognition of the validity of a rule in conventional and customary law

In the *Nicaragua* case, the Court seems to portray the subjective element as a recognition of the validity as customary international law of a conventional principle or rule. One of the relevant passages reads as follows: '...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'.¹¹

e. The subjective element as the opinion on the content of a customary rule

The Court also uses the subjective element, in the *Nicaragua* case, to denote the view of States as to the content of a customary rule. The relevant passage says: '...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'.¹²

f. The subjective element as an factor which determines legally relevant omissions

In the *Nicaragua* case, the Court considered that the failure by the United States to invoke or express recognition of a right or rule reflected its *opinio juris* regarding the non-existence of such right or rule.¹³ In the *Nottebohm* case, the Court regarded some instances of omissions as affording evidence of an *opinio juris* concerning the validity of a customary rule.¹⁴ In the *Lotus* case, the Court found that some omissions were not sufficient to evince an alleged customary rule because the subjective element was not proved.¹⁵

g. The subjective element as the expression of acceptance of a customary rule

In the *Nicaragua* case, the acceptance by a given State or States of the alleged customary rule or principle is used as the subjective element.¹⁶ In the *Fisheries Jurisdiction* case, the Court seems to have implied the subjective element in the same way.¹⁷ In the *Right of Passage* case, the Court seemed to have in mind the subjective element when, with reference to the practice, it used the following expressions: '...accepted by them as regulating their relations...', '...accepted as law by the parties...'.¹⁸ In the *Lotus* case, the Court spoke of 'usages generally accepted as expressing principles of law'.¹⁹ Again, in the *US Diplomatic and Consular Staff* case, the Court pointed out that the Vienna Conventions '...state principles and rules... accepted throughout the world by nations of all creeds, cultures and political complexions'.²⁰ There are also many instances of the use of the term by individual judges.²¹

h. The subjective element as a recognition of a customary rule

Use of this term has been made in the *Fisheries Jurisdiction* case, where the Court stated that '...reasonable regard must be had to such traditional rights by the coastal State, in accordance with the generally recognized principles embodied in Article 2 of the High Seas Convention'.²² The same term is used in the Opinion on *Reservations to Genocide Convention*: '...the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.²³ Individual Judges have also used this term in the same *Fisheries Jurisdiction* case and in the *North Sea Continental Shelf* cases.²⁴

i. The subjective element as an individual, collective or general legal view

There are cases in which the Court mentioned the subjective element as a general opinion or general recognition.²⁵ The word 'general', in this sense, is supposed to mean 'the aggregate of many individual opinions', but it is no more definite than that. On the other hand, the Court has used the subjective element in the *Nicaragua* case as the legal view of a specific group of States which were parties to an international convention or other type of legal or political instrument.²⁶ In that same case, the Court also endeavoured to demonstrate an individual *opinio juris* held by a particular State.²⁷

2. Analysis of the Court's Formulations

The first three items above (*a, b, c*) deal with the same question, namely, the subjective element as a conviction or belief regarding the legal relation constituted by a customary rule. As already indicated, the Court reduced the subjective element to one or both elements of this legal relation, and three possibilities were examined. In resorting to the concepts of (legal) 'right' and (legal) 'duty' or 'obligation', the Court apparently attempted not only to establish the legal character of the disputed customary rule but also the existence of the rule itself, for, as Prof. Kelsen has pointed out, the legal right 'is, like the legal duty, the legal norm in relation to a certain individual, designated by the norm itself'.²⁸ The subjective element, being described in those terms, provides a criterion for the identification of customary rules as legal

rules, distinguishing them from other types of social rules or standards. What calls for attention in the use made by the Court of these concepts is that, as shown above, it has laid emphasis on them in different ways. After all, should not all legal rules be defined simply in terms of legal rights and corresponding legal obligations? Prof. Kelsen has said that, because of the social character of legal norms, every right held by one person is a reflection of the duty imposed upon another person.²⁹ There is a jurisprudential debate over this issue. Some authors, for instance, argue that although to every legal right in the strict sense there is a corresponding legal duty, the converse is not always the case.³⁰ Some writers also envisage legal norms as expressing either a legal duty or a legal right in isolation.³¹ This discussion grows in complexity if consideration is given to the possibility of different meanings or functions being assigned to the words 'right' and 'duty' and several types of legal relations between those meanings.³² There is disagreement even as to the composition of a legal system. Prof. Dworkin, for instance, argues that legal rules are not the only standards in a municipal legal system, and account is to be given to legal principles and policies which differ from them in many respects, affecting, for example, the degree of definition possessed by the legal duties and/or rights established by legal principles.³³ This, however, goes beyond the general approach of the Court, which seems to have adopted a simpler reasoning in using the general concepts of legal rights and legal duties in connection with the subjective element. Nevertheless, this theoretical debate is not to be ignored, since it may affect directly one's conception of the subjective element.³⁴

The need for defining some legal relations in terms of a legal right and a correlative duty (item *a* above) could be ascribed to a simple reason. All cases in which a legal relation was so described concerned bilateral or sectional customs. One could attempt to explicate this view as a logical derivation of the particular legal regime created by such customs: the circle of participants is limited, and all of them are involved in the practice. Thus, in those types of custom the legal relations established are individualized and determinable: a State has a right and/or obligation as against another particular State or else an identified group of States and not *erga omnes*, which brings to mind the idea of strict mutuality. To speak of rights and

obligations *erga omnes* in the extremely limited range of participation of a bilateral custom would seem inappropriate.

The way the Court considered those legal relations may, however, be best explained by the type of practice to which the customary rule referred and the way the contending States invoked or dismissed the existence of this customary rule. In all cases, one of the parties to the dispute invoked a legal rule which, on the one hand, entitled it (as a matter of right) to behave or act in a given way and, on the other hand, obliged the other State not to interfere with or impede the exercise of the alleged right, or to act in a given way. Also, there was no mention or admission (except in the *Asylum* case) of the other State having the same right on a reciprocal basis (although it could have a different type of right, as, for instance, the right to require that the first State exercises its right in a reasonable manner or in accordance with some other procedure). On the factual plane, the positive acts involved in the practices under examination (except in the *Asylum* case) were performed exclusively by the State which alleged the existence of the right: the other State did not adopt the same course of conduct nor had any practical reason for doing so. Thus, those cases seem to show that there is a connection between the peculiar features of the international practice and the type of legal relationship constituted by it.

It is doubtful whether this way of defining the legal relation at issue makes much difference on the practical plane of evidence, for example. Just as much in the case of a legal relation which is defined solely in terms of a legal right or a legal obligation, in the case of legal correlatives the Court can ascertain the legal rule (and the subjective element) by identifying only one of the elements, since the other would thus be automatically determined.

In those cases where the Court found the subjective element identical with the legal obligation established by the customary rule (item *b* above), it was following the opinion of many writers.³⁵ In legal theory on municipal legal systems, the concept of 'legal obligation' has generally been considered paramount to the definition of a legal rule. Prof. Hart has affirmed

that 'the statement that someone has or is under an obligation does indeed imply the existence of a rule'.³⁶ It is not clear whether the Court envisaged the legal obligation as the sole element in the legal relation constituted by the disputed legal rule. Be that as it may, Prof. MacGibbon has criticized this single element idea of a customary rule, whilst acknowledging that there may be a corresponding right to every legal obligation. He maintained the view, however, that the notion of *opinio juris* has only an indirect and limited role in the acquisition of customary rights, and this role is to be understood from the '...standpoint of the States affected by the exercise of the right in question'.³⁷ Therefore, his view ends up confining the notion of the subjective element to the legal obligation constituted by the rule.

This way of looking at the subjective element still begs the question, since a further definition of 'legal obligation' is needed in order to clarify the notion of the subjective element when seen from this perspective. Thus, it seems now proper to bring into light another related concept, that of sanctions.

Under traditional legal positivism, the notion of law has generally been described in terms of commands or orders, duties and sanctions. In Prof. Kelsen's view, there is a fundamental connection between the concepts of sanction and legal duty, since a duty can only be characterized when associated with a 'threatened evil', or sanction. Sanction, Kelsen adds, presupposes a legal obligation, so far as its actual application is conditional upon the occurrence of a delict, i.e., non-compliance with the obligation.³⁸ Prof. Austin put forward a similar idea by describing legal obligation in terms of the likelihood that a corresponding sanction will be applied to an infringing behaviour. It would seem clear, therefore, that both Kelsen and Austin used the notion of sanction with a view to providing an objective standard for the definition of a legal obligation or a legal rule.

The application of this conception to the international legal system could mean, for customary law theory in particular, that the existence or not of sanctions in their varied forms is the real legal test of a legal rule, be it of conventional or customary origin. Prof. Guggenheim, who

shares the view that the doctrine of the subjective element displays some fundamental flaws, is one authority in support of this idea.³⁹ Taken in this sense, the subjective element could be defined as the view that the international practice in question reflects a legal rule because behaviour which is not in conformity with it entails the application of sanctions. In a word, the subjective element would be the view that the international practice is made obligatory by the existence of sanctions backing it. The first difficulty in using the notion of sanctions to convey the subjective element is that other social rules also give rise to some sort of sanctions in case of discordant behaviour, a fact which blurs the distinction for which the subjective element was designed. In order to resolve this problem, a definition of 'legal sanction' as opposed to other types of sanctions is to be devised. If this task is ever feasible, one could be tempted to refer the concept back to that of legal rules, saying that legal sanctions are those attached to a legal rule by the international legal system.⁴⁰ This amounts, however, to tautology. A second objection to the appropriateness of the use of the sanction criterion is that even within the domain of sanctions which are sometimes said to be the result of an international delict, they may be implemented in the form of a wide variety of measures, ranging from political or economic to diplomatic, and so forth. It is known that sanctions applied by political or economic means are also motivated and justified by purely political reasons, without any regard to whether the State affected by them has truly committed an international delict or not. The adoption of sanctions in support of ideological principles or a particular social-economic system ('democracy', for instance) is not rare in international relations. What is then the dividing line in these cases? Even when the breach of a legal rule is invoked by a State as grounding the employment of political or economic sanctions, in the absence of an effective objective authority having powers of ascertainment *erga omnes*, the action taken may indeed have resulted from mere political expediency. All this throws some doubt on the conceptual value of sanction for present purposes.

Prof. Hart has criticized the association made by Austin and Kelsen between the notion of law and sanctions (what he calls the 'predictability of punishment'). However, although he argued against the idea that the predictability of punishment is an exhaustive account of what is

meant by a legal rule, he seems to have expounded a concept of legal obligation somewhat along those lines, with a few qualifications added.⁴¹ He seems to follow Austin and Kelsen when he states that one of the prominent features of a legal obligation is that it is supported by serious 'social pressure brought to bear upon those who deviate or threaten to deviate'. He does not define very well this expression but indicates, as illustrative of it, 'physical sanctions', 'penalty', 'insistence on performance' or 'demand for conformity'.⁴² The main obstacles to applying this notion to the realm of the subjective element have been discussed above. Prof. Hart also thinks characteristic of a legal obligation that the rule to which it refers is thought 'important' because it is 'believed to be necessary to the maintenance of social life or some highly prized feature of it'.⁴³ If the importance of the rule is a feature of a legal obligation, it certainly is not the only one, for legal obligations on matters of lesser importance are perfectly conceivable and in fact exist. The other characteristic feature of a legal obligation, in Hart's opinion, is that the conduct it requires may 'conflict with what the person who owes the duty may wish to do'.⁴⁴ Is it, nonetheless, a valuable distinctive criterion? It is commonly accepted that the operation of other types of social rules may also cause the sacrifice of one's own interests. Prof. Hart seems to concede this, for he adds, after stating this criterion, that 'the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist'.⁴⁵

The brief exposition of some interpretations given to the concept of legal obligation serves to show the degree of controversy that surrounds it. The real doctrinal dispute between those three jurists would seem to lie in the choice of applying a subjective or objective criteria to define the legal obligation. According to Prof. Hart, the notion of obligation developed by Austin was designed, and understood by other writers, as an empirical substitute for subjective ideas of 'belief', 'fears' or 'motives'.⁴⁶ This may have been so, but Kelsen arrived at the opposite conclusion, actually denouncing what he saw as a contradictory posture by Austin in introducing a psychological element (fear of sanction) in his definition of duty.⁴⁷ There is no doubt, on the other hand, that Kelsen intended to consecrate a concept of an 'impersonal norm', by which he meant that 'the statement that an individual is legally obliged

to certain behaviour is an assertion about the contents of a legal norm and not about any actual events, especially not about the mental state of the obliged individual'. In defence of his proposition, he cited two examples: the principle that ignorance of law does not exempt from obligation, and the case where particular legal norms are given retroactive force.⁴⁸ A contrary thesis has been propounded by Hart in what he termed the 'internal aspect' of the rule. In Hart's thought, the external aspect of rules, described as the 'observable regularities of behaviour', fails to explain the way in which rules function as such in the lives of those subject to them. Therefore, Hart suggests that, instead of relying in the external aspect, the principal distinctive feature of a legal rule should lie in a 'critical reflective attitude to certain patterns of behaviour as a common standard', that is, its internal function.⁴⁹ There is certainly an element of subjectivity in this internal aspect of the rule. Hart, however, attempted to bring some objective criteria into it, by asserting that this internal aspect of the rule displays itself in 'criticism, demands for conformity, and in acknowledgements that such criticism and demands are justified'.⁵⁰ All three criteria have their own significance, but none of them is fully satisfactory. Hart's description is relevant so far as it seeks to portray with fidelity the internal aspect of a legal rule, but its criteria of identification are still very subjective. Kelsen's and Austin's view, on the other hand, are commendable so far as they attempt to provide an objective criterion for the identification and definition of a legal obligation. But the criterion they chose (sanctions) is, as already pointed out, insufficient.

So far, only the concept of legal obligation in general theory has been dealt with. One should, however, take into account a study made by Prof. Schachter, in which he undertook the task of presenting a detailed and comprehensive definition of an **international** legal obligation.⁵¹ His approach consists in connecting the definition of an obligatory legal norm with the legal process which created it. Thus, an obligatory legal norm is said to exist when two conditions are fulfilled. First, the legal process which creates the obligation must satisfy some requisites, namely, formulation of initial prescription, authority of the law-makers, observance of the proper law-making procedures, willingness to respect and enforce the prescription, and communication of the requirement to the 'target audience' (i.e., the

addressees of the prescription or requirement). Second, once those conditions are met, the response of the 'target audience' is to be twofold: it has to perceive the prescription as 'authoritative' (in the sense that all conditions laid down above regarding the legal process have been accomplished); and 'likely to be complied with in the future in some substantial degree' (by which he means 'effectiveness').⁵² Summing up, Schachter submits that an international legal obligation is established when the legal process satisfies some conditions and States perceive the resulting prescription as authoritative and effective. If this definition is suggesting that a legal obligation is that which derives from the regular operation of a recognized legal process, then it merely states the obvious. It seems to rely on the old criterion espoused by traditional positivistic schools, namely, that the legal pedigree of a rule is determined by whether it was brought about by specified formal processes of law.⁵³ Its utility would seem to depend on how well the customary process is defined and identifiable, since States ('the target audience') must know how to identify a regular legal process and understand how it operates before they can judge or perceive whether the prescription is really authoritative (and effective) and thus a legal obligation. The second part of the definition does not seem to take the notion any further. To rely on the effectiveness of the prescription as a feature which reveals its legal nature seems unwarranted, since a non-legal social rule may equally be 'likely to be complied with in the future in some substantial degree'.

The idea of a customary rule and the subjective element being expressed in terms of a legal right (item *c* above) raises some interesting points. It has already been pointed out that in general to every legal right there corresponds a legal obligation. In view of this connection, when only a legal right in isolation is being invoked, the subjective element may still be defined by reference to a legal obligation in two related ways: a view that there exists a legal obligation which is correlative to this legal right, or a view that the State which has the right to behave in a determined manner is not under a legal obligation to behave in this manner.

As pointed out above, the Court opted for a general notion of legal right in its approach. It did not entertain the possibility, explored by Hohfeld and others, that this notion might have

diverse meanings and therefore express diverse legal situations or legal relationships. It is questionable whether such distinction would have proven useful anyway. Take, for instance, Hohfeld's analysis. He found that the word 'right' had been used in four meanings: as a claim, a privilege, a power, and an immunity.⁵⁴ In defining the right as a claim (right *stricto sensu*), he refers back to the notion of duty (or legal obligation), saying that 'the term is used as the correlative of duty'.⁵⁵ This adds nothing, so it seems, to what has been said regarding the general notion of legal right, and demands further elaboration of the concept of duty. Furthermore, in distinguishing, for instance, liberty from a right *stricto sensu* he throws some doubt as to whether liberty is really a right, so far as liberty would not be legally enforceable.

In ascertaining the existence of a legal right, special attention has to be given to its exercise and not merely to its invocation. The way the right is exercised may negate its existence and the presence of the subjective element in the practice concerned. The relevance of this aspect should not be minimized, and the *Right of Passage* case seems to prove this point. In that case, the Court examined whether the alleged right of passage of armed forces, armed police and arms and ammunition was 'permitted or exercised as of right'. The Court concluded that 'no right of passage in favour of Portugal involving a correlative obligation on India has been established in respect of armed forces, armed police, and arms and ammunition'.⁵⁶ To the finding on the non-existence of the alleged right two factors were regarded as relevant by the Court: the fact that the practice in question was based on reciprocity, and that the exercise of the right was conditional upon a prior authorization by the other State.⁵⁷

To ascertain the existence of an alleged right by the way it is exercised may prove to be a difficult task. A point which should not pass unnoticed is that a legal right is discretionary by nature. This means that States which are holders of a legal right to do something or to behave in a given way are not under an obligation to do that thing or behave in that way: they exercise their right according to their discretion. As a result, there could be fewer instances of State practice to rely on. Moreover, in those cases where the holder fails to exercise its right on all possible occasions, the distinction between the discretionary exercise of the legal right and

actions based on 'political expediency' or on any other non-legal reason would be very difficult to draw in practice.

As pointed out above, the use by the Court of the concepts of legal right and legal obligation in representing the subjective element is designed to establish the legal character of the disputed rule. In other words, when the subjective element is expressed in those terms it is serving one of its recognized functions, namely, to operate as a criterion for distinguishing law from non-law. It should be clarified, however, that this notion of the subjective element refers solely to *lex lata*, that is, established rules of customary law. In this sense, it may be regarded as a useful guide for the Court's activity, since it is bound by its Statute to apply international law in force, that is, established customary rules. It must be borne in mind, however, that this notion of the subjective element may assume a more complex and varied form according to the state of development of the law in question (cf. *infra*).

In relation to items *g* and *h* above (acceptance and recognition), there can be no certainty that the Court used those expressions to convey the idea of the subjective element. If they were used in a different sense from that of the subjective element, however, one could raise doubt as to the real conceptual utility of the subjective element, at least in those cases where the other two concepts were used. To keep in line with an assumption that the Court has adopted throughout a consistent theoretical approach to the question, the notion of recognition and acceptance will be treated as two possible manifestations or meanings of the subjective element.

The description of the subjective element as a recognition of a given customary rule (item *h* above) can be said to be based on a sociological perspective. It seems to relate the legal or customary character of the rule to a factual state of affairs which is apprehended by answering to the following question: what standards or international practices do the actors of the international system recognize as representing legal customary rules at a given moment? A response to this question merely signifies that the actors perceive that there exists a given

customary rule within the international system. There is nothing to prevent this perception from encompassing the particular features of the customary rule as well, such as its local or general character. Although in all instances cited under this heading reference is made to a 'general' recognition, this does not mean that there may not be an 'individual' recognition. On the contrary, the word 'general' should be read as the aggregate of individual instances. In some cases before the Court, States have also used this term.⁵⁸

Recognition, as Prof. Schachter has suggested, does not necessarily imply an act of consensual acceptance.⁵⁹ This is an important point, for although some Judges of the Court have used interchangeably both terms (recognition and acceptance) in the same opinion, it is feasible to draw a distinction between them.⁶⁰ As a matter of logic, recognition of a rule antecedes its acceptance. Furthermore, a description of the subjective element in terms of acceptance of the rule highlights the consent of States as the criterion for its normative quality and existence.⁶¹ It is not clear, however, whether the Court or its individual Judges had in mind this possible distinction. An explanation for this might be that the Court has in general been neither orthodox nor heterodox in matters of legal theory, and therefore its flexible approach allowed for manifestations of both consensual and non-consensual views.⁶²

Item *d* above refers to a possible construction of a use made by the Court of the subjective element. In the instances cited in this item, the Court was not defining *opinio juris* simply as a view regarding the validity of a customary rule. It deliberately used the expression 'customary international law' to denote the group of rules derived from that specific formal source. It seems, therefore, that the purpose was to draw attention to the distinctive nature of the legal opinion in question, which concerned the recognition of a parallel operation or validity as a customary rule of a rule which had also a conventional origin; or, in other words, that the customary rule so identified possesses this special characteristic. A somewhat similar use of the subjective element has been made by a distinguished authority, Prof. Reuter. Noting that a rule of *jus cogens* originates from a customary rule, he holds that a rule of *jus cogens* consists

in a custom 'with a particular kind of *opinio juris*': a conviction that 'the rule in question is of an absolute nature'.⁶³

There is no difficulty in understanding item *e* above. It is a logic corollary of the proposition that a rule has been identified, for one cannot be said to identify a rule without necessarily implying that its contents are known as well.

The Court has treated the instances of omissions by States (item *f* above), in relation to an action by another (or other) State(s) or not, in different ways. What remains clear and uniformly established, however, is the paramount role of the subjective element in the determination of whether the omission was legally relevant, i.e., whether the omission attests to the existence of a customary rule. It has been used as a criterion for determining whether the omission was a **deliberate act** (and, in this sense, a positive act) motivated by the existence of a customary rule.⁶⁴ When the subjective element is plainly characterized in such cases, there is little difference between omission and acquiescence, and, in this sense, the subjective element is reduced to acquiescence. This seems to be the point made by Prof. Hudson in commenting on his 1950 paper.⁶⁵ There is, however, a situation of abstention in which the subjective element assumes a different form. Prof. Scelle has recognized the possibility of a repeated abstention over a custom which was previously followed as leading to its desuetude.⁶⁶ In this case, the subjective element indicates also a deliberate action, but one motivated by other reasons, such as the view or perception that the customary rule no longer exists. Whenever the subjective element is not verified, it is incorrect to consider inactions (negative conduct) as actions (positive conduct).

II. Evolutionary Theories

As pointed out above, the picture of the subjective element presented by the case-law and related doctrines covers only a very definite state of a customary rule: when it has already matured. In doctrine, there are some theories which, reflecting the reality of international

relations, attempt to develop a definition of the subjective element in relation to the state and nature of the customary process. Some of the main theories are discussed below.

Prof. Cheng put forward a theory according to which the subjective element is the 'sole decisive element' in the composition and formation of a customary rule.⁶⁷ Thus, a 'smooth' operation of a customary process is described by recourse to the subjective element alone, in the following way: a State, either individually or in concert with other States, expresses a new *opinio juris* regarding general international law on a given matter; when and if the individual opinion of the States representing the 'prevailing section of the international community' follows suit, a general *opinio juris* is established and as a result a rule of general international law has been created.⁶⁸ The subjective element is defined by Cheng as 'the view held by, or that may be said, with effect opposable to that state, to be held by, a state as to what the law is at any given moment. The state concerned accepts that the norm in question is of a legal character (and not simply moral or social), and, therefore as such, carries legal rights and duties *erga omnes*'.⁶⁹

At first, one may have the impression that Cheng thinks that a State may hold this view irrespective of the phase of the customary process or the real state of the law. If this is really what he means, then there would be no distinction between an opinion on what the law is on a given matter and an opinion on what the law should be on the same matter. Here a distinction should be drawn between two types of situations: 1) those where the new *opinio juris* first advanced is really new in the sense that it refers to a matter which was at the time unregulated; 2) those where the new *opinio juris* concerns a matter which falls under an already established general rule of international law, in which case the adjective 'new' used by Cheng should be read as 'different'. In both circumstances, which have not been distinguished by Cheng, and especially in situation (2), it would be hard for the State(s) which commences a new practice to actually justify its conduct by appealing to an existing general (customary) rule. In situation (2), the State concerned would either be deliberately attempting to change the law by breaking it or would be relying upon a poor evaluation of the state of the law. The illustrative examples

granted by Cheng which fall under situation (2) apparently negate this reasoning. For instance, Cheng suggests that the Truman Proclamation represented an *opinio juris* of the United States 'to the effect that international law allows a coastal state to appropriate title to the natural resources of the adjacent continental shelf'.⁷⁰ It is doubtful, however, whether this instrument really expressed this *opinio juris* of the United States or simply its opinion on the desirability of a corresponding norm, particularly if the state of the law at the time is taken into account. It is known that the Court, in the *North Sea* cases, regarded it as the first development of the law on the matter.⁷¹ Cheng seems to accept that, for he says that at the judicial level, the Truman Proclamation 'would have been declared contrary to international law'.⁷² This and perhaps other examples should be read against an account given by Cheng of a customary process in which a new *opinio juris* on a matter already regulated by an established rule is objected to by other States. In this case, he admits that the State which enunciates a new *opinio juris* will 'naturally defend its innovation as a much better rule for international society as a whole'.⁷³ This justification does not fit well into the definition of the subjective element. There is a clear contradiction between an opinion that the law is 'x' on a given matter and a justification that it would be desirable to be 'x' on the same matter.

In another example offered by Cheng, Canada's extension of her territorial sea, the Canadian Government, in justifying the Act, expressed its view that international law on the issue was 'moving from the three to the twelve mile limit'.⁷⁴ In other words, the law was unsettled but tending to become settled. How could one regard this as the expression of Canada's opinion that the general customary law was, at the time the Act was enacted, the twelve mile limit, and that as such it carried legal rights and duties *erga omnes*? This example could only be explained if one takes the view that, in those cases where the law is unsettled, either course of action is actually permissible. But that would require the definition of the situation in question as equivalent to situation (1); in addition, Cheng would have to endorse the validity and application to the case of the principle by which what is not forbidden is allowed.⁷⁵ He showed this perception in another example mentioned by him, the Canada's Arctic Waters Pollution Prevention Act. Having first observed that Canada recognized that there was no law

on the subject, he describes the Act as an *opinio juris* that 'general international law permits a coastal State to extend its jurisdiction to the extent she has claimed for the purpose of preventing pollution'.⁷⁶

The objections put forward above lose much of their significance if, as a corrective move, one perceives Cheng's theory from a different perspective. In outlining his view of the international legal system, Cheng states, firstly, that the bulk of international law rests on the auto-interpretative level, where each State is allowed to maintain its own view of the law.⁷⁷ He also maintains that States, being their own law-makers, deliberately act to bring about changes in the law.⁷⁸ As regards the customary process, he rejects the 'initial-error' theory.⁷⁹ Bearing in mind these elements, in order to remedy any discrepancy in his theory, one has to regard the first *opinio juris* advanced by States as a bargaining instrument which aims at setting into motion a customary process. When a given State enunciates a new *opinio juris*, it does not matter - from the standpoint of the customary process - whether the state of the law really corresponds to what this State asserts. The important thing is the reaction of the other States, whether they will change their legal opinion or not. Turning back to the example given by Cheng of the Truman Proclamation, in interpreting it he said that the United States had 'clearly advanced a new rule of general international law', and that had been 'a deliberate act due to no initial error'.⁸⁰ In other words, the customary process, in Cheng's view, would run largely on the auto-interpretative level of international law, and, in its initial phase, the subjective element is a law-making instrument.

This construction of Cheng's theory, however, still leaves the impression that his definition of *opinio juris* needs revision, especially the part which says that the State accepts that the norm in question is of a legal character and carries legal rights and duties. As pointed out above (Part 1), such type of discourse is used to denote established customary rules, and not those in development. When the prevailing section of the international community shares the same legal opinion, and as a result the customary rule is brought about, then the subjective element may faithfully reflect Cheng's definition. Alternatively, it may be argued in defence of

Cheng that the State which expresses a given *opinio juris* may well behave as if the rule were established, and also treat other States which follow it or not accordingly, i.e., condemning conduct inconsistent with the invoked rule and recognizing claims based on it. Unfortunately, none of these points seem to have been clarified by him.

If, however, this constructive interpretation of Cheng's theory is accurate, then it provides a point of intersection with another view, expounded by Prof. D'Amato. His theory assumes a basic proposition which may be summarized as follows: international law is a 'process of relative persuasion' whereby 'the better of two conflicting claims prevails'.⁸¹ The subjective element, in D'Amato's theory, has to be understood in the light of this claim-oriented approach. It is defined by him as an 'articulation of a rule of international law'.⁸² In a claim-conflict situation, characteristic of international law, many contradictory rules may be articulated at the same time by various States. The customary process, in his view, consists in the building up of precedents based on one of such articulated rules, which finally gives rise to a customary rule.⁸³ A customary rule is said to be established once there is a strong sense of assurance by the States which follow it that they are not violating international law, and the other States find it 'increasingly difficult to challenge the practice'.⁸⁴ When an articulated rule is manifested by an act of State (which in D'Amato's opinion is restricted to physical acts), the other rules remain 'in the realm of speculation'.⁸⁵ The instrumental nature of the subjective element, in the first stages of the customary process, is a common proposition in Cheng and D'Amato's theories.

D'Amato's theory has been open to various objections, some relating to the definition of the subjective element, others to its role in the creation of a customary rule. It seems convenient to challenge, firstly, a basic methodological criterion adopted in his theory. He has put on record that 'theorising in international law requires the drawing of generalizations from a number of instances and in this sense is an inductive process'. Thus, his theory lays emphasis on the 'functional, as opposed to the conceptualistic aspects of the theory'. In other words, he believes that from empirical knowledge one can induce a better conception of international

law. Now this is objectionable on the ground that, as a matter of logic, the identification, selection, classification and analysis of the material furnished by empirical reality presuppose a conceptual framework. It is right to seek to determine, by the application of an inductive method, the content of law, but not its conception. As Prof. Del Vecchio has pointed out: 'To say that the concept of law exists only in what is given by experience is to deny a principle while relying on its results, because law could not be determined if its concept was not first averred and applied'.⁸⁶ It is also questionable whether it is feasible or even desirable to distinguish between the 'functional' and the 'conceptualistic' aspects of a theory.

His failure to understand that an analysis of the realities of State practice could not start from a conceptual *tabula rasa* is reflected in some of the controversial conclusions at which he arrived. Indeed, some postulates of his theory seem to form a picture different from what really happens in the customary process. For example, it is difficult to accept D'Amato's proposition that States articulate argumentatively a general customary rule on the basis of one or even few precedents. In articulating a general customary rule, States do not cite one precedent; they would rather mention a number of precedents sufficient to indicate a general trend. The problem with a claim-conflict based theory is that it tends to be contextually bilateral, and D'Amato's line of argument seems to develop entirely on this ground. It disregards, or at least seems to be inappropriate to describe, situations where there is a multilateral formulation of a customary rule.

D'Amato's theory does not elaborate on the justification presented by States in commencing a new practice. The subjective element is simply an articulation of a rule, a tentative proposal. Again, State practice shows, in contradistinction to D'Amato's view, that States which participate in the initial stages of the customary process offer not only precedents but also legal and extra-legal justifications for their behaviour. States do not simply propound a given rule; on the contrary, they usually make every effort to present their behaviour as legal or permissible as possible. Those justifications may play a role of their own in the development of the customary rule and in its evidence.⁸⁷

Concerned with the issue of justifications offered by States for their new practices, Dr Thirlway has put forward a different view. He relies on the expression *opinio juris sive necessitatis* to propose that States which initiate a new practice act under the influence of an *opinio necessitatis*, by which he means the opinion that the practice is 'necessary as law'.⁸⁸ This *opinio necessitatis*, according to him, is sufficient to create a rule of law.⁸⁹ What precisely he means by 'necessary as law' he does not make clear. He cannot mean that the practice is made necessary by reason of an existing law, for in this case there would be no difference between his view and the one held by the pre-existing rule school, which he found incorrect. If he means that the practice is necessary as if there existed a law requiring it, the same objection applies. There remains the possibility that he had in mind a teleological aspect when he proposed this definition. In this case, the expression 'necessary as law' would mean that States are of the opinion that the new practice needs to be law, that is, to become mandatory *erga omnes* as a general customary rule. Is this, however, an opinion or an aspiration? As an aspiration, the legal opinion concerned would in reality constitute an expression on the desirability of the rule, connoting traces of a view *de lege ferenda*. Classic writers such as Suarez had already identified the important role played by intention in the formation of custom.⁹⁰ To the creation of a 'binding custom' as opposed to a custom of fact (usage), Suarez thinks indispensable that the participants intend to establish this type of custom. Although this construction reflects the reality that States initiating a new practice may be intending to bring about a new customary rule, it adds little to the delineation of the range of possible justifications for their conduct.

A further explanation as to why States think that the new practice needs to be law could be outlined. In using the word 'necessary', Thirlway certainly intended to stress that the new practice was more than desirable; it was essential. If law is, as Prof. Scelle understood, an expression of social necessity, then States which start a new practice could justify it on the ground of its social necessity: the new practice is necessary for the community of States (and not only for those which initiate it) and therefore needs to become law.⁹¹ There is indeed support for this idea in the individual opinions of some Judges in the Court.⁹² This

proposition seems to be based on the idea that necessity brings about law. Leaving aside the circularity of the argument (law is necessary and necessity produces law), it may be argued that although what is necessary may turn out to be law, not all necessities automatically bring about this effect.⁹³ A parallel could be made between the concept of necessity and the concept of utility. Some legal philosophers have identified every legal right with a utility, and thus attempted to develop a concept of law on the basis of the latter. They have to face the fact that, although every legal right may reflect a utility, the converse is not the case.⁹⁴ There seems to be a perspective of causality in this whole argument about social necessity. Law (consequent) is determined by social necessity (antecedent). The main flaw in this approach is that it is unable to explain either the beginning or the end of the chain. For instance, there should be a cause for this social necessity and so forth. Moreover, on a practical plane, the identification of a social necessity is a very subjective task.

In response to these objections, it may be argued that, for present purposes, there is no need to define either what causes social necessity or the concept of social necessity. What really matters is that States invoke it as a justification of their new practices. But then how can one know whether the necessity invoked really exists or is only part of a strategy employed by the State to see the rule established? It could be replied that the fact that the characterization of a social need is left for the States themselves is irrelevant for in the end the other States will have to react to it, either positively or not, thus showing whether in their opinion the claim is well-founded.⁹⁵ There are, however, more objections to this notion. First, it is theoretically possible that, in the first stages of a customary process, the perception of the social necessity is not uniform, and many contradictory practices are accepted as necessary by different States. Thus, States would hold that, as the practice exists, then it must be a necessary practice. Another difficulty is that, even if hypothetically there is a common perception of a social need from the start, the way chosen for meeting this need may be as varied as the number of States, in which case the resulting practice could not be said to be uniform. State practice also reveals that sometimes States invoke their particular needs and not any common need as a basis for their new practice or even for the existence of a custom. For instance, in the *Right of Passage*

case, Portugal adduced the subjective element as a social necessity in order to prove the existence of an established customary rule the operation of which was in its interests only.⁹⁶

In addition to the views just described and examined, it is worthy of mention the pre-existing rule school. Broadly speaking, it advances the conception that a customary practice, even in its initial stages, reflects a pre-established legal rule. As a result, the general practice would not be a law-making factor, but only law-revealing. This school has been correctly criticized, mainly on the account of denying to the customary process the character of a formal source of law. This was, for instance, the argument used by the members of the International Law Commission to oppose Prof. Hudson's proposal that one of the requirements of a custom is that the practice should be in accordance with prevailing international law.⁹⁷ Having in mind such objection, Prof. Lauterpacht attempted to resolve the dilemma by pointing out that in the initial stages of the customary process, although there is some element of obligation, it is not necessarily of a legal nature, as the conduct could be dictated by 'duties of neighbourliness, reasonableness and accommodation'.⁹⁸ This view is a remarkable departure from the strict pre-existing rule school, inasmuch as it offers non-legal criteria for the new practices. To this extent, it is perhaps misleading to use terms like 'duties' and 'obligation'. The duties alluded to by Lauterpacht are better described as policy considerations which decision-makers take in their selection of courses of action. The definition of the subjective element in those terms only would seem unwarranted.

III. The Relationship between the Two Elements

Most writers, and indeed the Court itself, identify two elements in a customary rule, the subjective element (*opinio juris*) and the material element (State practice). These elements are weighed differently according to whether they are mere components of a customary rule or also fulfil a normative role in its formation. Accordingly, to some writers the subjective element is an *ex post facto* element of a customary rule, whereas others see the subjective element as preceding the material element.⁹⁹ This is not a mere controversy about the order in time in which those elements appear, for the same writers tend to attach an exclusive

normative role to the element which they think comes first. The reason for attributing a greater or exclusive normative role to one of the elements is due to no time-based criterion, but rather to one's own conception of international law.¹⁰⁰ While one of the elements has a normative role in the formation of a customary rule, that is, is seen as contributing to the formation of the rule, the other is characterized as an evidence of the said rule already formed.¹⁰¹

It is submitted that both elements are inter-related and comprise the same phenomenon, which has been described in this work (Chapter IV) by the expression 'State practice'. The question whether one or the other element is prior in time is rendered meaningless because they are both present in each stage of the customary process. The subjective element, as will be noted below, is manifested in every phase of a customary process and not only when the rule has matured. A good illustration of this interpenetration is provided by legal theory: an human act is juridically relevant basically by reference to a subjective will. Thus, even though it is externally manifested as a unity, it has in fact a double aspect: the external manifestation and the internal motivation. Ihering has described this phenomenon in the following words: 'acting and acting with a purpose are synonymous'.¹⁰² Similarly, each relevant act of State is deemed to reflect or express a legal conviction.

IV. Definition of the Subjective Element - A Proposal

As it seems clear by now, the subjective element has a variety of functions: it works as a criterion for identifying law, as a justification for one own's conduct, and as a law-making tool. Its content is also multifarious. The expression of an *opinio juris* by a State denotes three main things. Firstly, it represents a State's view (and position) concerning the state of the law on a given matter. Secondly, it conveys a State's view as to the legality of its own practice in face of the existing law (in the sense of conformity with it or not). Thirdly, it shows a State's view regarding the *opinio juris* and practice of other States (not necessarily of a particular State). These three aspects are present whenever an *opinio juris* is manifested, but they differ in content according to the state of the customary process or the type of custom concerned.

Thus, before embarking upon the proper definition of each aspect of the subjective element, it is necessary to distinguish four possible situations in a customary process. These are:

Situation 1: where there is an established practice unchallenged by any diverging practice.

Situation 2: where a new practice begins on a matter previously unregulated by international law.

Situation 3: where a State or small group of States deliberately starts a new practice (with a law-making intention) which is incompatible with an existing custom.

Situation 4: where there are two conflicting practices followed by two group of States, each upholding a different customary rule.

These situations are not intended to be an exhaustive description of a model customary process. They do not delineate the successive stages of a customary process, but simply a range of possible different stages among different customary processes. They seem to cover, however, all or almost all possible expressions of the subjective element.

In Situation 1, an *opinio juris* held by a State should refer to its view that international law is settled on the question in the form of a customary rule; that the international practice (in which it is actively or passively involved) corresponds to a custom; that it and the other States possess legal rights and/or duties derived from the customary rule; that its own practice is legal or consistent with international law; that any dissident practice constitutes a violation of the said customary rule; that the practice and the *opinio juris* of the generality of States are settled in the same way.

Situation 2 arises in those cases where new developments open a new chapter of State activities which are not regulated by international law.¹⁰³ In such cases, an *opinio juris* evinced by a State commencing the practice should manifest the view that international law is silent on the matter; that its conduct is therefore consistent with, or permitted by international law¹⁰⁴; that any course of action adopted by other States is also permissible until international law on the matter is settled; that the other States hold the same *opinio juris*. It is possible that

the State which starts the new practice understands that some principles or rules of international law are applicable to the new matter by analogy (though not without leaving some gaps), in which case the *opinio juris* would maintain that, although international law lacks further development to respond fully to the new matter, in view of the principles or rules already applicable, its practice is legal or consistent with international law.

In Situation 3, the State or States which start the new practice could never be regarded as having an *opinio juris* in either of the two senses defined above. Unless it has had a misconception of the state of the law on the matter at that time, it should be expressing an opinion that its practice, though inconsistent with existing international law on the matter, was justified on an given ground. The justification advanced may rely on some extra-legal rationalisation, such as social necessity, self-preservation, inadequacy of existing law in view of new social developments, coupled with appealing reasons, such as reasonableness of the practice, or its beneficial results to the other States, and so forth¹⁰⁵; but it is also possible that States invoke the support of some other legal rule or principle. Along with this justification, the State concerned may hold the view that the international legal system provides for changes in the law through new or diverging practices, provided that they are not open violations, i.e., unjustified actions.¹⁰⁶ Finally, the *opinio juris* of this State maintains that the law on the matter ought to be something else (opinion *de lege ferenda*).

In Situation 4, the international practice on the matter indicates a state of uncertainty.¹⁰⁷ It presupposes that there are two or more diverging practices, each being uniformly followed by a group of States. International law is uncertain in the sense that there is no rule on the matter (legal vacuum) or, alternatively, that there are two (or more) conflicting rules on the same matter. It is very improbable that any State from either group would maintain this first interpretation, instead of supporting its own version of the rule. Therefore, having regard to the second interpretation, those States which are pursuing the more recent practice could be said to hold the following *opinio juris*: that international law on the matter is unsettled, in which case either course of action is permissible or that its own practice is legal or consistent

with international law; that the international practice in which they are involved corresponds to a custom *inter se* (sectional custom); that it and the other States of the group possess legal rights and/or duties derived from the customary rule; that any subsequent dissident practice from a State of the group constitutes a violation of the said customary rule; that the practice and the *opinio juris* of the other States composing the group are settled in the same way; that the old rule is partially in desuetude and has been partially abrogated, or subsists only in relation to the other States. It is also possible that those States pursuing a new practice assert an *opinio juris* similar to the one described in Situation 1, qualifying as deviation from a newly established general rule the conduct of the States composing the other group. This would depend on the number and political density of the States which continue to follow the old rule. It is likely that the States which uphold the old rule (which used to be generally established) will continue to hold an *opinio juris* similar to the one described in Situation 1. At any rate, they could evince the *opinio juris* that their customary rule subsists *inter se*.

It is theoretically conceivable that a State holds, in succession, more than one of the types of *opinio juris* just described. There may also be a collective expression of *opinio non-juris*, that is, the view that a previously established customary rule no longer has validity, by virtue of desuetude or instant abrogation, being replaced by a new one or leaving a legal vacuum. An individual manifestation of *opinio non-juris* means that it regards its practice as detached from any legal rule, and/or as not producing any legal effect, being performed merely on discretionary grounds, or by reasons of political expediency, comity, or any other extra-legal reason.¹⁰⁸

¹ See *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgement, I.C.J. Reports 1986, p.97; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgement, I.C.J. Reports 1985, pp.29-30.

² See *Case Concerning Right of Passage Over Indian Territory*, Judgement of April 12th: I.C.J. Reports 1960, p.39.

³ *Ibid.*, p.40.

⁴ *Ibid.*, p.43.

⁵ See *Colombian-Peruvian Asylum case*, Judgement of November 20th, 1950: I.C.J. Reports 1950, p.276, repeated with the same words at p.277.

⁶ See *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgement of August 27th, 1952: I.C.J. Reports 1952, p.200.

⁷ See *North Sea Continental Shelf cases*, I.C.J. Reports 1969, pp.44 (para.76), 44 (para.77).

⁸ See The SS Lotus case, Judgement n.9, September 7th, 1927, Permanent Court of International Justice, Series A, p.28.

⁹ Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgement, I.C.J. Reports 1974, p.58 (Sep. Op. of Judge Dillard), p.90 (Sep. Op. of Judge De Castro); North Sea cases, *op. cit. supra* n.7, pp.104, 127, 128-129, 130 (Sep. Op. of Judge Ammoun), p.230 (Diss. Op. of Judge Lachs).

¹⁰ See *op. cit. supra* n.1, p.108, para.206.

¹¹ *Ibid.*, p.98, para.185; see also the following passages: '...the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter' (p.100, para.188); 'A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found...' (p.100, para.190).

¹² *Ibid.* (p.98, para.184).

¹³ The relevant passage says: 'In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist; but in doing so it may take note of the absence of any such claim by the United States as an indication of *opinio juris*'. *Ibid.*, p.111, para.211.

¹⁴ See Nottebohm case, Judgement of April 6th, 1955: I.C.J. Reports 1955, p.22.

¹⁵ See *op. cit. supra* n.8, p.28.

¹⁶ The following passages could be cited: 'Also significant is United States acceptance of the principle of the prohibition of the use of force...' (p.100, para.189); 'Notwithstanding the multiplicity of declarations by States accepting the principle of intervention...' (p.107, para.204). See *op. cit. supra* n.1.

¹⁷ For example: 'State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States...' (p.26, para.58); '...the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted' (p.23, para.52). See Fisheries Jurisdiction case, *op. cit. supra* n.9.

¹⁸ See *op. cit. supra* n.2, pp.39, 40.

¹⁹ See *op. cit. supra* n.8, p.18.

²⁰ See Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgement, I.C.J. Reports 1980, p.24, para.45.

²¹ See Fisheries case, Judgement of December 18th, 1951: I.C.J. Reports 1951, pp.87, 91, 94 (Separate Opinion of Judge De Castro); p.161 (Dissenting Opinion of Judge Petren); pp.119, 120 (Separate Opinion of Judge Waldock); p.37 (Declar. by Judge Ignacio-Pinto). See also Gulf of Maine case, Judgement, I.C.J. Reports 1984, p.364, para.7 (Diss. Op. of Judge Gros); North Sea cases, *op. cit. supra* n.7, pp.103, 104 (Sep. Op. of Judge Ammoun), p.86 (Sep. Op. of Judge Padilla Nervo), pp.224, 230 (Diss. Op. of Judge Lachs), pp.242, 244, 245 (Diss. Op. of Judge Sørensen); South West Africa, Second Phase, Judgement, I.C.J. Reports 1966, p.292 (Diss. Op. of Judge Tanaka).

²² See Fisheries Jurisdiction case, *op. cit. supra* n.9, p.24, para.54. See also the following passages: '...the preferential rights of the coastal State were recognized in various bilateral and multilateral international agreements' (p.26, para.58); '...a similar extinction of rights of other fishing States... would not be compatible with the notion of preferential rights as it was recognized at the Geneva Conferences...' (p.30); '...the former *laissez-faire* treatment... has been replaced by a recognition of a duty to have due regard to the rights of other States...' (p.31).

²³ See Reservations to Genocide Convention, Opinion of 28 July 1951, p.23. See also The Corfu Channel case, Judgement of April 9th, 1949: I.C.J. Reports 1949, p.22.

²⁴ See Fisheries Jurisdiction case, *op. cit. supra* n.9, p.37 (Declaration by Judge Ignacio-Pinto); on the Jurisdiction Phase, see Dissenting Opinion of Judge Padilla Nervo, p.84, and Separate Opinion of Judge Fitzmaurice, pp.68, 72. See also North Sea cases, *op. cit. supra* n.7, p.106 (Sep. Op. of Judge Ammoun), p.86 (Sep. Op. of Judge Padilla Nervo), p.244 (Diss. Op. of Judge Sørensen).

²⁵ See The SS Wimbledon case, Permanent Court of International Justice, Series A, n.1, 1923, p.28, which reads: 'The precedents therefore afforded... are merely illustrations of the general opinion according to which...'; North Sea cases, *op. cit. supra* n.7, p.44 (para.76), where the Court says that: 'State practice... should have occurred in such a way as to show a general recognition...'. Judge Fitzmaurice, in the Fisheries Jurisdiction case (Jurisdiction of the Court), said: 'Article 2 of the Continental Shelf Convention - which provision was generally regarded as reflecting already received law...' (p.71, para.7).

²⁶ This may be inferred from the following passages: 'This *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 resolution by themselves' (p.100, para.188); '...the adoption by States of this text (UNGA Res 2625) affords an indication of their *opinio juris* as to customary international law on the question' (p.101, para.191); 'Acceptance of a text in these terms (Helsinki Final Act) confirms the existence of an *opinio juris* of

the participating States prohibiting the use of force in international relations' (p.100, para.189). See *op. cit. supra* n.1.

27 For instance, the following passage: 'As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the...' (p.100, para.189). *Ibid.*

28 See Kelsen, Hans, General Theory of Law and State (Cambridge, Harvard Univ. Press, 1945), p.78.

29 See Kelsen, Hans, General Theory of Norms (Clarendon Press, Oxford, 1991), p.136.

30 See, for instance, Lord Lloyd of Hampstead and Freeman, M., Lloyd's Introduction to Jurisprudence (London, Stevens & Sons, 1985), p.445. Prof. White argues very cogently against the proposition that to every legal right there corresponds a legal duty and vice versa. See White, Alan, Rights (Oxford, Clarendon Press, 1984), pp.55-73.

31 See Akehurst, M., Custom as a Source of International Law, The British Year Book of International Law 1974-75, pp. 37-38.

32 See Hohfeld, W., Fundamental Legal Conceptions (New Haven, Yale Univ. Press, 1923), pp.23-114; Lord Lloyd, *op. cit. supra* n.30, p.445; Mendelson, M.H., State Acts and Omissions as Explicit or Implicit Claims, in Le droit international au service de la paix, de la justice et du développement, Mélanges en honneur de Michel Virally (Paris, Pedone, 1991). pp.373-382.

33 See Dworkin, Ronald, Taking Rights Seriously (London, Duckworth, 1977), pp.22-31.

34 Prof. Akehurst, for instance, attributes different manifestations of the subjective element according to whether the rule is framed in terms of duties or liberties. See Akehurst, M., *op. cit. supra* n.31, pp. 37-38.

35 See, *inter alia*, Shaw, M., International Law (Cambridge, Grotius Publ., 1991), p.72; Kunz, Josef, The Nature of Customary International Law, American Journal of International Law 1953, p.667. This notion has been referred to by States in their contentions before the Court: see I.C.J. Pleadings, Case Concerning Right of Passage Over Indian Territory, Vol III, pp.276-277 (India); I.C.J. Pleadings, Fisheries case, Vol II, p.427 (United Kingdom).

36 See Hart, H.L.A., The Concept of Law (Oxford, Clarendon Press, 1991), p.83.

37 See MacGibbon, I., Customary International Law and Acquiescence, The British Year Book of International Law 1957, pp.125-126.

38 In his words: 'The legal duty is simply the legal norm in its relation to the individual to whose behaviour the sanction is attached in the norm. The behaviour opposite (contrary) to the behaviour which as a delict is the condition of the sanction is the content of the legal duty'. See Kelsen, Hans, *op. cit. supra* n.28, p.59.

39 In his words: 'Pour qu'il y ait coutume, il faut que la conduite soit réalisée d'une manière constante et effective; il faut, en outre, que la violation soit susceptible d'être suivie d'une sanction' (p.48). See Guggenheim, Paul, Traité de droit international public (Genève, Libr. de l'Université, 1953), Tome I, pp.46-48.

40 Kelsen's definition seems to follow this line, by simply mentioning sanction as a legal reaction against an international delict. See Principles of International Law (New York, Rinehart, 1952), pp.20-25.

41 See *op. cit. supra* n.36, pp.10-12.

42 *Ibid.*, pp.84-85.

43 *Ibid.*, p.85.

44 *Ibid.*, p.85.

45 *Ibid.*, p.85.

46 *Ibid.*, p.81.

47 See Kelsen, *op. cit. supra* n.28, p.72-74.

48 *Ibid.*, pp.71-72.

49 See Hart, *op. cit. supra* n.36, p.56.

50 *Ibid.*, p.56.

51 See Schachter, Oscar, Towards a Theory of International Obligation, in The Effectiveness of International Decisions (The Netherlands, A.W. Sijthoff, 1971), S. Schwebel (ed.), pp.9-31. He points out from the start that in his analysis he employed the conceptual framework developed by H. Lasswell and M. McDougal for inquiry into the 'global process of authoritative decision'. Although he said he would use 'more conventional language', some terms and expressions actually used by him did not help clarify the points made.

52 *Ibid.*, pp.1-17.

53 Ago, Roberto, Positive Law and International Law, American Journal of International Law 1957, pp.700-701.

54 See *op. cit. supra* n.32, pp.38-62.

55 *Ibid.*, p.71 (also p.38).

56 See Right of Passage case, *op. cit. supra* n.2, pp.41, 43.

⁵⁷ *Ibid.*, pp.40-43. This view was criticized by Judges Fernandes (pp.130, 134), Sir Percy Spender (p.99), and Armand-Ugon (pp.81, 85).

⁵⁸ See I.C.J. Pleadings, North Sea cases, Vol I, pp.411-412 (Federal Republic of Germany), and pp.192, 503 (Denmark); I.C.J. Pleadings, Fisheries case, Vol II, pp.430, 573, 574 (United Kingdom).

⁵⁹ See Schachter, *op. cit. supra* n.51, p.21.

⁶⁰ See I.C.J. Pleadings, North Sea cases, Vol I, p.410 (Federal Republic of Germany), and pp.190, 488 (Denmark); I.C.J. Pleadings, Fisheries case, Vol II, pp.501-502 (United Kingdom). It should be noted that in the Vienna Convention on the Law of Treaties, the definition given to a peremptory norm of general international law (customary rule in origin) states that it is a norm 'accepted and recognized' as such by the international community as a whole (Art. 53).

⁶¹ On the role of consent in the customary process, including the position of the Court about it, see Chapter III.

⁶² The opinions of the Court show a constant oscillation between consensual and non-consensual or objective justifications. This may be attributed to the flexible approach of the Court rather than to a doctrinal hesitation. See, in this respect, Koskenniemi, M., *From Apology to Utopia* (Helsinki, Lakimiesliiton Kustannus, 1989), pp.340-421; Aréchaga, Jiménez de, Customary International Law and the Conference on the Law of the Sea, in *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague, Martinus Nijhoff, 1984), ed. by J. Makarczyk, p.577.

⁶³ Reuter, Paul, *Introduction to the Law of Treaties* (London, Pinter Publ., 1989), p.110. He did not go as far as saying that a rule of *jus cogens* runs parallel to a corresponding rule of customary law, identical in content, though this is a possible interpretation.

⁶⁴ See Mendelson, *op. cit. supra* n.32, pp.379-381.

⁶⁵ See *Yearbook of the International Law Commission*, 1950, Vol I, pp.4-7.

⁶⁶ See Scelle, Georges, *Cours de droit international public* (Paris, Ed. Domat, 1948), p.576.

⁶⁷ The ensuing analysis is based solely on the following article written by Prof. Cheng: Cheng, Bin, Custom: The Future of General State Practice in a Divided World, in *The Structure and Process of International Law* (The Hague, Martinus Nijhoff Publ., 1983), R. Macdonald and D. Johnston (eds.), pp.513-554.

⁶⁸ *Ibid.*, p.537. In trying to explain how a new customary rule is borne in opposition to an established customary rule, Van Hoof also stresses the role of the subjective element. He differs from Cheng, however, in that he maintains (following Meijers) that the two components of the customary rule (State practice and *opinio juris*) are distinguishable from each other and operate separately in time. As this Chapter and Chapter IV show, this view is untenable both on the practical and theoretical levels. See Van Hoof, G.J., *Rethinking the Sources of International Law* (The Netherlands, Kluwer Law and Tax. Publ., 1983), pp.91-105.

⁶⁹ See Cheng, *op. cit. supra* n.67, p.531.

⁷⁰ *Ibid.*, pp.536-537.

⁷¹ See *op. cit. supra* n.7, pp.47, 53.

⁷² See *op. cit. supra* n.67, p.538.

⁷³ *Ibid.*, p.537.

⁷⁴ *Ibid.*, p.539.

⁷⁵ On this controversial principle, see Lotus case, *op. cit. supra* n.8, p.34 (Dissenting Opinion by Judge Loder); Kelsen, Hans, *op. cit. supra* n.28, pp.305-306.

⁷⁶ See *op. cit. supra* n.67, p.538.

⁷⁷ *Ibid.*, p.523.

⁷⁸ *Ibid.*, p.534.

⁷⁹ *Ibid.*, pp.531-532.

⁸⁰ *Ibid.*, p.537.

⁸¹ See D'Amato, Anthony, *The Concept of Custom in International Law* (Ithaca, Cornell Univ. Press, 1971), pp.18, 86.

⁸² *Ibid.*, p.76.

⁸³ *Ibid.*, p.88.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ See Del Vecchio, G., *The Formal Bases of Law* (New York, Macmillan, 1921), p.101 (see also pp.102-105). The use of inductive methods for inferring universal statements has also been sharply criticized by such distinguished authorities as Karl Popper; see Popper, K., *The Logic of Scientific Discovery* (London, Hutchinson, 1959), pp.27-48.

⁸⁷ On justification see Schachter, O., The Nature and Process of Legal Development in International Society, in *The Structure and Process of International Law* (The Hague, Martinus Nijhoff, 1983), R. Macdonald and D.

Johnston (eds.), pp.756-757; Twining, W. and D. Miers, How to Do Things with Rules (London, Weidenfeld and Nicolson, 1991), p.131.

⁸⁸ See Thirlway, H., International Customary Law and Codification (Leiden, A.W.Sijthoff, 1972), p.55.

⁸⁹ *Ibid.*, pp.55-56.

⁹⁰ See The Classics of International Law (n.20), Selection from Three Works of Francisco Suarez (Oxford, Clarendon Press, 1944), ed. James Brown Scot, Vol II (The Translation), pp.565-566.

⁹¹ Prof. Rousseau also argues along these lines. See Rousseau, Charles, Droit international public (Paris, Sirey, 1970), Tome I, p.323.

⁹² See North Sea cases, *op. cit. supra* n.7, p.178 (Diss. Op. of Judge Tanaka), p.158 (Diss. Op. of Judge Koretsky). In the same way, see the opinion of Peru in the Asylum case, Pleadings, Vol I, p.119.

⁹³ One could respond to this objection by making a distinction between different types of necessity. Thus, there could be absolute necessities and relative necessities. Suarez, for instance, seems to adopt this distinction; in his view, law is not absolutely necessary (see *op. cit. supra* n.90, pp.37, 47). This distinction, however, still begs the question.

⁹⁴ See Del Vecchio, *op. cit. supra* n.86, p.214-217.

⁹⁵ Needless to say, this resembles Cheng and D'Amato's argumentative views of a fluid customary process.

⁹⁶ See I.C.J. Pleadings, Case Concerning Right of Passage Over Indian Territory, Vol II, pp.(359-362). Its interpretation of social necessity was confined to saying that the passage between Damão and the enclaves was 'absolutely necessary'. India did not share this perception and, in addition, contested this conception of the subjective element (p.691-693, Vol IV).

⁹⁷ See *op. cit. supra* n.65, pp.6-7.

⁹⁸ Lauterpacht, Hersch, International Law (Cambridge, Univ. Press, 1970), Vol I, ed. by E. Lauterpacht, pp.63-64.

⁹⁹ See Visscher, Charles de, Théories et réalités en droit international public (Paris, A.Pedone, 1953); Gianni, Grégoire, La coutume en droit international (Paris, A.Pedone, 1931), pp.132-133.

¹⁰⁰ See Stern, Brigitte, La coutume au coeur du droit international: quelques réflexions, in Mélanges offerts à Paul Reuter (Paris, A. Pedone, 1981), p.482; Reuter, Paul, Droit international public (Paris, Thémis, 1976), p.94.

¹⁰¹ Prof. Quadri, for instance, has put forward the view that the subjective element is not the cause but the effect of the existence of a rule, and therefore functions as an evidence of such rule. See Quadri, R., Cours général de droit international public, 113 Recueil des Cours de l'Académie de Droit International 1964-III, p.327.

¹⁰² See Ihering, Rudolf, Law as a Means to an End (New York, The Macmillan, 1924), p.9.

¹⁰³ The first activities in outer space are often cited as good examples of such new practices in a field unregulated by international law. The creation in 1958 of a Committee on the Peaceful Uses of the Outer Space with a view to, *inter alia*, elaborating a study on the legal questions arising out of the exploration of outer space seems to endorse this possibility (about the COPUOS, see UN General Assembly Resolution 1348 (XIII), UN Doc A/C.1/L.220/Rev.1, and UN General Assembly Resolution 1472 (XIV), Yearbook of the United Nations 1959, pp.24-29). In fact, the Conventions drafted by the Committee touched upon matters totally new to international law, like the exploitation of the resources of the moon and other celestial bodies. On the other hand, it is difficult to say that any issue is entirely unregulated by international law if one believes in the principle according to which what is not legally forbidden is legally permitted.

¹⁰⁴ By 'permitted' it is meant 'not juridically forbidden'. A permissive practice is characteristic of situations on which international law is unsettled.

¹⁰⁵ For instance, in the Preamble of Truman Proclamation on the Continental Shelf, it is asserted, *inter alia*, that the exercise of jurisdiction over this area is necessary, 'reasonable and just', and compelled by 'self-protection'. See Platzoder and Vitzthum, Seerecht. Law of the Sea (Baden-Baden, Nomos, 1984), pp.477-478.

¹⁰⁶ By 'unjustified actions' it is meant here a behaviour which, as well as being contrary to prevailing law, is unaccompanied by any sort of express justification on the part of the State, be it of legal or extra-legal character.

¹⁰⁷ This was, for example, the conclusion reached by the Joint Separate Opinion of Judges Forster, Bengzon, Aréchaga, Singh and Ruda, in the Fisheries Jurisdiction case, with regard to fishery limits in international law. See *op. cit. supra* n.9, pp.46, 52.

¹⁰⁸ This seems to be the case where a State settles a question by means of an *ex gratia* payment, refusing to admit the contentions of the other party. See Parry, Clive, The Practice of States, 44 The Grotius Society 1958-59, pp.181-182.

CHAPTER VI

THE CUSTOMARY PROCESS

This Chapter is concerned with the theoretical and practical aspects of the customary process. It purports to investigate the nature of a customary process and describe how it operates. The issue, and the task which has been proposed to undertake, is enormous and very complex. Of course, some matters related to this Chapter have already been studied in the preceding Chapters. None the less, there are many difficult points which have not been addressed and others which require further refinement, and that may perhaps explain the size of this Chapter. This study has been divided into three parts. In the first part, State acts and interactions are examined. It is important to realize how States behave within the international system, and what legal effects may arise from that behaviour, so far as the customary process is concerned. The second part of this study is devoted to the role of international institutions in the customary process. The third part is an attempt to provide a synthesis of how a successful customary process operates. It draws heavily on the propositions and conclusions arrived at in the first two parts of this study and in the preceding Chapters.

The customary process of the Exclusive Economic Zone is used in this study to illustrate some of the propositions advanced. Although instances of State practice related to the Exclusive Economic Zone are especially referred to on many occasions, instances related to other fields are also used as illustrations.

SECTION I

State Acts and Interactions

I. State Behaviour and the International System

A different perspective of the manner in which the customary process evolves is achieved

when one takes due account of the way in which the social and structural environment (international system) influences the conduct of States. It must be realized that not only legal considerations affect the State's decision regarding whether, how and when to follow a given course of conduct. In order fully to grasp how States behave, one has to comprehend initially some external constraints and influences that affect their behaviour.

1. The Operation of Social Factors

States behave in a very complex manner. It has already been pointed out (Chapter I) that States are rational actors, i.e., they tend to act consciously and deliberately in pursuit of their particular interests. Their behaviour, however, is not only shaped by some well-defined objectives established according to their particular interests. The substance and form of a State's behaviour is subject to the influence of a number of social factors. A 'social factor' is a factor determined by the social condition of a State, that is, by the fact that a State exists alongside several other States, in a society or community of States. Before those factors are examined, it is necessary to define first the concept of interaction.

An act performed by a State which touches upon an issue of international relevance is likely to reverberate in the international scene, affecting other States. Thus, an act may give rise to a reaction on the part of other States in the form of another act. This causal relationship between an act and a corresponding reaction is better described as an 'interaction'. Naturally, an interaction may not be confined to a single act by each party: it may assume a much more dynamic form, where a reaction to an act (which is itself an act) gives rise to a reaction to that reaction and so forth. Indeed, in most cases bilateral relationships assume the form of a dynamic interaction. Therefore, an interaction may be deemed to constitute a dynamic relationship in which States are mutually responding and adjusting to each other's behaviour. A clarification could now be made. The acts involved in an interaction do not necessarily concern the same issue nor are they necessarily of the same nature or even proportionate to each other. For instance, as a reaction to the action of State 'A', which proclaims that a given area adjacent to its coast is now under its jurisdiction and

sovereignty, State 'B' may decide to dispatch its naval forces to the area in order to secure the continuation of the exploitation of the natural resources by its nationals. In this example, one has two different (though related) types of action.

The very fact that a given act or conduct is likely to bring about an interaction with other States or another particular State means that in deciding when to act and how to act a given State takes into account a number of factors. Some of the relevant factors may be summarized as follows:

1.1 Expectations

In the words of Prof. Maoz, 'national decisions are based upon decisions makers' anticipation of decisions made at the same or some future point in time by other actors'.¹ A State which intends to accomplish an act knows that it is likely to gain more positive reaction from other States, and thus establish an harmonious and advantageous interaction with them, to the extent to which its behaviour corresponds to what those other States would expect it to be under the circumstances. Of course, that State may decide to follow a course of conduct which other States will probably disapprove of, if it thinks that its primary interests are best served by that action. But even in this situation, it is likely that that State would still attempt to take the less provocative course of action.

The other States' expectations regarding how should be the conduct of a particular State may spring from many factors. For instance, those expectations could be justified by a rule of international law which in their opinion regulates the subject-matter to which the act relates. It seems understandable that a State expects another State to behave in conformity with international law rather than risk the costs of a violation.² Expectations as to a particular State's behaviour may also arise from a former pattern of behaviour verified amongst the generality of States with regard to the same matter.³ Last but not least, expectations may be created by the past record of the State itself, which leads the other States to believe that it will continue to behave in the same manner.

It is to be noted that expectations affect both sides of the relationship. It is reasonable to assume that in reacting to a given act, a State takes into consideration the expectations of the acting State as to how it should react. For instance, a reacting State may moderate its negative reaction because it thinks that a stronger reaction could cause the other State to take even stronger or disproportionate counter-measures.

1.2 Preferences

'Preferences' refer to the best possible outcomes which in the opinion of a State may arise out of a given interaction. Each State involved in an interaction is supposed to have its own preferences. The assertion could be made that a State which is inclined to perform an act is likely to do it according to its evaluation of its own preferences. But the reality is not so simple. It is possible, for instance, that in seeking its own preference a State ends up having its worst outcome, that is, anything but that preference. To demonstrate this, a simple theoretical model based on Game Theory can be employed.

The following model is a simplified representation of a two-State interaction developed around general trade. The model is founded on a non-zero-sum setting, which is characterized by the fact that the interests at stake partially coincide and partially conflict. Suppose that two States, State 'A' and State 'B', are to decide on how to behave over their future commercial intercourse. For State 'A', its best outcome apparently would lie in exporting its products as much as possible to State 'B' while at the same time importing as fewer products as possible from 'B'. Thus, one could say that State 'A' would be tempted to prefer the adoption of restrictive measures against products emanated from State 'B'. Indeed, if State 'A' acts in that way and State 'B' fails to adopt counter-measures against the protectionist policy of State 'A', then the former would certainly have accomplished the best outcome it was pursuing. However, State 'B' is likely to follow its own preferences, and it may well have the same perception as State 'A', namely, that it would achieve most by adopting protectionist measures while pursuing an aggressive trade policy towards State 'A'. The result then would be the worst outcome for both State 'A' and State 'B'. Even if State 'B'

were supposed to act subsequently to State 'A', it is very likely that State 'B' would have retaliated the protectionist measures of State 'A'. Thus, the real preference or best outcome for both States should be to maintain a free trade between them as much as possible. The representation of this interaction on the basis of preferences would then be as follows:

State A		
State B	Protectionism <i>Open</i> (3,1)	Protectionism <i>Protectionism</i> (1,1)
	Open <i>Protectionism</i> (1,3)	Open <i>Open</i> (2,2)

The matrix above represents four possible outcomes resulting from the combination of each State's course of action. The first number in brackets represents the value of the outcome (payoff) of the interaction described in that cell for State 'A', whereas the second entry represents the value for State 'B'. As the matrix above demonstrates, the worst outcome for both States (mutual protectionist measures, each having a value of 1 for both States) would result if each State pursued its own perceived preference **without any regard to the other State's preference**. Thus, the application of this very simple model of interaction seems to demonstrate, firstly, that a State has its own preferences and, secondly, that in deciding on which course of action it is to follow it should take into account not only its own preferences but the other State's preferences as well. This connection between the preferences of the States involved in a given interaction is even stronger when the interaction has a long-term perspective. The reason for that is simple: in a long-term interaction, short-term gains to the detriment of the other party are bound to be lost in the long run, since the other State would have many opportunities to retaliate.⁴

1.3 Attributes of Likely Parties to an Interaction

The attributes of the likely parties to an interaction determine the extent of their influence on the conduct which a State is intending to perform. Thus, the preferences and expectations of those States whose interests will be more affected by the action to be performed by a given State are most likely to shape or bear upon the latter's decision regarding the timing, substance and form of its conduct. For instance, when an act is to give rise to an interaction which involves States which are politically and/or economically integrated, such as the States members of the European Communities, the acting State may have to weight carefully the preferences and expectations of its partners before performing that act. In the same vein, reactions from those States to an act performed by one of them would be considered in the light of the expectations of the acting State.⁵

The same seems to hold for the preferences and expectations of the more powerful States, in particular those which exert greater influence upon the State which is intending to perform an act. The more powerful States have a greater sphere of interests (global interests) and are usually amongst those more directly affected by any given State's act. Furthermore, if a powerful State which has global interests engages in a course of conduct, its own expectations and preferences are likely to greatly influence the reaction of the other States.

2. Structural Effects

It has already been noted elsewhere (Chapter I) that the structure of the international system, constituted by the arrangement of the units according to an ordering principle (anarchy) and a distribution of capabilities, exerts its own influence upon the behaviour of the units in various ways. It seems appropriate now to describe in greater detail some main structural effects.

2.1 Differentiated Values for Behaviours

The degree of power a State holds can be conceived of as an attribute of that State which influences its interaction with other States. That is an effect which has been described above

(cf. 1.3) as a 'social factor'. However, it is not an individual state of power that is in question now, but how the general distribution of power amongst States generally affects their interactions.

The distribution of capabilities amongst States in the international system is unequal. In the present international system, it displays an oligarchic character, where power is concentrated on a few States. This means that the system's structure determines that the impact of a State's behaviour on the international scene depends upon the degree of power it holds. The more a State is powerful the more its behaviour conditions other States' behaviour. If the capabilities or power of the States were evenly distributed, then the behaviour of every State should have an equal weight upon the legal and political processes. But that does not correspond to the realities of the contemporary international system. The only way for countering this asymmetric balance of forces is by the formation of blocks or groups of States for the attainment of a common end. That solution, however, is not always feasible, because the powerful States may also act together for a common purpose.

2.2 Decentralized Interactions

The ordering principle of the international system is anarchy. In other words, in this international system, States stand in relation to each other on a (juridically) equal footing, there being no hierarchy between them nor any overall superior authority. Because the system's structure is organized in this particular way, interactions between States are decentralized and voluntary. That would entail the consequence that States can and should co-ordinate their actions when their interests converge in order to better achieve a common purpose. It also implies that even in situations where the interests are conflicting, a strategy of co-operation or common action will sometimes best serve the interests of both parties. This has been demonstrated by the example given above (cf. 1.2).

On the other hand, decentralized interactions bring some degree of uncertainty to final outcomes, especially where many interactions evolve around the same issue and they are

uncoordinated. The fact that many States pursue a similar course of conduct either individually or through a bilateral interaction may bring about a common result which is altogether different from that which each State originally intended. For instance, suppose that a State 'A' is facing a security dilemma: it is located in a region of great political instability and feels that its neighbours or some of its neighbours are potential threats to its territorial integrity (because of pending territorial disputes) or to its sovereign existence or political independence. In addition, State 'A' thinks that the military balance in the region has been shifting to the advantage of its neighbours. Thus, State 'A' decides to strengthen its military power in order to restore the balance and thus deter any possible threat. Its primary objective, in doing so, is to increase its own security, and its secondary objective is to enhance its political influence in the region. Yet, it is very likely that its neighbours will feel insecure by its new acquisition of arms and will proceed to respond by increasing and modernizing their own army. In the end, both State 'A' and its neighbours would carry on this arms race and continue to feel insecure. Clearly, the original aims of the parties are being superseded by the final outcomes. This actually happens in international relations, and a good illustration of that is found in the Middle East.⁶

3. The Impact of Behaviour Determinants on the Formation of Rules

The proposition has been advanced that social factors and structural effects not only determine but also explain State behaviour. In other words, States do not act in isolation; they behave in a very complex way in response to their 'social and structural environment'. Those social and structural factors influence the considerations of each State regarding whether to act, how to act and when to act; they also determine the impact that act will have upon other States and upon the legal and political processes within the international system. The question is whether those factors explain the emergence of a general pattern of behaviour involving the generality of States (as opposed to an individual State). In the solution of this problem lies the key to the understanding of the formation of a general practice which may lead to the creation of a custom.

The social factors and structural effects seem to explain why a given action is taken and why a given reaction to that action occurs. However, they provide a unsatisfactory explanation of why some States decide to adopt the same course of conduct that a particular State has engaged in. In other words, they fail to explain why the reaction to an action is positive, taking the form of a imitative conduct. A rational explanation of that process may be found in the so-called 'evolutionary principle' advanced by Prof. Axelrod.⁷ According to this principle, 'strategies shown to be relatively effective will be used more in the future than less effective strategies'. This principle seems to be inherent in any social environment. In the context of the international system, the evolutionary principle would mean that States tend to imitate that conduct (of another State) which has proved to be more successful. 'Success' refers to the extent to which the aims and interests of the State were achieved by the performance of an action. Naturally, the evolutionary principle assumes that the interests and aims satisfied by the conduct which is being imitated are similar to both States, the acting State and the reacting State. If this were not so, then there would be no reason for the reacting State to imitate the conduct of the acting State.

By the multiplication of instances of imitative practice amongst States, a successful individual practice becomes a general practice. And when a general practice is established, the way is open for the emergence of a social rule or a legal rule. The process by which a legal rule develops is the object of the ensuing study.

Summing up the foregoing analysis in one proposition, the behaviour of a State is conditioned by a number of social factors and structural effects; once the conduct is successfully performed, it may be widely adopted by other States by the operation of the evolutionary principle, and then give rise to a legal or social norm.

II. Legal Effects of State Acts and Interactions

Having examined how State behaviour and outcomes are externally conditioned by both social and structural factors, it is now appropriate to deal with the legal effects of State acts

and interactions on the customary process.

The diversity of State acts which may be relevant to, and the organs of the State which may contribute to, a customary process are issues which have already been dealt with in Chapter IV. For present purposes, it is necessary to design a conceptual framework in which different categories of acts may be distinguished. This classification will be useful in the ensuing analysis of the legal effects of State acts.

One can first distinguish between positive and negative acts, the former referring to actual acts or behaviour and the latter to legally relevant omissions. Secondly, the distinction can be made between a single act and a composite act. A single act is an act performed only once by a single organ, like an Act of Parliament. A composite act represents a series of acts or a continuous act regarding the same issue, performed by one or more organs of a State, either in a co-ordinated manner or not. Because a composite act has an element of continuity, it may also be understood as behaviour or conduct. State practice regarding maritime issues shows that many maritime claims have been advanced and applied by means of composite acts involving the three main branches of a State. Accordingly, one finds legislative enactments followed by executive decrees or regulations and then by administrative or judicial measures concerning the application of the claim and its enforcement.⁸ A third distinction which could be drawn concerns the States to which the act addresses. Thus, an act may be definite or indefinite. A definite act is verified when it is explicitly addressed to particular States, while an indefinite act is *prima facie* directed toward all States, that is, *erga omnes*. Fourthly, on account of the number of States involved in the act, it may be individual or concerted.

An act of a State may produce legal effects in two distinguishable but related ways. Firstly, it may affect the general state of the law on the matter. Secondly, it may give rise to particular legal relationships.⁹ A clarification of what constitutes a legal relationship is needed. 'Legal relationship' means here a situation of interaction which is regulated by

international law. International law regulates an interaction by determining the legal rights and duties which arise out of that situation for each interacting State, and by determining the legal effects that this relationship may have upon third States.

It is by the impact of those two types of legal effects that a new customary rule is formed and/or an existing customary rule is abrogated or changed. Those effects are related to each other in the sense that both are produced by an act of State and both contribute to the same outcome. They are distinguished from each other by the fact that the establishment of legal relationships precedes the general impact that the particular act may have upon the general state of the law on the matter. Of course, when one refers to legal effects of an act of State, one is implicitly acknowledging that those effects are only produced when combined with other States' acts and reactions.

The establishment of particular legal relationships is the 'immediate' effect of a State act. It is an assumption underlying this study that when States start a new practice, new legal relationships may be established the legal basis of which is not found in any particular customary rule. It is on the basis of those particular legal relationships that the customary process evolves. The customary rule that is finally created by the customary process will then reflect the legal rights and duties which are uniformly found in all those legal relationships. The mechanisms by which those relationships are formed and the diverse legal effects created by them are examined below.

1. Legal Relationships Established by State Acts

State acts which may set into motion a new customary process are those which embody a new legal claim. Therefore, a proper consideration of the matter now under investigation requires the prior definition of the concept of legal claim.

1.1 The Concept of Legal Claim as Applied to a Customary Process

The notion of legal claim has always been associated with the notion of legal right. From

this common position, however, many different interpretations of the relationship between the two ideas have emerged. Perhaps it is more correct to say that there are many ways in which the concept of a legal claim can be understood and applied, none of which is the sole possible expression of the concept. However, as this study is concerned primarily with the general understanding of the operation of the customary process, the definition of the concept of legal claim which is developed herein bears this object in mind. The assumption which founds the whole definition is that a legal claim has a different meaning according to the state of the customary process to which it refers.

To begin with the case of a customary process which has reached its final phase, it appears correct to say that in this situation States **have** a legal claim, in the sense of 'possessing a legal right'. Because there is already an established customary rule, the legal claim is equated with the legal right. Indeed, it would seem entirely inappropriate to say that a State is **making** a legal claim to a right which has already been generally recognized as established.¹⁰ If the exercise of the right to which States **have** a claim is ever obstructed by a particular State, then every claimant State would be entitled to enforce its claim, that is, its generally recognized right. If the generally recognized right is ever denied by a particular State, then the claimant State does not have to make a claim to the existence of the right: it can simply enforce its claim.¹¹ In order to comprehend this notion better, one could also define the concept of legal claim by reference to the definition of the other related concept, that of legal right. Thus, in a customary process which has reached its final phase, every State **has** a legal right in the sense of 'possessing a recognized or legally enforceable claim'. Because a right is, in this situation, a legally enforceable claim, such right comprises also the right to claim the enforcement or observance of the corresponding duty (and/or the unimpeded enjoyment of the right).

By contrast, in the case of a customary process which is in the initial stages of development, States do not **have** a legal claim (in the sense just described) but **make** a legal claim. A legal claim made at this stage of the customary process either refers to an alleged

existence (and possession) of a legal right or to the desirability of the existence (and possession) of a legal right.¹² When a State advances a legal claim in the sense of asserting the existence and possession of a legal right, that does not mean that the right asserted actually exists and that it actually possesses that right. That is an assertion which may be falsified. Indeed, this type of claim is commonly made with a view to causing the creation of that right, and the State which makes it knows that it does not exist. Of course, the claimant State usually is not prepared to concede this. But that does not negate the fact that in reality there is a discrepancy between what the State claims to exist and what really exists. As to the legal claim which refers to the desirability of a legal right, an observation could be made. The State which makes this type of claim knows, and is publicly acknowledging it by the act of claiming in that way, that the legal right in question does not exist and that it does not possess this right. This type of legal claim is in fact an assertion *de lege ferenda* with a view to causing a change in prevailing law.

State acts which lead to the establishment of legal relationships are those which embody the notion of claim which is found in an incipient customary process (as defined above). A further elaboration of that notion of claim will now be suggested, so that the type of legal claim with which this study is concerned may be distinguished.

A legal claim represents a purposive action, a conscious attitude designed to bring about a result, namely, the general recognition and adoption of a given legal right. As defined above, it constitutes an assertion of the existence or desirability of a new legal right *erga omnes*, either in opposition to an existing generally recognized right or not. It is also important to bear in mind that, in the initial stages of the customary process, States tend to put forward a legal claim to a right which clearly does not derive from any existing treaties (bilateral or multilateral) or customs (bilateral, sectional or general). In this sense, they are really making a claim to a new right.

Another very important point to be made is that, although the claimant State knows that the right claimed does not exist, in making the claim, it usually acts **as though** the right existed. In this way, the claimed right is usually embodied in national legislation and as such enforced *erga omnes* by the claimant State.¹³ That attitude is justified by the fact that States seem to realize that in the customary process the successful enforcement and defence of a legal claim contributes to the development of the rule maintained by it. A consequence that arises out of this attitude is that a legal claim usually does not confine itself to the world of words; it creates a new state of things in the real world which may be different from the previously existing situation.

The question which needs to be addressed now is when the first legal claims will give rise to actual legal rights. It is submitted that in the initial stages of the customary process, legal claims may give rise to actual legal rights only when **particular** legal relationships are established in the form described below. It has to be emphasized that a legal right which arises out of those legal relationships has no customary source, since *ex hypothesi* there is no established customary rule in the sense of the right claimed. As the customary rule matures, States will have a legal claim to a right which is established by that rule.

A basic proposition which is adopted in this work is that a legal claim necessarily affects the legal position (rights and duties) of other States.¹⁴ In a sense, this is self-evident since a legal claim can only be applied as against another subject or other subjects. In the particular case of the type of legal claim which is considered in this study, it has already been pointed out that this claim is by definition directed *erga omnes*. This proposition is also made self-evident if one considers it by reference to the legal right to which the claim refers, since it is known that a legal right does not exist and operate in a vacuum, but within a social realm. It is true, however, that although the claim is made *erga omnes* some States may be more affected by it than others, while the legal position of yet other States may remain unaffected. How one can determine which States are affected by a given legal claim? It is suggested that this definition can be arrived at by reference to two inter-related factors: the subject-matter

and the category of the act performed, especially whether the act is definite or indefinite in form.¹⁵ Having said that, the creation of legal relationships will now be considered.

1.2 The Creation of Legal Relationships

When a State performs a single or composite act which conveys a legal claim, the response to it, either in the form of a positive or a negative act, may bear upon its legality (i.e., the conformity of the claim with the general law on the matter) and/or opposability. Opposability of a legal claim is a legal effect by which a legal right claimed by a State is applicable and invokable against another particular State. It transforms a claimed legal right into an actual legal right. It is from the establishment of a situation of opposability that a legal relationship emerges; in other words, opposability of a claim is the mechanism whereby legal relationships are created. To stress what has been said above, it is a proposition of this study that the initial stages of development of a customary process are characterized by the formation of a series of bilateral legal relationships. It can be added now that those legal relationships are established on the basis of opposability.

Opposability of a legal claim can only give rise to a two-way relationship. 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 opposed as against it, provided that the reacting State endorses its claim.¹⁶ A clarification is needed now. The pledge to reciprocal application of the legal claim may be express or implicit, and the claimant State may also impose a condition upon this commitment by demanding, for example, absolute conformity of the reacting State's claim with its own legal claim. A good illustration of that is the 1945 Truman Proclamation with Respect to Coastal Fisheries in Certain Areas of the High Seas. It stated that **'the right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interest of nationals of the United States which may exist in such areas'**.¹⁷ Summing up, once a situation of opposability is created,

reciprocity comes into play to ensure that reciprocal legal rights and duties operate in the established relationship.¹⁸

It is to be observed that a legal claim may be *prima facie* contrary to general international law and yet be opposable to a particular State. One could attempt to justify this proposition by noting that the bulk of general customary law is included in the category of *jus dispositivum*, and in that condition those rules may be derogated from *inter partes*. If this possibility were not to be conceded, it would be very difficult to explain the development of a customary process the first acts of which stand in opposition to an established general customary rule.

How can a situation of opposability arise between two States? Opposability of a legal claim may arise, in particular, from two different but related attitudes: 1) recognition, by a reacting State, of the other State's legal claim; and/or 2) renunciation, by a reacting State, of its own right when and if it stands in contradiction to the right claimed by the first State. The term 'recognition' is used here in the sense of an acknowledgement by a State that a given legal claim and the state of affairs created by that claim are opposable (or valid) as against it.¹⁹ This recognition may be explicit, when it entails some sort of act, or implied, when it is constituted by relevant inaction. In the second sense, recognition and acquiescence are two concepts which have the same meaning. The term 'renunciation' is used to describe the act or conduct by which one renounces one's right, regardless of the degree of formality involved in the act. It is to be observed that renunciation presupposes that the legal claim touches upon a matter which, in the opinion of the reacting State, is already regulated by international law in a manner inconsistent with the claim. In this case, a situation of opposability emerges under both forms, i.e., the reacting State recognizing the legal claim and abandoning its perceived right.

To recapitulate what has been said so far, legal relationships are established on the basis of opposability; and opposability of a legal claim, in turn, results from acts of recognition

and/or renunciation. The question that needs to be addressed now is how can one know when recognition of a legal claim and/or renunciation of a legal right has occurred. Those two attitudes may be manifested by positive and/or negative acts. They will be examined now.

1.2.1 Negative Acts and Recognition or Renunciation

As already pointed out, negative acts are legally relevant omissions. An omission may be legally irrelevant when, for instance, a State refrains from reacting because it had no actual or constructive knowledge of the act performed by the other State due to lack of sufficient or reasonable publicity; or because the act concerned an issue which had no relevance for the abstaining State.²⁰ In such cases, an omission should not be counted as an act leading to the creation of a legal relationship. Indeed, it is very likely that, should this occur, the assertion by the claimant State that a legal relationship exists between them will be contested by the abstaining State.

A legal relationship may be established in terms of opposability when a State fails to react to another State's legal claim the object of which affects its own legal interests.²¹ In this case, the affected State has a 'duty' or more accurately a need to react to the legal claim advanced, and failure to do so may justify treating that abstention as a legally relevant act or conduct. This type of omission may suggest 'acquiescence' or 'implied recognition' on the part of the affected State. In other words, it may indicate that the affected State has acquiesced in or recognized the right claimed by the other State and the state of things created by the legal claim.²² Furthermore, when this type of omission occurs, the renunciation of the affected State's rights may also be implied; the affected State is then considered to have lost the entitlement to rely upon its own rights or simply to have waived its rights vis-à-vis the claimant.²³ One could raise the objection that, according to a well established principle, the renunciation of a right is not to be presumed. The application of this principle, however, seems to be confined to those cases where there is doubt over the renunciation of the right.²⁴ If recognition of or acquiescence in a right claimed by another

State is verified, and the claimed right stands in opposition to the right held by the State which recognizes the claim, then the renunciation of the latter's right is to be taken for granted. It could be pointed out that when a State renounces its right in that situation, it is equally renouncing its right to contest the legal claim which it recognized.

A relevant omission occurs when, for instance, an affected State fails to lodge a protest against the act performed by the claimant State and/or to reserve its own rights on the matter. A good illustration of that is the *Fisheries* case, where the Court found that the Norwegian system of delimitation was opposable to the United Kingdom, observing that 'the notoriety of the facts..., Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom'.²⁵

So far as the establishment of a legal relationship is concerned, it may be immaterial whether the absence of protest is due to a deliberate decision or not on the part of the affected State. If an affected State shows no opposition for a given period of time, a legal claim and the act (either single or composite) which embodies it may bring about a state of affairs, or a *de facto* situation, between the two States which precludes the affected State from opposing the other State's legal claim later.²⁶ Thus, if the affected State were to maintain subsequently, in a diplomatic note of protest, that in reality it did not acquiesce in or recognize the legal claim, notwithstanding the initial abstention on its part in relation to that claim, it could find itself in a situation where its protest is legally ineffective. For instance, in the recent *Land, Island, and Maritime Frontier Dispute* case, involving El Salvador and Honduras (Nicaragua intervening), the Court's Chamber held that a protest made by Honduras and 'coming after a long history of acts of sovereignty by El Salvador in Meanguera, was made too late to affect the presumption of acquiescence on the part of Honduras'. It then noted that 'the conduct of Honduras vis-à-vis earlier effectivités reveals an admission, recognition, acquiescence or other form of tacit consent to the situation'.²⁷ A subsequent denial by the affected State that it ever intended to recognize or acquiescence in

the other State's legal claim might even be a true statement. Yet, due to the situation which developed around its initial abstinence, the affected State may have to face up to the fact that it is now precluded from challenging the validity of the legal relationship thus created.²⁸ This possibility is more clearly characterized if the claimant State is able to demonstrate that its conduct was clear and consistent and that it relied, to its detriment, on the conduct of the affected State and the state of affairs created by it.²⁹ For the good of security in international relations, not to mention the application of the principle of good faith, a State is not supposed to maintain a claim which is contrary to its past conduct.³⁰ Prof. Lauterpacht has cogently maintained that the legal effects of the failure to protest in due course are justifiable on account of it being 'an essential requirement of stability', 'a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others', and 'in accordance with equity inasmuch as it protects a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very states'.³¹

1.2.2 Positive Acts and Recognition or Renunciation

The other way in which recognition and/or renunciation of a legal claim are manifested is through positive acts. Positive acts constitute concrete and express instances of State practice. They contribute to the establishment of a legal relationship when they manifest recognition or admission of a legal claim, and/or when they show that a reacting State has, by its own practice, adopted the same or a similar claim.³² The distinction between recognition and adoption seems necessary in order to provide for two possible situations:

1) When a reacting State manifests its support for the practice and the legal claim of the other State without, however, adopting itself the same practice and claim. For instance, in 1971, Peru and China issued a joint communiqué 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'. This express support for the Peruvian claim was given by China notwithstanding the fact that China did not at the time adopt the same

claim.³³ This situation now under consideration allows for at least two more variants. First, it is possible that a State, in reacting to the claim of another given State, recognizes the claim of a third State without adopting it. An illustration of that is a diplomatic note sent by Japan in 1958 in response to a Mexican legal claim. In this note, Japan manifests recognition of a claim advanced by the Scandinavian States, although it had not been required to do so, in the following terms: 'It is, however, the view of the Government of Japan that the 3 mile breadth for the territorial sea still remains to be the recognized rule under current international law and therefore, all claims for a broader breadth may not be validly asserted, except the Scandinavian States' claims of 4 miles'.³⁴ Second, a State may also recognize in advance a given legal claim, without specifying the State or States to which its recognition is directed (indefinite act), even though it is not adopting that claim itself. For instance, in the Presidential Statement which accompanied the Proclamation establishing a 200 mile Exclusive Economic Zone, the President of the United States stated that 'while international law provides for a right of jurisdiction over marine scientific research within such a zone, the Proclamation does not assert this right'. He then added 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'.³⁵

This form of recognition (i.e., recognition of a claim which the recognizing State does not adopt it itself) is usually granted by a State for one of the following reasons: it had no legal interest affected by the claim; it considers advantageous to strengthen the legal claim and, perhaps, also weaken a general customary rule to which the legal claim is opposed, because it might in future adopt the same claim itself; or it thinks that this act will serve a given political interest.

2) When a reacting State not only recognizes the legal claim but adopts it as well by way of a imitative conduct.³⁶ It has to be noted, however, that a imitative practice may not correspond entirely with the practice of the claimant State. Reacting States may engage in a somewhat

different (but not contradictory) practice, thus adopting a somewhat different legal claim. This happens when, for instance, a reacting State follows a practice which reflects a more extensive legal claim. Thus, in 1945 Chile issued a Presidential Declaration concerning the Continental Shelf which, despite mentioning expressly the Truman Proclamation of 28 September 1945, was considered by the United States to have gone beyond its own claims.³⁷ The relevant excerpt of the American note of protest read as follows: 'At the same time, the United States Government notes that the principles underlying the Chilean Declaration differ in large measure from those of the United States Proclamations and appear to be at variance with the generally accepted principles of international law'.³⁸ In such cases, the establishment of a legal relationship between the claimant and the reacting State may be impaired, for instance, by the former's objection to the legal claim of the latter to the extent to which they differ. Another possibility is that a legal relationship is established between the two States to the extent of the claims' overlap.

Recognition may take the form of a concerted act, and this act may be either definite or indefinite or both. There are many instances of concerted acts of recognition. In 1952 the Governments of Chile, Ecuador, and Peru issued a Joint Declaration whereby they proclaimed, *inter alia*, as a 'principle of their international maritime policy' that 'each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending no less than 200 nautical miles from the said coast'.³⁹ This act was definite so far as it purported to secure recognition of each other's claim (the declaration was addressed to each other), while it was also indefinite in that it was designed to present a common claim (as it were) before the other States not parties to the instrument. With a similar purpose, Colombia and Ecuador signed an Convention in 1975 in which they agreed to 'recognize and respect the procedures used by each State at present, and those that may be used in future, for exercising its sovereignty, jurisdiction or supervision in those marine and submarine areas which are adjacent to its coast as far as 200 miles...'.⁴⁰

Some types of positive acts, on the other hand, may prevent a legal relationship from being established. The main means by which States seek to hinder a legal relationship is by lodging a diplomatic protest against the claimant State. There is much uncertainty regarding the effectiveness of a diplomatic protest. Before one embarks upon the examination of this matter, however, it seems necessary to delimit the possible legal effects of a protest. Generally speaking, a diplomatic protest is lodged with a view to: 1) manifesting the legal opinion of the State regarding the legality of another State's legal claim; 2) expressing a reservation of its own rights in relation to the purported effects of that claim; 3) non-recognition of the claim; 4) denying any legal effects to the claim; and 5) preventing the establishment of a new legal relationship between itself and the claimant State.⁴¹ Effects 4 and 5 usually follow from the others. For instance, in 1981 Syria enacted a law by which the breadth of its territorial sea was extended to 35 miles. In response to that legislation, Israel sent a diplomatic note the relevant part of which reads as follows (the legal effects envisaged by the act are identified in the text below according to the enumeration made above):

In the view of the Government of Israel, there is no foundation in existing international law for Syria's claims (1) to extend the territorial sea to a breadth of thirty-five miles from the baselines from which the breadth of the territorial sea is measured and, accordingly, it does not recognize (3) the said Syrian measure, and reserves its rights and the rights of its nationals in respect of it (2).⁴²

The intended effects of a diplomatic protest depend upon a set of circumstances and conditions. There are, for example, conditions attached both to the form of a diplomatic protest and its content.⁴³ Thus, a diplomatic protest has to be made through the accepted channels of diplomatic communication and the State official or organ who presents it should be legally competent according to the internal legal order of the State. Also, the protest ought to be unambiguous, rendering precise the object to which it addresses, and it should be lodged within a reasonable period of time after the legal claim has been put forward. The content of the protest issued is of utmost importance. Depending on the way in which it is written, it may produce unwanted or unintended effects. Thus, in the *Land, Island and Maritime Frontier Dispute* case, the Chamber understood - in contradistinction to El

Salvador's contention - that a protest made by El Salvador concerning the sale of an island by Honduras was directed solely to that act, and that the protest only served to show recognition of Honduras's claim implied by that act to sovereignty over the island.⁴⁴

Given that all formalities are observed, it is still uncertain whether a protest will entail the intended legal effects. The question is whether a single protest suffices *per se* to bring about those legal effects, or should be accompanied by other protests or acts on the part of the protesting State.⁴⁵ An argument could be developed to the effect that, given that a legal claim creates a continuous situation, the reaction of an affected State should persist until such date as the situation created reverts to the *status quo ante*.⁴⁶ Thus, a single diplomatic protest which is manifested in timely manner and complies with all formalities may still be insufficient to produce the intended legal effects.

If the affected State responds to a legal claim by issuing regular protests, this reaction alone may constitute a bar to the creation of a legal relationship in terms of opposability. On the other hand, it may fail to impede the continuing assertion of the legal claim and the existence of a state of affairs as against the affected State itself.⁴⁷ As it has already been observed, States which make a legal claim tend to act as if the right claimed existed, and that means the application and enforcement of the claim as against other States. To respond to that situation, the affected State could then resort to additional counter-measures, such as retorsions and actual challenges to the legal claim.⁴⁸ Whether the actions taken by the affected State will eventually impel the claimant State to withdraw its claim depends upon the latter's reaction. An analysis of State practice on claims over maritime jurisdiction, however, reveals that comparatively weak States were prepared to enforce their claims even against the most powerful States.⁴⁹ In general, the maritime powers had recourse to bilateral agreements in order to continue their operations in the area claimed by the State in question.⁵⁰ Notwithstanding the fact that in many of those agreements the legal position of each party was expressly reserved, the legal claim concerned continued to apply and exist not only as against the opposing State (this time in the form of agreement or concession and

not enforcement) but regarding other States as well. Thus, the legal claim could be said to be *de facto* effective. The accommodation between the claimant State and the protesting State in the form of a bilateral agreement resulted in the ending of the measures of challenge and retaliation on the part of the protesting State, thus corroborating the effectiveness of the legal claim. But that is not all. The general impact on the customary process of a claim which subsists in face of opposition, particularly when the opposition comes from great powers, is that it encourages other potentially interested but reluctant or cautious States to adopt or follow the same claim. For instance, it is known that in the decision-making process which finally led Brazil to claim a 200-mile territorial sea in 1970, an influential report prepared jointly by the Ministry of External Relations and the Navy noted that the political and diplomatic costs of the measure to be adopted would be tolerable, and that 'those Latin American countries which have adopted a 200-miles claim have survived the protests and sanctions'.⁵¹

Another difficulty in the effective use of a protest is provided by the operation of inter-temporal law. A legal claim which is consistently maintained during a period of time even in face of regular protests, in creating a *de facto* situation as against the protesting State, may bring about novel legal claims originated from new legal developments. For instance, United Kingdom's claim to sovereignty over the Falkland/Malvinas Islands has been subsequently coupled with a claim to the islander's right of self-determination.⁵² Thus, although Argentina may sustain its protests in a regular form, it now has to confront a new legal issue attached to the question. The successful application of the right of self-determination in this case could well make the sovereignty question secondary.

When and if a reacting State adopts another State's legal claim, it assumes a position of a claimant State and will provoke, in turn, the reaction of the States affected by its new claim. This chain reaction will either end up in a general practice or simply be interrupted by lack of continuity or due to opposition.

From what has been said above, one may have the impression that the legal effects of a State's act, so far as it embodies a legal claim, depend largely or solely on the reaction of other States, especially those which may be regarded as most affected by it. But this would be a limited account of how legal relationships are established, for it has already been noted (cf. Section I, I) that in reality a State enjoys limited autonomy in deciding how to react. Expectations, preferences, the attributes of the claimant State, and so forth, all shape to some extent the reacting State's decisions.⁵³

All that has been said above can be summed up in the following proposition: before a customary rule becomes established, an international practice on a given matter may well reveal the existence, amongst those States involved in it, of several bilateral legal relationships established on the basis of opposability.

2. Effects on the General State of the Law

A legal claim is often advanced in relation to an issue which, in the view of some States affected by it, is already regulated by international law. Naturally, the claimant State may maintain that international law does not govern the matter, or that it does not regulate it satisfactorily or entirely because, for instance, new conditions have arisen.⁵⁴ Be that as it may, in such situations the question of the claim's legality in relation to existing law will necessarily be raised. Whether or not the claim's legality will be upheld depends ultimately upon the reaction of other States.

By their acts, the reacting States will either endorse the claim or oppose it. If they endorse the claim, then it will be valid as against them (opposable) and will gradually become general law to the extent that the general attitude regarding the established law changes and the corresponding customary rule is progressively undermined and finally superseded. On the other hand, if the reacting States oppose the legality of the claim they will also, by their attitude, bring about legal effects to bear upon the general state of the law. It is submitted that two general effects may arise out of a situation in which a legal claim is opposed: 1) the

dispute serves to reinforce the established customary rule; 2) the dispute not only reinforces the settled customary rule but serves to refine and/or define it further. This last effect (2) occurs when States, in opposing a legal claim on the ground of illegality, define the prevailing customary rule as they see it. It also happens that in the resolution of the conflict a third party, which usually is a law-determining agency, is called to state what the law is and whether the legal claim is consistent with it. In that case, the rule is further developed by the definition offered by this organ and the influence of the organ's decision on States' perception of the rule.

In situations where, hypothetically, both the reacting States and the claimant State agree that there is no settled law on the matter, their acts will in the end contribute to the definition of the law.

Summing up, the act accomplished by a State to convey its legal claim, together with the way other States react to that claim, will ultimately determine whether the state of law on the matter subsists as it was prior to the claim, is altered or is superseded.

SECTION II

Institutional Means

International organizations and the organs and procedures set up by it may affect the development of the customary process in various ways. Some of the main functions performed by them in the customary process are examined below.

I. Identification and Definition of Customary Rules

Some organs of international organizations have acted as law-determining agencies, ascertaining and asserting the existence and content of what they see as settled customary rules. One organ is the International Court of Justice, an organ of the United Nations (UN Charter, Chapter XIV). The Court has certified, on several occasions, some customary rules

whose existence and/or content was being disputed by the contending States. Thus, in the *Continental Shelf* case (Libya v. Malta) the Court stated that 'the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law'.⁵⁵ It has also pronounced upon customary rules regarding non-intervention, non-use of force, collective self-defence, diplomatic relations, maritime delimitation, international frontiers, and so forth.⁵⁶ This considerable law-determining activity is explained by the function assigned to it by its Statute, namely, 'to decide in accordance with international law such disputes as are submitted to it' (Art 38). In deciding a dispute, the Court has firstly to ascertain the state of the pertinent law. It should be observed that the Court, in expressing its view on the state of a customary rule, is at the same time describing the state of the respective customary process, that is, whether the process is in the initial stages, developing or has matured; whether the law is certain or uncertain.

The fact that the Court's decision 'has no binding force except between the parties and in respect of that particular case' (Art 59 of the Court's Statute) does not affect its law-ascertaining role. One should draw a distinction between the ascertainment of the general state of the law on a given matter and the application of that law to a particular case. True, the decision (i.e., the operative part of the judgement) can not 'bind' third States. But the determination of the general state of law transcends the limited scope *ratione personae* of the decision: it is a pronouncement which can and usually does influence the legal perception of a much larger number of States. This is the reason why the Statute also refers (Art 38, *d*) to judicial decisions 'as subsidiary means for the determination of rules of law'. In the words of Sir Hersch Lauterpacht, 'it must be assumed' that this provision also refers to 'the decisions of the Court itself'.⁵⁷

Another UN organ which has been performing a law-identifying function is the International Law Commission. This Commission has been entrusted with the task of promoting the codification and progressive development of international law, and to that end

it has had to investigate and attest the state and content of some general customary rules. Indeed, in presenting the outcome of a particular work, which in most cases is a Draft Convention, the Commission sometimes indicates expressly that a given article reflects established customary law. Thus, in the Draft Articles on the Law of Treaties, the Commission, commenting on the proposed Article 59, which refers to *rebus sic stantibus*, stated that 'the evidence of the principle in customary law is considerable'.⁵⁸

The Security Council is an organ which performs essentially a political function. However, it is often called to determine or define in legal terms, that is, in the light of current international law, a given international situation or dispute. Although it has in many occasions refrained from citing expressly a given rule, the legal definition it makes of the situation reveals the underlying rule to which it has had recourse. For instance, in considering in 1975 the question of East Timor, the Security Council adopted a resolution in which it deplores the 'intervention of the armed forces of Indonesia in East Timor' and calls upon all States to 'respect the territorial integrity of East Timor' and 'the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)'.⁵⁹ In this particular decision, three different rules have been relied upon: the rule on non-intervention, the rule on self-determination and the rule on territorial integrity. More recently, the occupation of Kuwait by Iraq has led the Security Council to make determinations on questions of sovereignty, independence and territorial integrity, and humanitarian law.⁶⁰ It may be argued that the Security Council was in those decisions referring exclusively or mostly to the rules embodied in the UN Charter as opposed to the relevant customary law rules. If, however, the proposition is accepted that the development of the conventional rules of the Charter may cause the development of the corresponding customary rules, then the activity of the Security Council may contribute in this way to the definition and development of customary law.⁶¹ At any rate, so far as some of the decisions on the Kuwait question were concerned, the Security Council did not seem to have relied directly on the Charter provisions.⁶²

The objection may be made that the Security Council acts only for the performance of its functions in relation to a particular case; thus, its resolutions could not be relied upon by other States as authoritative statements of the general law on the matter. The distinction that was made above between the Court's application of general law to a particular case and its prior determination of that law is also applicable here. As far as law-finding is concerned, the recognition of a given customary rule and the ascertainment of the general state of the law on the matter is more important than the legal definition given by the Security Council to a particular political dispute or situation.

In addition to those organs, there are others within the UN structure which are called to express their view on the state of customary law. The UN Secretariat, for instance, has on several occasions done precisely that. Thus, in one of its legal opinions it has declared that many of the provisions of the 1969 Vienna Convention on the Law of Treaties 'are regarded as restating the customary international law of treaties'. It then proceeded to characterize as such article 11 of the Convention.⁶³

Instances of law-determining activities are also found in regional organizations. The Inter-American Juridical Committee, an organ of the Organization of American States, has the function of, *inter alia*, promoting the codification and progressive development of international law.⁶⁴ Throughout its history, which dates back as far as 1906, it has pronounced on the state of customary law in many fields. For instance, in 1965 the Committee adopted a resolution in which it stated, amongst the 'principles and rules that faithfully reflect the existing customary rule of international law', that 'every American State has the right to fix the breadth of its territorial sea up to a limit of twelve nautical miles measured from the applicable base line'.⁶⁵

Whether the findings of those organs have proved to be correct as regards the actual state of customary law is another question. The relevance of their task has to be assessed from a broader perspective. It has already been observed that the international system is anarchic,

and as a result of that the customary process is decentralized. Even though, individually, each State may act consciously within the process, and by the aggregation of their practices a customary rule is brought about, this does not mean that a common perception of the state of the law emerges easily, in particular regarding the moment when the customary rule has matured. Prof. Mendelson has ingeniously described this process of identification of a mature rule by drawing an analogy with the rules of fashion: all the followers of fashion know when a fashion has changed, although nobody could state precisely when this happened. It is submitted that this same analogy also serves to explain that if an authoritative fashion magazine says that a given way of dressing is now in fashion, it undoubtedly influences the judgement of many people, and might even cause the establishment of a fashion which in reality was still in developing stages.

Law-determining organs such as those mentioned above not only influence the States' perception as to the existence of a mature customary rule; they also contribute to the definition of the rule's content. The general content of the rule may be further clarified when, for instance, the rule is being applied to a case by the organ in question. This law-defining task is also relevant for the customary process. In view of the international system's nature, it has already been noted that States have some degree of discretion in the interpretation of international rules and principles.⁶⁶ This autointerpretation and resulting diversity of views applies both to the content of the rule in question and to its application to a given situation. For instance, in the *Gulf of Maine* case, the Chamber noted that the parties were in agreement over the fundamental norm to be applied, though there was a dispute as to how it should be applied to the case in question.⁶⁷ If States hold different views on the content or application of a given customary rule, it is likely that their practice will differ accordingly, thus prejudicing the achievement of general uniformity in the general practice. Therefore, in resolving the uncertainty in the customary law on a given matter, those organs help the perfection of the customary process.

This seems to be the role played by organs such as those mentioned above in the customary process. No matter how repeatedly they stress that their finding was based on the analysis of current State practice (and therefore it was merely declaratory of the genuine state of the law), the fact remains that their pronouncements exert influence upon the States themselves. At the very least, their pronouncements serve to strengthen the state of law when they confirm it. If the customary process were to be described as a bargaining process, law-findings emanated from such organs would either help define the dispute or end the debate, or strengthen the position of players who hold a similar view. States and arbitral tribunals alike often rely on those findings to demonstrate or confirm the existence of a given customary rule.⁶⁸ Obviously, the extent to which those findings influence States' behaviour and perception of the law vary according to the organ in question; even two findings emanating from the same organ may produce different effects.

On the basis of what has been said above, it may have become apparent that the borderline between a purely law-ascertaining task and a law-creating task may sometimes be obscure. The activities of the Court, in particular, seem to be a case in point. A first reading of the Court's Statute would seem to warrant the view that the Court has no competence to engage in judicial activism. Unless the parties agree to a decision *ex aequo et bono*, the Court is only required to apply existing international law to the dispute. Yet, the fact of the matter is that, owing to the open-textured character of customary law, the degree of discretion in the ascertainment of the elements of a customary rule, the criterion of generality and uniformity in the practice, not to mention the difficulty in specifying the exact moment in which a custom has risen, the decisions of the Court in contentious cases can hardly avoid being described as amounting to legislation or, as Sir Gerald Fitzmaurice put it, 'judicial innovation'.⁶⁹ Having regard to those difficulties, Sir Hersch Lauterpacht has correctly stated that: 'In few matters do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of international custom... Many an act of judicial legislation may in fact be accomplished under the guise of the ascertainment of customary international law'.⁷⁰ To cite an example, the Chamber in the

Gulf of Maine case openly stated that the Court's Judgement in the *North Sea Continental Shelf* cases had made 'the greatest contribution to the formation of customary law in this field [delimitation of continental shelf]'.⁷¹

Apart from having organs which operate either directly (by reason of their assigned competence and functions) or indirectly as law-ascertaining agencies, international organizations also contribute to the determination of law in another way. They provide a forum where legal positions and justifications for conduct are manifested. To confine oneself to the United Nations, it is a common practice amongst States members to send to the Secretary-General or the President of the Security Council Diplomatic Notes in which legal protests, reservations, assertions and justifications are made with respect to the practice of another State or a group of States. This procedure is widely adopted by States because it allows the message intended by the sending State to reach the largest possible degree of instant publicity by way of one sole document and one action, and/or to provoke the competent organs to manifest their views on the legality of another State's conduct.⁷² The importance, in many respects, of such Notes is self-evident. No doubt they may constitute a means for the determination of the law. But one has to evaluate this piece of evidence with all due care. A legal view manifested by a State, relating to a legal claim, or to conduct, may have been the result of the 'adjustment' of the relevant law to its own political interest. That State may well have deliberately distorted the law with a view to influencing its change, or it may have intended only to oppose the practice of a particular State or simply that other State itself. Those Diplomatic Notes may, however, contain general statements about the law, which are to a greater extent detached from the peculiar features of a particular situation. For instance, in 1987 the United States sent a Note to the UN Secretary-General in which it objected to a claim made by Viet Nam and the People's Republic of Kampuchea to certain, allegedly historic, waters in the Gulf of Thailand. In that Note, the United States restated what it called 'long-standing standards of customary international law and State practice' with respect to the requisites which have to be fulfilled in order that historic waters are recognized as valid.⁷³

II. Formation of Customary Rules

International organizations may participate directly in the customary process through their own practice. There seems to be widespread agreement in the doctrine on this.⁷⁴ The clarification to be made is that their direct participation is limited to those areas where they act in their own capacity, that is, as distinct subjects of international law. Thus, reference could be made to the customary law on the immunities of international organizations, to the formation of which the practice of international organizations has been significant.⁷⁵ In the large majority of cases, however, international organizations act only indirectly in the customary process. Despite being an indirect participation, it is nevertheless a very important contribution to the development of the customary process. The diversity of ways in which international organizations influence the evolution of the customary process will soon be revealed. In general, one could list the following ways:

- a) promoting the codification and progressive development of general customary law by means of codifying multilateral conferences and resulting multilateral conventions.
- b) providing a institutional framework within which States members may, individually or collectively, propagate and strengthen their claims, or form a common front against other State's legal claims.

1. The Codification and Progressive Development of International Law

This item is best illustrated by the international 'legislative' effort which has been made under the aegis of the United Nations since its inception. That Organization has made use of several different methods and procedures for creating and developing general international law. True, the legislative activity in question is mainly designed to have as an end-product a multilateral convention. However, one should bear in mind that a large part of this legislative effort has been made to perform one of the functions set forth in the Charter for the General Assembly, namely, the promotion of the codification and progressive development of international law. What has happened, then, in many important cases, is that

the rules enshrined in the resulting multilateral conventions either reflect existing customary law or have become customary law even before those conventions enter into force. As a result, general international law has developed significantly since this legislative activity first started. But before the role of codifying conferences and conventions is properly understood, it is perhaps appropriate to offer a general comment on the complex and multifarious ways adopted in the United Nations for its law-making activity. It is important to take up this point in order to highlight how a law-making procedure or technique may have a proper role in the establishment of a given international practice.

1.1. The Relevance of Law-Making Procedures

The various methods employed within the United Nations for the promotion of multilateral treaty-making activities have been the subject of a detailed Report prepared by the UN Secretary-General for the thirty-fifth session of the General Assembly.⁷⁶ It is unnecessary to reproduce it here, but the following general points could be made on the basis of that report. The first observation to be made is that most procedures seek to ensure that States participate in the three main stages of a multilateral treaty-making procedure: in the initial formulation of the draft, by way of written comments or debates on the draft; in the discussions and negotiations regarding the draft, within the framework of a codifying conference; and finally, in the formal adoption of the draft at the closing stages of the conference. In the particular case of the procedure which involves the use of the International Law Commission as the drafting body, the participation of Governments in the drafting process may be even more accentuated. For instance, according to the Commission's Statute, States are to be given the opportunity to maintain a direct relationship with the Commission's work at various stages. This happens when Governments are asked to supply information and data concerning the items included in the Commission's plan of work, or when the General Assembly requests comments by Governments on the draft submitted by the Commission. In addition to that, States may also manifest their views on the drafts of the Commission *qua* members of the Sixth Committee and/or the General Assembly.⁷⁷ Therefore, when after extensive discussions and negotiations, the draft proposal

is finally adopted in a codifying conference, generally by consensus or by a very large majority, it is to be presumed (though it is a rebuttable presumption) that some provisions contained in that draft may actually reflect the legal position of the generality of States. This seems to be one of the reasons why some important unratified conventions have been considered to reflect existing customary law or to have given rise to customary law, and some credit for this must lie in the law-making procedure adopted.⁷⁸

It must be pointed out, however, that despite all this preparatory work by the International Law Commission, there are examples in which the resulting convention remains unratified and shows no prospect of ever coming into force (for example, the 1978 Vienna Convention on Succession of States in respect of Treaties). Surely this shows the limitations of the law-making procedures, and that the presumption that the resulting convention depicts a reliable picture of the general state of the law on the matter is rebuttable. But that does not mean that law-making procedures are irrelevant; it only shows that in certain cases, the procedures used were not the most appropriate or that they were not used properly. After making a good analysis of why some codifying conventions have been unsuccessful, Sir Ian Sinclair concluded that 'the process itself is more important than the actual content of a particular exercise in codification'.⁷⁹

There is another important point with regard to the preparatory work in the procedures adopted by the United Nations. In many cases, this work is done either by the International Law Commission itself or by an *ad hoc* body or Committee especially established to that end. The composition of the Commission and of the other bodies tends to reflect not only the main legal systems of the world, but also the main interests at stake. This has been achieved, for example, by apportioning the available seats according to geographical regions (in the case of the Commission) or simply by opening the composition of the organ to all States concerned. This procedure, according to Judge Ago, has meant that the conceptions and interests which will later be raised at the codifying conference are already manifested within the drafting bodies.⁸⁰ As a result, the main difficulties regarding the drafting or acceptance

of some provisions may be detected and worked upon earlier, thus improving the prospects of the coming conference.

Finally, the procedures adopted within the United Nations (and that includes the conferences convened by the United Nations) usually provide for follow-up mechanisms designed to verify the ratification and compliance or implementation by States of the provisions adopted. Those mechanisms may take the form of an organ to which States are required to report periodically or on request; or a series of acts whereby the Organization seeks to encourage compliance and ratification (resolutions of the General Assembly appealing for compliance, for example); or a range of support activities, such as disseminating relevant information about the convention and its status, supplying international technical assistance (training legal personnel of a given State, for example), and so forth.⁸¹ Those mechanisms add up to the legal and political force the instrument might have to induce States to behave in conformity with the rules embodied in that instrument. Thus, the procedure adopted by the Organization may in this indirect form contribute to the formation of a given international practice.

1.2. The Impact of Codifying Conferences and Conventions

As noted above, the main thrust of the United Nations legislative effort has been centred on the convening of multilateral conferences for the codification and progressive development of international law. Since the Court's pronouncements on the *North Sea Continental Shelf* cases, part of the doctrine has embraced the view that a codifying convention may produce three main effects upon the development of a customary process: it may declare the existing law, crystallize an incipient customary practice into a custom, and generate a new custom.⁸² Before those effects are examined, however, it is necessary to draw a distinction between the role played by a codifying conference and the role played by the resulting convention in a customary process. A proposition which is submitted in this thesis is that a codifying conference may have its own contribution to the customary process, distinct from the contribution offered by the resulting unratified convention.

A case which seems to offer grounds for this proposition is the customary process related to the Exclusive Economic Zone. An examination of the international practice related to the concept of the Exclusive Economic Zone will reveal that during the proceedings of the Third United Nations Conference on the Law of the Sea (hereinafter referred to as UNCLOS III), and before the final adoption of the text of the Convention, a very extensive practice on the matter had already developed amongst the coastal States. As far back as 1978, some 42 coastal States had proclaimed a 200-mile Exclusive Economic Zone, and around 12 other coastal States had adopted a 200-mile Exclusive Fisheries Zone.⁸³ In many of those proclamations there was an explicit reference to UNCLOS III. Those references may well provide an indication of the understanding held by States regarding the role played by the Conference in that customary process.⁸⁴

The first thing to be noted is that, in the opinion of some States, the Conference alone had brought about a change in the law of the sea or had founded that process of change, particularly in relation to the legal status of the maritime area located beyond the territorial sea. Thus, in 1978 the Republic of São Tomé and Príncipe decreed a Law n° 15/78, establishing an Exclusive Economic Zone, in which it declared in the preamble that it took into account 'the evolution of international maritime law, particularly the work of the United Nations Conference on the Law of the Sea'.⁸⁵ Another example is provided by the Federal Republic of Germany, which stated in the Proclamation whereby it established an Exclusive Fishing Zone, that 'far reaching changes are being made in the international law of the sea. They are seen above all in the Third United Nations Conference on the Law of the Sea...'.⁸⁶ Those two instances say nothing, however, about how specifically this process took place.

The Court has made a pronouncement on this very point. In the *Fisheries Jurisdiction* case, the Court held that 'the law evolved through the practice of States on the basis of the debates and near-agreements' at the 1960 Conference on the Law of the Sea. It then added that two 'concepts have crystallized as customary law in recent years, arising out of the general consensus revealed at that Conference'.⁸⁷ Thus, in the Court's view, the importance of the

Conference in question was that it revealed to all States the extent of general support for a given practice; in other words, what was generally regarded as a reasonable or acceptable practice, or the so-called 'common ground'. Thus, a State which engaged in that practice could feel confident that it would not be seriously challenged by other States or that it would receive the support or recognition of other States, especially those which espoused the proposals made at the Conference in favour of the practice. It is the combination of this consensus, and the expectation it generates that the proposed rule will be generally followed, which may induce States to engage in the corresponding practice. This view seems to be corroborated by the practice of States. When, for instance, the United States enacted the Fishery Conservation and Management Act of 1976, the Presidential Statement which accompanied the Act contained the following explanation: 'The bill I sign today is generally consistent with the consensus emerging at the Conference'.⁸⁸ In 1976, Norway and Canada signed an Agreement on their Mutual Fishery Relations, designed to formalize a mutual recognition of each other's claim to an extended area of jurisdiction and to regulate their co-operation in this area. The preamble of that agreement stated that they took into account 'developing state practice and the consensus emerging from the Third United Nations Conference on the Law of the Sea'.⁸⁹

One clarification has to be made at this point. Consensus and expectations of behaviour alone are not sufficient for the transformation of a proposed conventional rule into established customary law. There has to be a practice of States on the matter and this practice has to fulfil the requirements of a custom. It is to be recalled that in the pronouncement reproduced above, the Court made it clear that the law evolved 'through the practice of States'.⁹⁰ This view has also been maintained in the recent *La Bretagne* Arbitration, where the Tribunal noted that: 'The Third United Nations Conference on the Law of the Sea and the practice followed by States on the subject of sea fishing even while the Conference was in progress have crystallized and sanctioned a new international rule to the effect that in its exclusive economic zone a coastal State has sovereign rights in order to explore and exploit, preserve and manage natural resources'.⁹¹

Apart from this particular role, a Conference may simultaneously produce another effect, which could be named the 'domino effect'. This consists in provoking States into action as a reaction against those other States which have engaged in a practice on the basis of the changes in the law they claim to have been introduced by the conference. This type of effect may be explained by reference to the maritime claims again. When, for example, State 'X' extends its jurisdiction over sectors of the sea which were formerly regarded as high seas, the other coastal States will see themselves in an unequal relationship, since they would be deprived of the benefits of an open sea off the coast of State 'X' whereas State 'X' could continue to enjoy the sea areas adjacent to their territorial sea. True, those States could oppose the extension of jurisdiction established by State 'X'. But that would only entail a situation where they could benefit from something only at the risk of confrontation, while State 'X' would benefit from their open seas unopposed. A justification along those lines has indeed been advanced by some States in proclaiming their Exclusive Economic Zones. Thus, in 1977 Cuba enacted an Act Concerning the Establishment of an Economic Zone, the preamble of which stated that 'other States of the geographical area in which the Republic of Cuba is situated have proclaimed their economic zone or fishing zone taking into account, among other things, the current concepts of the international law of the sea, thus affecting areas of the high seas in which Cuba has thus far exercised rights and legitimate interests'.⁹² The USSR also issued an Edict in 1976 in which it declared that 'the Presidium of the USSR Supreme Soviet notes that recently an ever greater number of states, including those neighbouring the USSR, are establishing off their coasts economic or fishing zones with a breadth of up to 200 nautical miles, without waiting for the conclusion of the international convention being worked out at the III United Nations Conference on the Law of the Sea'. It then added that 'having in view that until the conclusion of such a convention it is necessary to take measures without delay for the protection of the interests of the Soviet state...'.⁹³ To give one more example, the Proclamation made by the Federal Republic of Germany in 1976, after mentioning that 'numerous States, including those in the North Atlantic area, have already proceeded unilaterally to claim fishing or economic zones of up to 200 nautical miles..., without waiting for the outcome of the Conference', affirmed that 'the fishing

interests of the Federal Republic of Germany, as well as those of the other member States of the European Communities, are most severely threatened thereby'.⁹⁴ Thus, an initial practice adopted by some few States on the basis of the Conference may provoke a sort of chain reaction, leading other States to follow suit.

It is feasible that a law-making conference may produce a third type of effect on the customary process. It has been noted above that a conference may engender an international practice on the basis of the consensus it reveals around a given proposal. One has to concede the possibility that the international practice thus started may rebound, so to speak, upon the proceedings of the conference itself, causing a modification of the provisions which are being proposed and discussed and to which the practice refers. However, this could only happen if the international practice displays a general pattern which contrasts to some degree with the contents of the proposed provisions. In that case, the States participating in the conference may well decide to introduce the change they consider appropriate. Once that alteration has been agreed at, those States which had not thus far adopted the on-going international practice may decide to follow it because they see the compatibility between the provisions (as modified) and the corresponding international practice, and/or because they perceive that the practice has indeed gained general acceptance. This 'boomerang effect' would seem to be possible in the particular case of a codifying conference which extends for a relatively long period in time, since it allows for the effects of the continuing international practice to be felt on the parallel negotiations. Whether this actually happened in the case of the Exclusive Economic Zone, that would require a separate study. What can be pointed out at this stage is that in UNCLOS III some States sought to influence the outcome of the negotiations and the general law on the matter by means of their own practice. For instance, it is now clear that Brazil maintained throughout the proceedings of the Conference a 'territorialist position' in the negotiations, and the validity of its claim to a 200-mile territorial sea, with a view to pressing indirectly for the general acceptance of the concept of the Exclusive Economic Zone. As the Foreign Minister has stated in the Brazilian Chamber of Deputies, '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'.⁹⁵

One limitation on the role of a law-making conference in the customary process is that it may not secure uniformity in the international practice which it generates. The reason for that is that while the conference is in progress, the relevant rule is part of a draft which is subject to changes. Furthermore, the negotiating States are under no obligation to comply either partially or entirely with a (*lex ferenda*) rule which is being proposed in a negotiating text. Therefore, although States might well decide to follow strictly the provisions of the draft proposal, they may feel more inclined to retain only its most advantageous parts, in the hope that the final draft will be altered accordingly (by way of the 'boomerang effect' referred to above). It is submitted that the codifying convention which results from that conference may serve as a complement to the conference in this respect. When a convention has been finally adopted, it provides a model of conduct which is both written and definitive, thus eliminating the threat of undesirable modifications. Most importantly, while some doubt may persist as to the degree of consensus enjoyed by a text which is under negotiation, a State may justifiably consider that a text which has been formally adopted by consensus really reflects the widest possible support. Furthermore, those States which have signed the convention and intend to ratify it may be more inclined to follow strictly the rules of the convention and adapt their previous practice accordingly. For these reasons, an unratified convention may have the effect of bringing uniformity to an international practice which first commenced under the influence of the codifying conference or even prior to it. One example of this 'adapting effect' is the Act n° 2/85, enacted by Guinea-Bissau in 1985, which opens with the following words: 'in view of the need to establish straight baselines in accordance with the Convention on the Law of the Sea of 10 December 1982'.⁹⁶

The case may be made that those instances of State practice should be considered irrelevant for the customary process since they represent merely practice under the 1982 Convention. Thus, they could not be said to have any effect upon the customary process. The difficulty in this argument is that the 1982 Convention had not entered into force when those States adopted their new legislation. Therefore, strictly speaking, the acts of those States were neither the fulfilment of a conventional obligation nor the enjoyment of a conventional right. True, the States parties to the 1982 Convention have assumed the obligation to conform their national legislation to the provisions of the Convention, but this obligation applies to them only after the Convention has entered into force. The argument that the application of Art 18 of the Vienna Convention on the Law of Treaties *qua* customary law explains this type of conduct lacks conviction. It assumes something which needs to be proved, that is, that Art 18 reflects customary law and is thus binding on all States.⁹⁷ If, however, Art 18 is indeed expressive of a general customary rule then there is still the problem of defining what is the exact content of this obligation.⁹⁸ For example, what is or are the object(s) and purpose(s) of the 1982 Convention? It is doubtful, for instance, whether a State which maintains a different delimitation system while the Convention is not in force is defeating the object and purpose of the 1982 Convention, even if *ex hypothesi* the object and purpose of the Convention were the establishment of a uniform delimitation system. The only way to overcome those difficulties is to prove that the State concerned expressly acted in application of this provision *qua* customary law.

In addition to turning an already existing international practice into a uniform practice, an adopted yet unratified codifying convention may, just as much as a codifying conference, produce the effect of leading States, which had not done it thus far, into pursuing a course of conduct which conforms to some or all of its provisions.⁹⁹ Judge Sørensen has described this process as follows: 'The convention may serve as an authoritative guide for the practice of States... and its provisions thus become the nucleus around which a new set of generally recognized rules may crystallize'.¹⁰⁰ Reverting to the case of the Exclusive Economic Zone (EEZ), while in 1978 some forty-two coastal States had proclaimed a 200-mile EEZ, ten

years later (or six years after the convention which resulted from UNCLOS III was formally adopted) that number had increased to seventy-five.¹⁰¹ It should be noted that all that practice took place while the convention was not in force. The significance of the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the 1982 Convention) to the international practice regarding the EEZ is demonstrated by the relevant legislation adopted by States. One may find instances in which the relevant national law expressly mentions the 1982 Convention, and also instances where although that Convention is not expressly referred to, its provisions are clearly reproduced in the law. For example, the Archipelagic Waters and Exclusive Economic Zone Act, enacted by the Republic of Trinidad and Tobago in 1986, states in the preamble that the Act is designed to 'declare Trinidad and Tobago an archipelagic State, and to define the new areas of marine space appertaining to Trinidad and Tobago in the exclusive economic zone...and the nature and extent of the jurisdiction to be exercised by it in each of these areas... in accordance with the United Nations Convention on the Law of the Sea, done at Montego Bay, Jamaica on 10th December, 1982'.¹⁰²

The three effects which a codifying convention may give rise to will now be examined. The first point to be made is that 'declaratory' is not really an effect but a condition of the codifying convention or some of its provisions. A convention which purports to codify existing customary law on a given issue should evidently be termed a 'declaratory convention', at least in relation to those rules which in fact reflect existing customary law.¹⁰³ But the effects of a convention which declares existing customary law should be described in other ways. For instance, it might be said that in declaring an existing customary rule the convention confirms or strengthens it. This is not a negligible effect, since the customary process does not terminate or freeze in time when the customary rule becomes established; by nature, it is always subject to changes as regards the content of its rules and its state, so that what is currently settled law may be superseded by another law subsequently. For those States which favour the rule most, its reiteration is very welcome. Another consequence arising out of a declaration of existing customary law is that it gives definition and certainty

to what is an unwritten rule, thus helping the uniformization of the custom (this issue has already been covered above). There is still a third point which has to be taken into account. It is undisputed today that a distinction between a work of codification and a work of progressive development is often difficult to draw in practice.¹⁰⁴ Therefore, one should expect that in some occasions an unratified convention which is expressly characterized as declaratory of existing law may in fact have gone beyond the mere restatement of that law in regard to some of its provisions. In that case, a 'declaratory effect' and a crystallizing or generating effect could be said to overlap.

With regard to the other effect associated with a codifying convention, namely, the crystallization of a custom, some clarifications should be made. The crystallizing effect is said to mean that an incipient practice, existing prior to the adoption of the convention, becomes settled as custom. It is submitted that this crystallization is in reality not a direct effect of the convention itself but rather of the international practice which is started subsequent to, and on the basis of the convention (provided that this practice satisfies the requirements, namely, generality, uniformity and consistency). The argument that the convention alone could produce the consolidation of an incipient practice into a custom could only be grounded in the assumption that the adoption of the convention manifests a general *opinio juris* to that effect, and that this *opinio juris* alone is sufficient to cause that transformation. This assumption would seem unwarranted. It relegates the role of the material element in the formation of custom to a lower plane. Furthermore, it tends to anticipate and in this way dissociate the subjective element from the material element, which is a rather difficult approach to accept. Another problem in this argument is that it imparts to a codifying convention a greater normative power than most States would seem prepared to recognize. How would States react if they knew that the mere adoption of a convention in the closing session of a conference could have the immediate effect of transforming, by a crystallizing effect, a pre-existing incipient practice into a general custom? A matter for further consideration, which has often been overlooked in the treatment of this question, is that an incipient practice may well be facing opposition from some States. If those States

vote for the adoption of a codifying convention, some provisions of which reflect that incipient practice, it would seem unjustifiable to consider that act alone as a manifestation of their new *opinio juris*, constitutive of a new custom. Those States could have accepted the inclusion of those provisions because they regarded them as being new conventional law, without any association with any custom. Also, they might decide later not to ratify the convention for as long as those provisions are maintained.

A final question which has to be considered in connection with the crystallizing effect is how to harmonize the effects of a codifying convention with the effects of the preceding codifying conference. Given that a codifying conference may, prior to the final adoption of the convention, equally induce States to follow an international practice, there are two possibilities. First, an incipient practice is generated by the conference, and the convention influences the development of that practice and thus serves to crystallize it into a custom. Second, an incipient practice which already exists prior to the conference initially evolves on the basis of that conference, and then is further developed by the influence of the convention. In both cases, the crystallizing effect may in the end have been originated by the aggregate of the influence of the conference and the convention over the international practice.

The other possible effect of a codifying or law-making convention is the generation of a new custom.¹⁰⁵ This effect is in reality an indirect effect, since it is the subsequent practice of States in the sense of the relevant provision of the convention which determines the formation of a custom.¹⁰⁶ In order to differentiate this effect from the crystallizing effect, it would seem necessary to presuppose that the international practice which originates the new custom starts only after the convention has been adopted. If there is any international practice on the matter before the adoption of the convention, then the case could be made that one is referring to the crystallizing effect instead. Along the same lines, it could be pointed out that if there is, prior to the adoption of the convention, an international practice which had been developing on the basis of the conference, then one can only infer that the

effect of the convention was a crystallization of a pre-existing practice, or alternatively, that it was the conference which had the effect of generating a new custom. Another requisite to be fulfilled for the occurrence of a generating effect is that the provisions on the basis of which the international practice develops should constitute 'new law', otherwise they could be characterized as a mere declaration of existing law and would certainly be associated with a pre-existing international practice. In that case, one should speak of a 'declaratory effect' rather than a generating effect.

All those conditions are to be satisfied if one intends to dissociate the generating effect from the other two effects. Taken together, especially that which demands that the practice subsequent to the adoption of the convention be entirely new and that which requires that the rules represent new law, they raise some doubt as to whether a generating effect would ever constitute the effect most often verified in practice.

The difficulty in drawing a clear-cut distinction between the generating and the crystallizing effect is made more patent by the fact that both effects produce in the end what seems to be the same result, namely, a new custom. Thus, there seems to be a case for discarding this distinction. The practice of international organizations shows an almost uniform adoption of a dual, simpler, categorization of the nature of the provisions of a codifying convention: a provision may represent either a codification or a progressive development of international law.¹⁰⁷ The possible effects of a convention on the customary process would stem from those two categories alone. But how can they be defined in comparison with the tripartite classification of the effects referred to above?

The Statute of the International Law Commission also distinguishes only two categories of provisions in a codifying convention: provisions which represent a codification of existing customary law and provisions which represent a progressive development of international law. In the terms of Art 15, the expression 'progressive development' means 'the preparation of drafts on subjects which have not yet been regulated by international law or in regard to

which the law has not yet been sufficiently developed in the practice of States'. Thus, the Statute uses the same expression to include the formulation of conventional rules which could - but not necessarily do - give rise to a wholly new practice (generating effect), so far as they refer to a subject which has not yet been regulated by international law, and to the consolidation of an on-going practice (crystallizing effect), so far as they refer to a subject in relation to which there has already been some practice.¹⁰⁸ One could draw the conclusion that, on the basis of the distinction made by the Commission, the provisions of a codifying convention could give rise to two effects only: the 'declaratory effect', on the one hand, and the generating or crystallizing effect, on the other hand.¹⁰⁹ The practice of the Commission shows that it understood the expression 'progressive development' to include all cases where there is a formulation of new law. For instance, in its 1953 report on the draft articles on the regime of the high seas (covering the international regulation of fisheries), the Commission stated that 'in their main aspect both drafts go beyond the existing law and must be regarded to a large extent as falling within the category of progressive development of international law'. With regard to the draft convention on Arbitral Procedure, the Commission reported that 'while in some matters, which are of fundamental nature, it does no more than codify existing law of international arbitration, in other respects its provisions are in the nature of a formulation, *de lege ferenda*, of what the Commission considers to be desirable developments in this field of arbitral procedure'.¹¹⁰

There is ample evidence that States have generally adhered to this dual definition of codification and progressive development with relation to the nature of the provisions embodied in a law-making convention. At the concluding session of UNCLOS III, several representatives described in this manner the provisions of the convention which were to be adopted. The United Kingdom representative, for example, contrasted those provisions which 'express, codify or clarify existing law' with those which 'seek to make new law'.¹¹¹ Attention should also be drawn to what some codifying conventions state in this respect. Thus, for instance, the preamble of the Vienna Convention on the Law of Treaties declares that 'the codification and progressive development of the law of treaties achieved in the

present Convention will promote the purposes of the United Nations set forth in the Charter'.¹¹²

It is instructing to contrast all those considerations on the effects of a codifying convention with the pronouncements made by the Court in the *North Sea Continental Shelf* cases. The first point to be noted is that, although Denmark and the Netherlands clearly drew a distinction between a declaration and a crystallization of a customary rule, the position of the Court seems to indicate that it perceived both effects as the same. As the Court summarized it, those two Governments did not contend that the Convention was 'merely declaratory of existing rules'; their contention was that 'although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet the process of the definition and consolidation of the emergent customary law took place through the work of the International Law Commission, the reaction of Governments to that work and the proceedings of the Geneva Conference; and this emerging customary law became crystallized in the adoption of the Convention'.¹¹³ In examining that contention, however, the Court seems to have equated both effects, as the following extracts show: 'The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under article 12, were not regarded as declaratory of previously existing or emergent rules of law...'; 'Article 6... was considered to have a less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law'; '...the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law...'; 'The Court concludes that if the Geneva Convention was not... declaratory of a mandatory rule of customary international law... neither has its subsequent effect been constitutive of such a rule...'.¹¹⁴

The reason why the Court took that position is a matter for speculation. One tentative explanation which could be put forward is that the Court was prepared to accept a wider conception of the 'declaratory effect'. This conception could be stated as follows: if it is right to hold that a conventional norm is declaratory when it faithfully and strictly reflects an

already established customary rule, then it would be also reasonable to hold that a conventional norm is declaratory when it faithfully reflects an evolving or 'emergent' customary rule; there is a declaration in both cases, although they declare different things. Against this conception, however, it could be suggested that the need for a distinction between the declaratory effect and the crystallizing effect lies precisely in this recognized difference regarding the legal state of the rule which is being declared. In fact, the argument would add, although in the second case the conventional norm is also declaring a customary rule, it goes beyond a mere restatement, for the convention crystallizes the evolving rule into a settled customary rule; therefore, the distinction ought to be maintained. To counteract this argument, it could be argued in defence of that wider conception that if, in the second case, the convention is also a constitutive act, bringing about the final and immediate settlement of the evolving rule, the relevant conventional norm represents in the end the same thing, namely, a declaration of an established customary rule. It may be noticeable now that the difference between both positions derives from the way in which the question is approached.

Because the Court seems to have regarded both the declaratory and the crystallizing effects as one and the same, it investigated the contention that the Geneva Convention was declaratory and/or a crystallization of the alleged customary rule by looking solely at the nature of the provision as embodied in the convention (whether a right of reservation in relation to provision was recognized), and at the 'processes that led the Commission to propose it' (whether the International Law Commission proposed the rule *de lege ferenda* or *de lege lata*).¹¹⁵ In other words, it did not scrutinize, so far as the alleged declaratory and/or crystallizing effect was concerned, State practice on matters of delimitation of continental shelf (in particular, if there was, as Denmark and the Netherlands contended, an incipient practice prior to the adoption of the Convention). Neither did the Court seem to follow the view that, if the crystallizing effect is to be accepted as a valid and distinct effect of a convention, then in ascertaining whether this effect has indeed occurred, State practice subsequent to the convention must be taken into account, for it is this posterior practice which directly provokes the consolidation of the incipient practice. Last but not least, the

Court had no regard for the possibility that the act of ratification of a codifying convention like the Geneva Convention could count as State practice which evidences the existence of a customary rule. If that convention is indeed one of those which purports to represent (at least partially) a codification of international law, should not the act of ratification count (not exclusively, though) as evidence that some of its provisions may reflect customary law? This viewpoint may, however, be countered by the argument that ratification can mean only that a State has agreed to be bound by the convention. At any rate, the point is irrelevant because the Court indicated very clearly that the provision in question (Art 6) had been proposed by the International Law Commission 'at most *de lege ferenda*'.

The divergence of views between the Governments of Denmark and the Netherlands, on the one hand, and the Court, on the other hand, was also manifest in the consideration of the other possible effect of a convention, the generating effect. Those two Governments maintained that the relevant customary rule had matured partly because of the impact of the Geneva Convention and partly on the basis of subsequent State practice.¹¹⁶ Therefore, they conceived a two-stage process of development, starting with the Convention and being completed by subsequent State practice. In considering the contention, the Court set forth a number of conditions to be fulfilled in order that such a result could be regarded as having been attained, and found that none had been satisfied. Those conditions were:

1) the provision concerned should, 'at all events potentially, be of a fundamentally norm-creating character'; 2) there has to be a 'very widespread and representative participation in the convention', including that of States 'whose interests are specially affected'; 3) an 'extensive and virtually uniform' (in the sense of the provision invoked) State practice, which shows a 'general recognition that a rule of law is involved'.¹¹⁷

Before the conditions are examined, it is to be observed that in contrast with the *Fisheries Jurisdiction* case, where the Court found that the 1960 Geneva Conference had caused an impact on customary law, in this case the Court disregarded the possible role of the Conference and centred exclusively upon the resulting Convention, so far as the generating effect is concerned. As will be noted below, the Court examined only State practice

subsequent to the Convention, leaving aside State practice that might have occurred during the Conference and which therefore may have been attributed to it. In order to harmonize this apparent contradiction, the attitude of the Court could be explained as follows. In the *Fisheries Jurisdiction* case, no convention resulted from the conference, so that if State practice underwent a change it must have been due to the conference alone. By contrast, in the *North Sea* cases a convention was concluded at the conference, and the relevant State practice which had been referred to and was being disputed in this case started only after the Convention.

The way in which the Court described those conditions would indicate that it considered each of them essential for the determination of whether the Geneva Convention had in fact caused the formation of the alleged customary rule. As the literature which later emerged on this case demonstrates, the Court's reasoning was not wholly convincing. Consider, for example, requisites 2 and 3.

The Court seems to have used the term 'participation' in condition 2 in the sense of 'ratifications and accessions to the Convention'.¹¹⁸ This view would suggest that a convention which has been adopted, or even signed by a good number of States, but has not secured a 'very widespread and representative' ratification, including from those States whose interests are specially affected, could not produce the generating effect. The underlying motive for that understanding was revealed by the Court: it implied that only ratification or accession could unequivocally manifest the 'positive acceptance' of the relevant principle.¹¹⁹ It would follow that, according to this view, only a convention which has been widely ratified and therefore is in force could be capable of generating a new custom. Would that mean, by implication, that the Court thought it feasible that a widely ratified convention could *ipso facto* produce a new custom? That seems unlikely, for the Court also relied on other requisites, including the existence of State practice in the sense of the provision invoked. There are, however, other controversial inferences which could be drawn from that pronouncement, as will be seen below. A different point to be made is that

the Court should have justified more cogently why the support of States for a rule which is embodied in a convention may not be inferred from other means or acts, since in the *Fisheries Jurisdiction* case it had clearly ascertained the existence of support for a rule within a conference from which no convention had resulted. In that case, it had no ratifications which could substantiate its finding.

With regard to condition 3, the Court describes it as an 'indispensable requirement'.¹²⁰ This view would seem to corroborate the opinion expressed above, in regard to the generating effect, that a convention alone could not bring about a change in the law; State practice on the matter is the primary ingredient. The description by the Court of the qualities that the relevant State practice must display in order to be counted as evidence of an established custom does not raise much difficulty. Questions are bound to arise, however, when the way in which the Court investigated State practice to see if condition 3 had been satisfied is compared with condition 2. The Court examined State practice subsequent to the signature of the Geneva Convention.¹²¹ To follow the Court's reasoning in connection with condition 2, a Convention could only give rise to a generating effect if positive acceptance of a principle is manifested by the act of ratification. Would not this view entail the consequence that only the practice of those States which have ratified the Convention should count? Furthermore, given that the Geneva Convention would satisfy condition 2 as stated by the Court only if it had received widespread ratification, any practice related to matters regulated by the Convention, and which is prior to this state of widespread ratification, should also be irrelevant. The Court, however, made the surprising statement that it dismissed the value of State practice which showed that the States were 'acting actually or potentially in the application of the Convention', by which it meant those instances where the States which performed the practice 'were or shortly became parties to the Geneva Convention'.¹²² This apparent contradiction could only be avoided if the conditions set up by the Court were viewed as alternatives, the satisfaction of only one of them being sufficient for the conclusion that a customary rule exists. The way in which this part of the decisions was drafted, however, indicates that the Court considered all conditions as interdependent.

In ascertaining the evidential value of State practice (regarding the generation of a new customary rule), it must be borne in mind that the practice of those States which 'were or shortly became parties' to a convention is only one among several other possibilities. It is proposed now to examine other situations. There may be, for example, the case where a State signs the Convention and, only after a long time has elapsed, decides to ratify it. Perhaps this State had decided to join in the convention only when it had been satisfied that the convention would really receive the necessary number of ratifications and thus enter into force. How should the Court characterize a practice followed by this State in the period following signature until the ratification of the convention? Perhaps the answer would be, as the Court put it, to 'presume' that the practice was in the application or anticipated application of the convention.¹²³ But this presumption is rebuttable, and in addition, could be applied in the opposite sense, that is, to assume that the practice was either in application of an established customary rule or constitutive of a customary rule.

Another possibility which could be mentioned is that of a State which signs the Convention but fails to ratify it. In fact, this possibility is often verified in practice. In the case *sub judice*, Germany was in this position. Should the practice of those States be presumed to be in application of the convention and as such discarded? There seems to be no justification for the adoption of that presumption; indeed the presumption should be the opposite, namely, that the State is not willing to be bound by the treaty, and therefore that its practice is not to be considered as an application of that treaty. It is submitted that this understanding is applicable even in the case of a State which fails to ratify a convention because it maintains its objections in relation to a single provision.¹²⁴ In this last example, the case could be made that a practice in the application of the convention is to be inferred regarding the other provisions in relation to which the State has no objections. That suggestion, however, may be rejected on the ground that if a State has objections to only one of the provisions of a convention, the fact of the matter is that this reservation still is preventing it from being a party to the convention, and indeed there is no prospect of it ever becoming a

party to the convention while the provision is maintained. An illustration which seems to reflect well this situation is the attitude of the United States regarding the 1982 Law of the Sea Convention. The 1983 Presidential Statement which accompanied the Proclamation on the Exclusive Economic Zone stated that the United States would not sign or ratify the 1982 Law of the Sea Convention 'because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations...'. At the same time, he declared that the Convention contained provisions 'which generally confirm existing maritime law and practice and fairly balance the interests of all States'.¹²⁵ Thus, the United States made it clear they would not sign the Convention and that they were applying those conventional provisions so far as they reflected customary law. In this way, how can its practice be considered as practice in the application of the convention? The only reservation which could be made to this example is that it does not illustrate the generating effect but rather the declaratory effect of a Convention. Be that as it may, the point is made.

Although the Court dismissed the relevance of the practice of those States which were parties to the Geneva Convention, it is possible to envisage situations in which that practice could be counted as a practice which is both evidential and constitutive of a customary rule. As Prof. Schachter has pointed out, the possibility of this being verified lies in the presence of a particular subjective element. In his words, 'the only possible basis for such differentiation would be evidence on the belief (the *opinio juris*) of the States that their acts were meant to be pursuant to customary law rather than the treaty or vice-versa'.¹²⁶ One might add that in the circumstances, the subjective element should be unequivocal, preferably maintained by an express declaration. It has to be observed, however, that the occurrence of such situation is only a possibility, and there is no indication of it having been realized in practice. On the other hand, the practice of States parties to a convention vis-à-vis non-parties may be a good indication of the existence of a new customary rule, provided that this practice is in the sense of the relevant provision of the convention.

2. Institutional Support for Legal Claims or Legal Representations

The activities of States within the framework of regional systems are the most typical examples of the use by States of international institutions with a view to propagating and strengthening their legal claims. This type of action has been verified, for instance, in two regional organizations: the Organization of American States (OAS) and the Organization of African Unity (OAU). The reason for this joint action on a regional basis lies in the general purpose of a regional organization: to promote co-operation amongst the States of a particular region on those matters which are of common concern. Thus, when all or a great number of States of a region have assumed the same or a similar position in relation to a given problem, as a result of a common perception of their needs and interests, the framework of the regional organization to which they belong sometimes represents a suitable and supportive vehicle for the manifestation of their legal claims.

States may benefit from the activities of a regional organization in two ways. The first way has already been referred to in connection with international organizations in general, namely, the role played by organs of international organizations in the enhancement of a given customary process and the legal claims related to it. The second manner concerns the use of the regional organization's institutional umbrella in order to promote one's legal claim. An analysis of the regional practices on the initial stages of the customary process related to the Exclusive Economic Zone will show how this connection between States and the regional organization takes place.

In order to understand properly Latin American practice, it is necessary to bear in mind that the Organization of American States (OAS) is one element in a wider regional arrangement called the Inter-American System, which is composed of organs, procedures (including the mechanism of conferences), institutions and principles common to the American States.¹²⁷ Traditionally, since the inception of the Pan American Union (predecessor of the OAS), one of the ways used by the American States to promote principles and rules of international law in the region is by convening a regional Conference and adopting Resolutions,

Recommendations and Declarations in which the principles and rules are stated. Some principles which were very significant to the Latin American States, like the principle of non-intervention, non-aggression, continental solidarity, non-use of force, and the pacific settlement of international disputes were first developed in this manner.¹²⁸ Naturally, those principles were also embodied in conventions, and later in the OAS Charter. But it is important to note that, as the Inter-American Juridical Committee has put it, the mechanism of declarations, recommendations and resolutions adopted at Conferences 'contributed to the consecration of the principles of the American international law'.¹²⁹ That is why some authors have put them alongside regional conventions as the source of the 'inter-American regional law'.¹³⁰ To illustrate how the American States have considered the role of such Declarations and Resolutions, the Act of Chapultepec, adopted in the final stages of the 1945 Conference on Problems of War and Peace, contained a Declaration of American Principles which stated, in its preamble, that 'The American States have been incorporating in their international law, since 1890, by means of conventions, resolutions and declarations, the following principles...'.¹³¹ With this introduction, the regional action regarding claims to an extended maritime area of jurisdiction and sovereignty will now be described.

Following the 1945 Truman Proclamations, an increasing number of Latin American States extended unilaterally their zones of maritime jurisdiction and sovereignty off their coasts. In the beginning of this process, only limited support from the Organization of American States could be secured, owing to the novelty of the practice and the opposition by some American States. To cite an example of that institutional support, in 1956 the Inter-American Council of Jurists, an advisory organ of the Organization which was also entrusted with the promotion of codification and progressive development of international law, issued a declaration entitled 'The Principles of Mexico on the Juridical Regime of the Sea'. That Declaration stated the conclusions of the Council on the subject, one of which was that a 3-mile limit for the territorial sea did not constitute a rule of international law and that every State was entitled to fix another reasonable limit, provided that it took into account geographical, geological and biological factors, the economic needs of the population, and

its security.¹³² The relevance of this action by an organ of the Organization would seem to be demonstrated by the fact that in replying in 1970 to protests lodged by other States against its new legislation on the territorial sea, the Government of Brazil made express reference to this document in support of its claim.¹³³

By 1970, what was initially a scant practice had become widespread in Latin America: Argentina, Brazil, Costa Rica, Chile, El Salvador, Ecuador, Honduras, Nicaragua, Panama, Peru, and Uruguay had all adopted a new extended maritime zone of jurisdiction and/or sovereignty. In that year, those States decided to initiate a concerted action, within the Inter-American System, with a view to strengthening their claims and gaining more adherents to their international practice. Following the traditional procedure, in 1970 a Conference was convened the result of which was a declaration by the participating States, called the 'Montevideo Declaration on the Law of the Sea'. The Montevideo Declaration was signed by Argentina, Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua and Uruguay. In this instrument, these States declared the principles of international law which, in their view, endorsed their claims, such as the 'right to establish the limits of their maritime sovereignty and jurisdiction in accordance with their geographical and geological characteristics and with the factors governing the existence of marine resources and the need for their rational utilization'.¹³⁴ Two points raised by the Declaration should be mentioned. Firstly, the Declaration expressly associated the legal principles which it declared with the international practice developed within the Inter-American System. The relevant text reads as follows: '(Considering) that a number of declarations, resolutions and treaties, many of them inter-American, and multilateral declarations and agreements concluded between Latin American States, embody legal principles which justify the right of States to extend their sovereignty...'.¹³⁵ The impression that this statement would seem to give is that those States wanted to suggest or claim that their practice was in conformity with international law and firmly established in the region, and furthermore that it enjoyed the backing of the regional system. A second point of utmost importance is made in the last paragraph of the Declaration, where those States expressed 'their intention to co-ordinate their future action

with a view to defending effectively the principles embodied in this Declaration'. In other words, the Montevideo Declaration was the starting point of a regional sub-system of collective assertion and defence of a common legal claim.

It has to be noted, however, that a similar initiative had already been in practice since 1952 amongst three of those States, namely, Chile, Ecuador and Peru. In a first Tripartite Conference on the 'Exploitation and Conservation of the Maritime Resources of the South Pacific', held at Santiago in 1952, a common policy of exclusive sovereignty and jurisdiction over a 200-mile area adjacent to their coasts was proclaimed by means of a Declaration. Two years later, those three States signed an agreement in which a common plan of action described in it was to be carried out should their claims be challenged.¹³⁶ The arrangement has indeed proved to have worked well, as may be seen by the way in which the parties behaved in the disputes that followed with the United States.¹³⁷ Interestingly enough, when representatives from those States met again at a Conference, in 1977, they issued a joint Declaration whereby they reiterated their determination to maintain the close co-operation which had grown up between them since the 'South Pacific system' had been in force.¹³⁸

Perhaps inspired by this reasonably successful endeavour, those other Latin American States attempted to establish a wider arrangement of the same kind within the Inter-American System. The main objectives of the 'South Pacific system', namely, mutual recognition of claims, their publicity and their common defence, were reproduced in the Montevideo Declaration. But the number of Latin American States involved in this arrangement was still insufficient. That is one of the reasons why a second regional Conference was convened in 1970, this time in Lima, with the purpose of gathering a wider support amongst the States of the region which had been thus far undefined. The instrument which resulted from the Conference, the 'Declaration of the Latin American States on the Law of the Sea', secured the support of those States which had signed the Montevideo Declaration, and, in addition, of the following States: Colombia, Dominican Republic, Guatemala, Honduras and Mexico. In general, this new Declaration reproduced the terms of

the Montevideo Declaration, with the notable exception of one provision: that which expressed the intention of the declaring States to co-ordinate their actions with a view to defending the principles declared.¹³⁹ Another important reason which motivated the meeting was the perceived need to adopt a common position regarding the arrangements which were being made for convening a comprehensive Third United Nations Conference on the Law of the Sea. The Latin American States represented at the Lima Conference wanted to influence both the agenda and the outcome of UNCLOS III, and to that end they adopted at Lima four Resolutions on all the main issues which were to be dealt with at UNCLOS III.¹⁴⁰

The effort of disseminating the continuing regional practice within the region led Colombia, Mexico and Venezuela to promote in Caracas, in 1971, a meeting of the Foreign Ministers of the countries of the Caribbean sub-region. This meeting prepared the ground for the 1971 'Specialized Conference of the Caribbean Countries on Problems of the Sea', from which a declaration, called the Declaration of Santo Domingo was adopted.¹⁴¹ The Declaration of Santo Domingo was adopted by the following States: Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Trinidad and Tobago, and Venezuela. It not only sanctioned the general terms of the right claimed by the other States in the preceding two Declarations, but it also introduced for the first time a more elaborate concept, that of the 'patrimonial sea', the contents of which were generally reflected in the concept of the Exclusive Economic Zone.¹⁴² It is noteworthy that the Declaration of Santo Domingo indicated that it was to be seen as part of the Inter-American System and that it was intended to state principles which were in conformity with regional law. For instance, it stated that it was for the 'strengthening of the norms of the inter-American system that the principles of this document shall be realized'. Also, it declared that the norms of the Inter-American System founded the principles declared. Thus, it referred, in the preamble, to the rights proclaimed in two 'International American Conferences held in Bogota in 1948, and in Caracas in 1954', and to the 'Principles of Mexico on the Legal Regime of the Sea'.

The practice on maritime jurisdiction and sovereignty within the Inter-American System may be summarized as follows. After performing unilateral acts extending the maritime area under jurisdiction and/or sovereignty, the Latin American States sought to create within the Inter-American System collective arrangements designed to secure mutual recognition, publicity and co-ordinated action for the defence of their claims. Those arrangements were made both at the regional and at the sub-regional levels. The procedure used for the establishment of those arrangements was the convening of a Conference followed by the adoption of a Declaration of Principles.

While the regional process in Latin America was evolving, a parallel process developed within another regional system, the Organization of African Unity (OAU). By 1970, some African countries such as Senegal, Ghana, and Cameroon had already extended their zones of maritime jurisdiction. The Report of the twelfth session (1971) of the Asian-African Legal Consultative Committee, which studied various issues of the law of the sea, concluded that most delegations felt able to support 'in principle, the right of a coastal State to claim exclusive jurisdiction over an adjacent zone for economic purposes'.¹⁴³ This first reference to the right to an extended area of jurisdiction was subsequently elaborated at the African States Regional Seminar on the Law of the Sea, held in 1972. The Seminar adopted a recommendation in which the concept of the exclusive economic zone was first mentioned. Two years later, the Council of Ministers of the Organization of African Unity adopted in 1974 a 'Declaration on the Issues of the Law of the Sea'. This Declaration recognized the right to an Exclusive Economic Zone and encouraged the establishment of regional arrangements for the settling of disputes and mutual co-operation.¹⁴⁴

It is important to notice the considerations invoked by the Council to justify its position. Mention was made in the preamble to the 'positions and the views of other States and regions', which suggests that the Council of Ministers relied also on the on-going regional experiment in Latin America as a precedent which endorsed the principles stated in the Declaration. It is known for a fact that representatives from Argentina, Chile, Ecuador and

Peru took part, as observers, in the meeting of the Asian-African Legal Consultative Committee, with a view to persuading the other States of the benefits derived from the practice already adopted by some Latin American States.¹⁴⁵ One could conclude that an international practice which evolves within a given regional system may interact with or influence the practice of States belonging to another regional system.¹⁴⁶ A second point to be made is that the Declaration did not refer to the conclusions of the 1972 Regional Seminar or the Asian-African Legal Consultative Committee; instead it cited four Council of Ministers Resolutions, two of which dealt with the permanent sovereignty of African States over their natural resources. This attitude may warrant the view that, in contrast with the Latin American experience, which showed a preference for informal procedures within the Inter-American System, the African States would rather use in a more direct and formal manner the regional organization to consecrate the principles within their region. In other words, whereas the Latin American States preferred to adopt the procedure of conferences and declarations, the African States were more inclined to further their legal views by using an organ of their Organization in which they were directly represented.¹⁴⁷

The foregoing analysis of the role of two regional systems in the customary process related to the EEZ seems to confirm the general points initially made. There is no doubt that Latin American and African States found it easier to disseminate their legal claims within the region where they were located. This is partly explained by the cultural and political affinities amongst the States of the region, partly by the coincidence of their interests, and partly by the existence of a regional system which proved to be a good means for the propagation of their claims. This analysis also shows that the use of the institutional umbrella of the regional systems, through the appropriate regional procedures, worked well in maintaining and strengthening the States' legal claims. Finally, this analysis shows that legal developments in a regional system may affect another regional system, and that two regional systems may interact towards a given legal development.

3. Resolutions of the United Nations General Assembly

Despite being an organ of an international organization, the UN General Assembly represents a case to which particular attention should be devoted. The General Assembly is a peculiar case in the sense that its membership comprises almost all States of the world, and it has a very wide competence to discuss matters and pass resolutions on them. It has served, therefore, as a wide forum for the discussion of legal questions. But it has also been designed to promote the codification and progressive development of international law (cf. Art 13 of the UN Charter); accordingly, some of the main codifying multilateral conferences have been sponsored by this organ. Moreover, it has engaged in acts which have an impact on the development of general international law. Those acts take the form of resolutions and declarations. It is this mechanism of participation in the customary process which will be examined below.

The particular bearing that some UN General Assembly Resolutions may have on the customary process is discussed below. First, it is necessary to adduce a preliminary explanation. One is concerned here with the possible **normative effects** (*latu sensu*) of General Assembly resolutions. A normative effect is here understood as the impact on the customary process; in other words, the effect of contributing towards the creation of a new customary rule and/or abrogation of an established rule. Theoretically speaking, this impact might be direct, when a resolution alone brings about a particular general customary rule, or indirect, when it is part of a complex process leading to the creation of a general customary rule. Thus, a resolution could be said to have had direct normative effects when it has laid down general rules and principles which were in fact held as customary rules of general validity for and application to all subjects of the international legal system, members and non-members of the Organization alike. By contrast, a resolution has an indirect normative effect when it contributes, together with other elements, to the establishment of a general customary rule binding on all States, members and non-members alike. It goes without saying that a resolution could only be regarded as having normative effects if the rules or principles enunciated in it are not already part of international law. Otherwise, it could not

be said to have had any influence in the creation of those rules, and their source would have to be looked for elsewhere.

The notion of normative effects is to be distinguished from other legal effects in a stricter sense, especially those related to the establishment of legal obligations under the Charter rather than under customary law. For example, resolutions which deal solely with the internal legal order of the United Nations are, according to the Charter, legally binding, but they apply only to the members of the Organization and the basis of the obligation established by them is the constituent treaty. It is clear that this class of resolutions gives rise only to legal obligations *inter partes* and as such have no normative effects in the sense just described. Accordingly, they are not examined.

It has been thought proper not to embark upon the issue of the legal validity of the resolutions, that is, the conditions (formal and of substance) which, according to the organization's internal legal order, must be observed so that a resolution may be regarded as legally valid.¹⁴⁸ Furthermore, as this Chapter is not intended to cover thoroughly the subject of UN General Assembly resolutions, the factors or conditions which are considered necessary for the identification or characterization of a normative resolution, like the object of the resolution, the voting majority, and so forth, are also excluded from this study. Any such endeavours would only deviate this study from the main object set out above, namely, the investigation of possible normative effects.

It is perhaps appropriate to start this inquiry by examining the question whether a UN General Assembly resolution may be a formal source of law. The issue is relevant for this study because those who advocate this idea suggest that at least some of those resolutions may be subsumed under the category 'custom'. How could one test the proposition that a resolution or the process by which it is formulated may constitute a type of custom? One could first approach the question by bringing in the debate on whether the General Assembly has competence to adopt legally binding resolutions. The strategy of the argument

is to demonstrate that if the instrument or procedure (resolution) is 'soft', then its by-product (rules and principles which are enunciated) must be 'soft' as opposed to 'hard' law. It would follow that UN General Assembly resolutions could not be regarded as a formal source of law, since that which it creates is not a legal rule but at most some sort of standard.¹⁴⁹ This path, however, is not as smooth as it may seem, as the extensive doctrinal debate over it shows.¹⁵⁰ Instead of following this line of inquiry, a different one is proposed.

The validity of this proposition (UN General Assembly resolutions as a formal source of law, i.e., as custom) could be said to depend on whether the traditional components of a custom are found to be present in some resolutions or, what amounts to the same thing, whether the process by which they are made resembles the customary process. Turning first to the subjective element, it seems to be accepted that votes and statements by a given State's representative, regarding a proposed UN General Assembly resolution, may in some cases be considered as an expression of its *opinio juris*. Thus, in the *Nicaragua* case, the Court seems to have endorsed and applied this view in the analysis of the legal position of the United States and Nicaragua in relation to two particular resolutions, namely, Res. 2625 (XXV) and Res. 2131 (XX).¹⁵¹ In the same vein, Nicaragua, in the *Border and Transborder Armed Actions* case, and Australia, in the *Nuclear Tests* case, maintained the view that UN General Assembly resolutions could reflect the *opinio juris* of States.¹⁵² Therefore, one could quickly draw the inference that the subjective element may indeed be found in a resolution or in the process by which it was formulated. With regard to the second element, it has been showed in Chapter IV that there is evidence that votes and statements by State's representatives concerning a given proposal or draft of resolution may be a piece of State practice. On the basis of those considerations, could one maintain that a resolution alone or its process of formulation may give rise to a customary rule? There are a number of reasons against this idea.

In the instances mentioned above, *opinio juris* was understood as the view of States regarding the status in customary law of the rules or principles declared by them in the

resolution. In this sense, the subjective element does not afford evidence that the rule which is viewed as representing customary law was actually created by means of that particular process. It surely shows that the rule was brought about by a customary process, but it gives no indication that the rule resulted from the resolution-making process. An *opinio juris* to the effect that a customary rule exists and has been established by the resolution is not impossible, but it would have to be express and very clear. There is no known instance of this. The second element (State practice), as noted, is present in the resolution-making process. But the aggregate of such practice by the member States in the United Nations cannot suffice to create a custom. This sort of State practice seems to be an 'incomplete' piece of practice, since it affords no evidence of the State's actual conduct with regard to the subject-matter which the rule purports to regulate. It is very difficult to conceive how a custom may develop without any general practice (outside the UN framework) on the subject-matter of the rule, if only because it is from the practice of States on a given matter that the customary rule acquires its content and develops.¹⁵³ Moreover, the actual conduct in the sense of the rule has to display internal consistency and general uniformity.

The difficulty in considering State practice in the United Nations as sufficient for creating a custom is demonstrated by the possibility that the actual practice outside the UN may be different or in opposition to the rule embodied in the resolution. If the States which voted for a resolution contravene the rules enunciated in it and fail to justify their behaviour by reference to the rule (e.g., as an exception permitted by it), or explain their behaviour on the ground that international law or another rule allows that behaviour, it is hard to understand how the rule could be said to represent established law. Another difficulty is that when States vote for a particular resolution, many of them (if not most of them) regard it as a non-binding instrument.¹⁵⁴ If those States would not be prepared to concede the binding force of a resolution *qua* an act of the General Assembly, there is little prospect that they would consider it binding *qua* custom. Indeed, just imagine the difference it would make for States if they knew in advance that in voting for a resolution they could be creating 'instant' customary law, binding on all States, regardless of any subsequent and/or previous practice

on the matter.¹⁵⁵ There is no evidence that they regard the resolution-making process in such way.

In a word, if an international legal rule may be created solely by means of a resolution, independent of any subsequent or previous practice on the matter, then this law-creating process is anything but custom: it is (a type of) legislation. On the other hand, if a resolution may not by itself create a rule, then it is clear that it has no direct normative effects and thus it is not a law-creating process. A third alternative is that the State practice which leads to the adoption of the resolution (votes, declarations, and so forth), together with the resolution itself, may contribute to the formation of a custom, provided that they are complemented by actual State practice (in the sense of the provision embodied in the resolution) outside the UN framework. In this case, a resolution may be said to produce indirect normative effects, and in this way be an element in the customary process. This last option will be pursued now.

A General Assembly resolution may influence the customary process in various ways. It is submitted that the effects a resolution may have on the customary process vary according to the state of this process at the time when the resolution is being adopted. The reason for this is only too obvious: the effects of a resolution which is adopted on a subject-matter about which there is already a settled practice can only be distinct from the effects the same resolution would bear if there were no contemporary practice on the matter. Thus, one should consider the three basic phases of the customary process, namely, the initial stage, the intermediate stage, and the final stage.

. Initial Phase: The UN General Assembly may adopt a resolution which purports to lay down rules or principles designed to guide State conduct in a field where there is very little or no State practice, or where the existing practice is entirely different from the one prescribed or encouraged by the resolution. It is submitted that a normative resolution may (but will not necessarily) set into motion a customary process by hastening the subsequent

development of the (pre-existing) scant State practice in conformity with it, or by constituting the starting point of a new practice. Either way, this resolution would be located, in a time perspective, in the initial phase of a new customary process.¹⁵⁶

The proposition that a resolution may hasten or provoke a given course of conduct on the part of States is still too general. One could attempt to present a more elaborate description of the resolution's impact on the behaviour of States on the analogy of a codifying conference. It has already been suggested that a codifying conference may bring into light the existence of a consensus around a proposed course of conduct or rule. The conference can play this particular role firstly because it provides a multilateral forum in which States may manifest their legal views; secondly, because its procedure makes it possible that proposals are extensively discussed, and consultations, formal and informal meetings and statements can take place in the search for the common ground. It is submitted that, because a similar procedure may be found in the formulation of a resolution with a normative character, and because the General Assembly is also a multilateral forum, the legal position of each State may equally be known to the others. Thus, an overwhelming acceptance of a resolution which lays down rules and principles may well be taken to manifest the view of States that (1) the conduct prescribed by it is permissible and/or desirable and that (2) behaviour which is in conformity with it will receive a good deal of support or recognition (at least by the States which voted in favour of the resolution) or will not be seriously challenged.¹⁵⁷

The proposition has been put forward above that a State may rely on a resolution, and on the positive attitude of other States towards it, as a good indication of the practice which, if followed, would encounter recognition and support by those other States; and that as a result this resolution may be said to encourage the adoption of a given course of conduct. One could now add that, if a resolution is seen by a State as an expression of that degree of support, this State will probably expect that the other States follow the course of conduct encouraged by the resolution, particularly those which voted for its adoption. When many

States hold the same perception, a resolution may be said to have created a general expectation that a given course of conduct will be generally followed or at least will not be seriously opposed. This expectation is a factor which may facilitate the decision of States as to whether follow the conduct prescribed by the resolution, if only because it diminishes the uncertainties regarding the reaction to its future course of action. Even though a State may decide to 'wait and see' what the others will do (in particular to what extent the conduct required by the resolution will be reflected in the practice of the other States), it may also be inclined to benefit as soon as possible from the political or economic advantages which may result from the practice.

One could then draw the conclusion that a practice prescribed by a resolution of this type has a good prospect of being generally adopted and eventually becoming a custom. This conclusion, however, must be considered with all due caution. The likelihood that a normative resolution opens the way for the development of a new custom depends largely upon the degree of actual support it enjoys. The extent of support truly received by a resolution will determine the extent to which States will actually guide their behaviour by it. This is where the problem lies. One has to allow for the possibility that a resolution is not entirely agreeable to all States (or some of them) which voted in favour of its adoption or simply abstained.¹⁵⁸ It is conceivable that a State votes for the adoption of a resolution or abstains from calling a vote on the resolution (in the case of the consensus procedure) even though it approves of only some of its provisions. In voting in that way, it may have taken into consideration that the resolution is not legally binding, and therefore it is entitled to disregard in practice the provisions it dislikes; that anyway the text of the provisions which it dislikes is sufficiently ambiguous to allow for a convenient interpretation; and that it may attempt to influence the development of the law in the way that suits it best, that is, by engaging in a practice which covers only the provisions it likes.¹⁵⁹ Indeed, if a majority of States adopt a practice which reflects only some of the provisions contained in a normative resolution, then it is clear that the law will develop accordingly, that is, in respect of those provisions alone. This possibility, however, is very remote, for it is difficult to conceive how

the majority of States would disagree with a provision included in a resolution which was approved by themselves. It is more likely that some provisions in a resolution may be supported by a group of States and at the same time opposed by another group of States. In this case, a general and uniform practice on the basis of those provisions would not easily emerge; neither would a general support for those provisions. Bearing in mind this clarification, it is perhaps appropriate to summarize the point by saying that a State should not expect that general support to a practice which is entirely in conformity with a normative resolution will necessarily arise, though this may happen; and that, in addition, a new custom is not a necessary development of a normative resolution, though, again, this result may be realized.

It has been pointed out above that a resolution may provoke or encourage a new practice by bringing to light the existence and extent of support for an intended course of conduct. It may be added now that a normative resolution also provides the material content of the customary rule which eventually develops. This is the reason why some authors have claimed that some normative resolutions may be a material source of law.¹⁶⁰ This function is fulfilled when the resolution establishes a model for a given course of conduct and this model is actually followed by States. A model of conduct which is written down in an instrument adds considerable certainty and definition to the practice that is evolving. Those two elements combined, namely, the fact that a course of conduct has been delimited in a written instrument which has encountered wide support for its adoption, may constitute a powerful driving force making States behave accordingly.

Now one could inquire whether the States which are inclined to pursue the course of conduct stipulated in the resolution could find any legal basis for their practice in the resolution itself. In this respect, one might cite Judge Sir Hersch Lauterpacht's view that, in some cases, a resolution may provide 'a legal authorization for members determined to act upon them individually or collectively'.¹⁶¹ It is noticeable that Sir Hersch chose to employ the expression 'legal authorization' instead of 'legal right'. It would seem that this was

deliberate, with a view to making clear that a resolution does not create legal rights in the strict sense, i.e., enforceable claims as against the other States. One could offer a tentative development of his argument in the following way. A normative resolution may have the effect of turning a practice encouraged by it into permissible conduct under international law. Permissible conduct is conduct which is not prohibited by international law, and therefore is not open to challenges by other States on the ground that it violates international law.¹⁶² On the other hand, States are not obliged to engage in permissible conduct; it is discretionary by nature. It may be difficult to understand how something is legally permissible without recourse to the idea of a legal right. But it is equally unconvincing to speak of a legal right (at least in the strict sense) in a situation where the law is unsettled and the instrument which enunciated the rule (resolution) is regarded as recommendatory in character.

Permissible conduct, in the sense used here, is therefore characteristic of a situation where international law is unsettled. If this were not the case, then the States which were already engaged in a practice regulated by international law could theoretically challenge the legal grounds of the new practice and would not be bound to respect any situation or claim arising out of such new practice. Whether their challenge would be successful is another question. The time has come to define how, in this *Initial Phase*, international law on a given matter may be said to be unsettled. It is to be recalled that the two cases considered are: a) where there is very little or no practice on the subject-matter of the resolution; and b) where there is an established practice which stands in opposition to the course of conduct prescribed by the resolution. As to the first situation, it is clear that there is no settled customary law on the matter at the time when the resolution is being adopted; therefore, the conduct encouraged by the resolution could easily be described as permissible. In the second situation, the possibility of emergence of permissible conduct leading to a new custom may be explained as follows. It has been pointed out above that a normative resolution may evidence the *opinio juris* of States. It is feasible, therefore, that a resolution may express an *opinio juris communis* that the old law no longer subsists or represents international law. Some authors

have called this a 'destructive effect'.¹⁶³ The state of the law, in this case, could be described as unsettled, since the old law has been repealed and a new law has yet to come about through the practice of States (it has already been observed that the subjective element alone does not bring about a custom). Thus, any new practice would be permissible and would lead to the desuetude of the old custom.

When States start to adopt the permissible practice, legal relationships may be established *inter se*, and in this manner what was initially permissible becomes a legal right and a corresponding legal obligation. When an increasing number of States follow the practice prescribed by the resolution, then that which in the beginning was a permissible practice open for all may develop into an obligatory practice *erga omnes* or a general legal right (*stricto sensu*) by way of a customary process. Needless to say, in order for that to happen the other elements of a custom must be verified.

The proposition that a normative resolution can only bring about permissible conduct which is discretionary by nature seems to be in accordance with the view that a resolution as an act of the General Assembly does not create legal obligations. It seems to establish a right balance between, on the one hand, the interests of the State which intends to engage in the practice encouraged by the resolution, and on the other hand, the interests of the State which would rather abstain from following the practice without incurring in any breach of a legal obligation. However, if one follows Sir Hersch Lauterpacht's opinion, one has to allow for the possibility that a resolution may give rise to 'some legal obligation' to the members, in particular the obligation to consider in good faith the adoption of the course prescribed by it.¹⁶⁴ This would entail that, although States are not legally bound to comply with the prescriptions of the resolution, they should consider in good faith the possibility of observing them. Naturally, one could play down this legal obligation as something similar to a political commitment, in practical terms, since it leaves for States a good deal of discretion in deciding whether to actually observe the resolution or not. Indeed, how great is a

commitment to consider in good faith something? How could one verify whether a State has actually considered in good faith a course of action?

There are, however, other ways used by authors to justify a greater level of legal commitment to a rule prescribed by a normative resolution. Some authors have argued that a resolution is an instrument of the United Nations for the promotion of its object and purposes, in particular the purpose of promoting co-operation amongst the States; and that States parties to the Charter have assumed under it the obligation to co-operate. Thus, a disregard by a member State of a prescription issued by a resolution would constitute a violation of the State's obligations under the Charter.¹⁶⁵ One has to examine two assumptions behind this argument, namely: a) that Member States are, on the basis of the Charter, under a duty to co-operate; b) that a disregard of a resolution constitutes a breach of this duty. To confine oneself to the second assumption, the argument presents the following difficulty. The same writers who have propounded this view also hold that a normative resolution is under the UN Charter merely recommendatory in character. If that is the case, then assumption (b) would expose a great contradiction in the Charter itself. To say that a resolution is legally binding on States on account of it being an instance of international co-operation under the UN Charter would mean to ascribe to the resolution a legal force it does not possess under that Charter. One cannot have both ways. A normative resolution is either legally binding or recommendatory in character according to the Charter. Incidentally, this interpretation runs the risk of being applied to all resolutions, even those which are not claimed to be normative, for it could be argued that all resolutions are designed to promote co-operation amongst the member States. Prof. Tunkin might have perceived this problem, for he attempted to harmonize this interpretation by saying that 'there is a certain element of legal obligation in recommendatory resolutions of international organizations and that this element is determined by relevant clauses of the international organization's charter'. He could not concede that a resolution could give rise to a 'full obligation', therefore, following Sir Hersch Lauterpacht, he pointed out that it created 'a *certain element* of legal obligation'. But this remedy, it is submitted, makes things worse, for it implies that the 'duty to co-

operate' is something less than a legal duty or obligation. In other words, Tunkin seems to be saying that the duty to co-operate, as established by the UN Charter, imposes upon States a 'certain element of legal obligation' to comply with 'recommendatory resolutions'. If it is sufficient that States 'consider in good faith' (to follow Lauterpacht's definition of 'some legal obligation') whether to comply or not with the recommendatory resolution, then one wonders whether that resolution has any legal force.

Summing up the treatment of this first hypothesis (*Initial Phase*), a normative resolution in this phase may provoke or encourage a new course of conduct in the following way: it offers a definite model of conduct by reference to which States may guide their actions; it brings to light the existence and extent of support for the practice regulated by the model; and it offers a legal basis upon which States may act in pursuance of that model. As the States engage in their practices, legal relationships are established between them and the 'rules' embodied in the resolution, which were originally *de lege ferenda* propositions, become legal obligations binding on them on the basis of the legal relationships. As a third stage, the chain of legal relationships could form a custom and the States would be now invoking the customary rule as the source of their legal obligations.

. *Intermediate Phase*: This is a stage where there is already a new international practice in progress, though not yet established. This international practice is 'new' in the sense of being a practice around a new matter or a practice which stands in opposition to an old settled practice. It is the role of a normative resolution adopted at this stage that is being considered now. In order not to complicate this investigation further, it is assumed that the course of conduct prescribed by the hypothetical normative resolution is similar, or at least sufficiently similar, to the new international practice already developing. The general proposition is that a normative resolution could contribute to the final definition of the new practice, and in this way bring about the establishment of a customary rule.

One could be tempted to assert that a normative resolution in this phase would operate in a rather similar way to that described in the *Initial Phase*, but this statement would conceal some actual differences. For instance, in the *Intermediate Phase*, there may already be several legal relationships established amongst the States engaged in the new practice, so that a coming normative resolution could not be considered to have given rise, even in an indirect manner, to those relationships. By contrast, in the *Initial Phase*, a good deal of practice supposedly develops subsequently to, and on the basis of the normative resolution, and as a result the creation of bilateral legal relationships may follow suit. A second distinctive feature of the role of a normative resolution in the *Intermediate Phase* is found in the subjective element. It is possible that some of the States engaged in the new international practice may, already prior to the adoption of a normative resolution, maintain an *opinio juris* to the effect that a new customary rule has been established. Another alternative is that the adoption of a normative resolution could then be interpreted, by the States already involved in the new practice, as an attestation or confirmation by the generality of States - in particular those other States which had not been directly involved in the practice as yet - of the existence of a new customary rule. In practical terms, they would consider the resolution as the final imprimatur to a new right now enjoyable under new general customary law. Thus, the resolution could be said to both originate and subscribe an *opinio juris*, especially on the part of the States already involved in the practice, that a customary rule has been generally established and is now in operation.

A normative resolution which is formulated at the *Intermediate Phase* could not be said to produce a model for a new conduct since the hypothesis is that there is already a model to be found in the common features of the new international practice itself. It may be argued, however, that a particular normative resolution not only incorporates the nascent model verified in the new international practice but also presents some innovations. As has been pointed out, in the process of codification some elements of progressive development are almost inevitable; similarly, a normative resolution which purports to reflect the existing international practice may end up introducing some novelties. In this case, if State practice

subsequent to the resolution reflects those innovative features, the resolution could be regarded as having a direct influence upon the adoption by States of those new developments in the on-going international practice. To that extent, the effects of a resolution in the *Initial Phase* and in the *Intermediate Phase* would coincide.

The position of those States which were not at the time of the formulation of the resolution following the new international practice or were pursuing an opposite course of conduct will now be examined. A normative resolution is usually adopted by a very considerable majority or by consensus. It is to be assumed, therefore, that a great number of those States which stood aside from the on-going international practice have manifested their support for the normative resolution. If indeed there has been real support for the resolution amongst those States (whatever is the reason for this change or endorsement of policy), then that attitude should be reflected in their subsequent practice. Those States which opposed the new international practice would come to endorse it thus causing the desuetude of their own practice, and those States which had reason for engaging in the practice but abstained would be expected to join in as well. In that case, the resolution would certainly have caused the erosion of all or most opposition, thus strengthening and settling the new international practice.

A final point could be made. It has been pointed out, in the analysis of the *Initial Phase*, that a normative resolution could offer a legal basis for subsequent State practice in conformity with it. This consists in a legal authorization which makes a practice in the terms of the resolution a permissible practice. One wonders whether the same may occur to a normative resolution in the *Intermediate Phase*. The difference here is that the on-going new international practice has probably, by the time the normative resolution is formulated, already made international law on the matter unsettled. Therefore, the new international practice would already be permissible at the moment when the normative resolution is adopted. This is not to say, however, that a normative resolution would have no normative effect at this phase. By causing the crystallization of the new international practice, the

resolution may well determine the consummation of a customary process which turns the permissible practice into an obligatory practice *erga omnes*.

. *Final Phase*: When a customary process reaches this phase, the respective customary rule may be regarded as generally established. It is at this time that a normative resolution is formulated, the contents of which are similar to the contents of the customary rule. Generally speaking, the normative resolution would have a declaratory function, that is, it would declare or reaffirm the customary law on the issue. But in practice the situation may be much more complex.

One should bear in mind that the provisions of a normative resolution may touch upon matters regulated by both conventional and customary law. Therefore, any reference to one may (though not necessarily) affect the other. This is particularly the case when the resolution purports to be an interpretation of the conventional law. An illustration of that is Resolution 2625 (XXV) on Friendly Relations. It clearly states that it represents an interpretation of the relevant provisions of the Charter. However, this resolution was not a mere reproduction of the Charter's provisions; it contained innovations. It is therefore possible that the law of the Charter has been modified (in the sense of change by addition) by this 'interpretative' move. This being so, the practice of States on those matters could modify accordingly, and customary law may in this way undergo the same process. Thus, a normative resolution which is supposed to merely restate and interpret existing law may in the end influence the development of that law. It not only reinforces the law, but it also provokes its alteration to the extent to which its provisions differ from the Charter.

Another possibility is that a normative resolution purports to be simultaneously a declaration of existing law and an attempt at its progressive development. As customary law is known to carry a certain element of uncertainty as to its precise content, the distinction between what is a restatement and what is progressive development in a normative resolution would be hard to arrive at. Even if the resolution expressly purported to merely

restate existing customary law, this would not necessarily mean that every provision would be an exact reproduction of the corresponding customary rule. To use the analogy of a codifying convention, it is accepted today that a sole exercise of codification reveals the difficulty in separating a mere restatement from a progressive statement. Whenever the normative resolution in fact presents some innovations and those new features are verified in subsequent State practice on the matter, then that resolution may be regarded as having produced a truly normative effect in influencing the development of customary law.

One could conclude all that has been said above on normative resolutions by citing the Draft Resolution prepared by the Institute of International Law on this same subject. Conclusion 23 states that 'Principles and Rules proclaimed in the resolution can initiate, influence or determine State practice that constitutes an ingredient of new customary law. A resolution can contribute to the consolidation of State practice. A resolution can contribute to the formation of the *opinio juris communis*'¹⁶⁶

SECTION III

The Customary Process - A Synthesis

Bearing in mind what has been said above, and the conclusions of the preceding Chapters, the following general propositions could be advanced:

(1) A customary process develops on the basis of situations of inter-State conflict and co-operation. (2) States behave within a social and structural environment, which means that their behaviour is conditioned by social factors and structural effects. (3) Those social factors and structural effects determine the impact of each conduct on the international plane and the outcome which will result from the situation of interaction it creates. (4) A custom becomes established when an international practice displays some external and internal qualities, namely, general uniformity, individual consistency, generality of participation, and *opinio juris communis*. (5) International institutions may play a very important role in the

development of a customary process, affecting the initiation or growth or consolidation of an international practice on the matter, the identification of the customary rule and its definition.

(6) The customary process is better understood if it is viewed in a time perspective, that is, if its different phases are recognized. (7) In general, three distinct phases are identifiable: initial phase, intermediate phase, and final phase.

(8) In the initial phase, the customary process may start on a matter which is regarded as unregulated by international law, but it may also commence in opposition to an established custom. The new international practice tends to lack uniformity, or at least to show a lower degree of uniformity as opposed to the same international practice in the final phase. The customary process evolves under the form of bilateral legal relationships. States engaged in the practice may hold a specific *opinio juris*, as defined to Situations 2 and 3 in Chapter V.¹⁶⁷ International institutions may play a role in the initiation of the new international practice.

(9) In the intermediate phase, what was initially a scant practice has been more widely extended, while the pre-existing international practice (if there was one) enters into a process of desuetude. The international practice has acquired more uniformity. Legal relationships tend now to be based not only on the opposability of legal claims, but also on the evolving customary rule. States engaged in the practice may hold a specific *opinio juris*, as defined to Situation 4 in Chapter V.¹⁶⁸ International institutions may have a role in the consolidation of the international practice.

(10) In the final phase, the new international practice becomes a custom; the old international practice (if there was one) has fallen into desuetude. The new international practice shows general uniformity and individual consistency; the generality of States are involved in it or recognize it. Relationships between States are regulated by the newly

formed norm of general international law. An *opinio juris communis* exists, as defined to Situation 1 in Chapter V.¹⁶⁹ International institutions may have a role in the identification of the customary rule, delimitation of its content, and its reaffirmation.

¹ See Maoz, Zeev, National Choices and International Processes (Cambridge, Cambridge University Press, 1990), p.4.

² See Cohen, Raymond, International Politics (New York, Longman, 1986), pp.14-18.

³ See Luard, Evan, International Society (London, Macmillan, 1990), pp.61-63.

⁴ See Snidal, Duncan, The Game Theory of International Politics, 38 World Politics 1985, pp.50-51.

⁵ In fact, during the Falkland/Malvinas conflict (1982), the EC States maintained a common reaction to the actions performed by Argentina, as the economic embargo demonstrates. See Doc. S/14976 in Security Council Official Records, Thirty-Seventh Year, Supplement for April, May and June 1982, New York, 1984, pp.21-22.

⁶ For a general discussion of State interactions in the field of security, and how outcomes and preferences are affected by the international system, see Jervis, Robert, Cooperation under the Security Dilemma, XXX World Politics 1978, pp.167-214.

⁷ See Axelrod, Robert, An Evolutionary Approach to Norms, 80 American Political Science Review 1986, pp.1095-1098. Although in that essay Prof. Axelrod is referring only to norms at the national level, it is submitted that the application of the evolutionary principle to the present case may be useful and appropriate. See also, by the same author, The Evolution of Co-operation (New York, Basic Books, 1984), pp.50-69, 158-159.

⁸ See, in this respect, Johnston, D., The International Law of Fisheries (New York, Yale University Press, 1965), pp.98-99. An example is found in the regulations established by the Netherlands concerning the Netherlands Antilles, which comprised an Extension Act (January, 1985) and a subsequent Decree (October, 1985). See Simmonds, K., New Directions in the Law of the Sea (New York, Oceana Publications, 1992), C.12, p.1.

⁹ Consider this authoritative statement by Prof. Mendelson, made on the basis of an analysis of the 1945 Truman Proclamation on the continental shelf: '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'. Cf. Mendelson, M.H., State Acts and Omissions as Explicit or Implicit Claims, in Le droit international au service de la paix, de la justice et du développement, Mélanges en honneur de Michel Virally (Paris, Pedone, 1991), p.379.

¹⁰ On the distinction between having a claim and making a claim, see White, Alan, Rights (Oxford, Clarendon Press, 1984), pp.121-124.

¹¹ The position of the State which is obstructing the exercise of, or denying the right claimed is not being considered here. The analysis could be more complex if, for example, this State is regarded as a persistent dissenter.

¹² See the distinction made by Prof. White between the indicative and the subjunctive use of the word 'claim'. See *op. cit. supra* n.10, pp.116-120.

¹³ Thus, in a diplomatic note sent to Japan in 1958, the Government of Mexico made it clear that it maintained the 'validity and obligations *erga omnes*, of the provisions enforced in the Mexican legislation on the matter, establishing the width of the territorial sea of Mexico in 9 nautical miles...'. See Whiteman, M., Digest of International Law (Washington, Department of State, 1965), Vol. IV, p.114.

¹⁴ Prof. Mendelson has applied Hohfeldian analysis to demonstrate this principle. See *op. cit. supra* n.9, pp.373-382.

¹⁵ It is perhaps in the light of those criteria that one should determine in a given case which are the States 'whose interests are specially affected'. This phrase was employed by the Court in the North Sea Continental Shelf cases, I.C.J. Reports 1969, pp.42-43. On what is a definite or indefinite act, see p.154.

¹⁶ See Mendelson, *op. cit. supra* n.9, p.379.

¹⁷ Emphasis added. See Platzöder and Vitzthum, Seerecht. Law of the Sea (Baden-Baden, Nomos, 1984), p.478.

¹⁸ On reciprocity, see Virally, Michel, La réciprocité dans le droit international contemporain, 122 Recueil des Cours de l'Académie de Droit International 1967-III, pp.48-62.

¹⁹ On the principle of recognition and its underlying rules, see Schwarzenberger, G., A Manual of International Law (London, Stevens & Sons, 1967), pp.68-69.

²⁰ On the attitude of the Court regarding the question of the publicity of the claim, see Barale, Jean, *L'Acquiescement dans la jurisprudence internationale*, Annuaire français de droit international 1965, pp.401-404.

²¹ Because a legally relevant omission presumes that the abstaining State must be or have been affected by the act of another State, this study is using the expression 'affected State' to refer to the State whose abstention may be legally relevant.

²² See *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgement, ICJ Reports 1984, pp.304-305; *Frontier Dispute*, Judgement, ICJ Reports 1986, p.654 (Sep. Op. of Judge Luchaire); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgement of 11 September 1992, ICJ Reports 1992, pp.563, 577, 579; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgement, ICJ Reports 1974, p.120 (Sep. Op. of Judge Waldock) and p.161 (Diss. Op. of Judge Petren). Acquiescence and recognition have been regarded as producing the same effect. See Suy, E., Les actes juridiques unilatéraux en droit international public (Paris, Libr. Gén. de droit et de jurisprudence, 1962), pp.258-259.

²³ See *Case Concerning the Temple of Vihear (Cambodia v. Thailand)*, Merits, Judgement of 15 June 1962: ICJ Reports 1962, pp.40-41 (Sep. Opin. of Judge Alfaro); *Islands of Palmas case (Netherlands v. USA)*, UN Reports of International Arbitral Awards, Vol. II, p.869; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgement, ICJ Reports 1984, pp.410, 413; *Continental Shelf (Tunisia/Libya)*, Merits, 1982, p.69; *Land, Island and Maritime Frontier Dispute*, *op. cit. supra* n.22, p.579.

²⁴ See Cahier, Philippe, *Le comportement des États comme source de droits et d'obligations*, in Recueil d'études de droit international en hommage à Paul Guggenheim (Genève, Institut universitaire de hautes études internationales, 1968), pp.252-255; Suy, E., *op. cit. supra* n.22, p.165.

²⁵ See *Fisheries case*, Judgement of December 18th, 1951: I.C.J. Reports 1951, p.139. See also *Affaire des Grisbadarna (Norway v. Sweden)*, UN Reports of International Arbitral Awards, Vol. XI, p.161.

²⁶ See *Affaire des Grisbadarna*, *op. cit. supra* n.25, pp.161-162; *Island of Palmas case*, *op. cit. supra* n.23, p.870; *Case Concerning Right of Passage Over Indian Territory*, Judgement of April 12th: I.C.J. Reports 1960, p.83 (Diss. Opin. of Judge Armand-Ugon); *North Sea Continental Shelf cases*, *op. cit. supra* n.15, p.113 (Sep. Op. of Judge Ammoun).

²⁷ See *Land, Island and Maritime Frontier Dispute*, *op. cit. supra* n.22, p.577.

²⁸ See *Temple of Vihear case*, *op. cit. supra* n.23, pp.32-33, and p.63 (Sep. Opin. of Sir Gerald Fitzmaurice); *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgement of 18 November 1960: ICJ Reports 1960, p.219 (Sep. Opin. of Judge Sir Spender).

²⁹ See Bowett, D., *Estoppel Before International Tribunals and Its Relation to Acquiescence*, The British Year Book of International Law 1957, pp.201-202; *North Sea Continental Shelf cases*, *op. cit. supra* n.15, p.26; *Gulf of Maine case*, *op. cit. supra* n.22, p.305, 309; *Military and Paramilitary Activities in and against Nicaragua*, *op. cit. supra* n.23, pp.414-415; *Elettronica Sicula S.p.A. (ELSI)*, Judgement, ICJ Reports 1989, pp.43-44.

³⁰ This reasoning was adopted by the Court in the *Nuclear Tests case* to justify the finding that the conduct of France had created a legal obligation on its part in relation to other States. See *Nuclear Tests (Australia v. France)*, Judgement of 20 December 1974, ICJ Reports 1974, p.268.

³¹ See Lauterpacht, Sir Hersch, *Sovereignty over Submarine Areas*, 27 The British Year Book of International Law 1950, p.396.

³² As the examples given demonstrate, positive acts may be legally relevant regardless of whether the State which reacts to the claim is an 'affected State' or not. That is why any such State is now referred to as the 'reacting State'.

³³ This instance was cited by the Joint Separate Opinion of Judges Foster, Bengzon, Aréchaga, Singh and Ruda in the *Fisheries Jurisdiction case*, *op. cit. supra* n.22, p.49.

³⁴ See Whiteman, M., *op. cit. supra* n.13, p.115.

³⁵ See The Law of the Sea (New York, United Nations, 1987), Office of the Special Representative of the Secretary-General for the Law of the Sea, p.138.

³⁶ Judge Lachs has maintained in the *North Sea cases* that one of the ways in which a customary process is started is by States adopting 'unilateral acts relying on the confident expectation that they will find acquiescence or be emulated'. See *op. cit. supra* n.15, p.231.

³⁷ The Chilean Declaration may be found in Szekeley, A., Latin America and the Development of the Law of the Sea (New York, Oceana Publ., 1986, Vol. I, pp.13-16. For the text of the US protest see I Laws and Regulations on the Regime of the High Seas (UN Legislative Series, 1951), ST/LEG/SER.B/1, pp.6-8.

³⁸ See Whiteman, M., *op. cit. supra* n.13, p.796.

³⁹ See Platzöder, *op. cit. supra* n.17, pp.479-480.

⁴⁰ See Churchill, Nordquist and Lay, New Directions in the Law of the Sea (New York, Oceana Publ., 1977), Vol. V, pp.12-13.

⁴¹ Putting it in other terms, a protest is designed to rebut the presumption of recognition, acquiescence or renunciation. See Venturini, G., *La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats*, 112 Recueil des Cours de l'Académie de Droit International 1964, p.393. Although there is not any real difference between 3 and 4, they were mentioned separately because, as the example which follows shows, States usually refer expressly to both aspects in their protests.

⁴² See Simmonds, *op. cit. supra* n.8, C.2, pp.3, 5. The note was sent to the Secretary-General of the United Nations, and the Permanent Representative of Israel requested that it be transmitted to the 'Permanent Missions of States members of the United Nations'.

⁴³ See MacGibbon, I., Some Observations on the Part of Protest in International Law, The British Year Book of International Law 1953, pp.294-299.

⁴⁴ See Land, Island and Maritime Frontier Dispute, *op. cit. supra* n.22, p.568.

⁴⁵ Prof. Suy has stated that the efficacy of protest depends, firstly, on the 'l'assiduité avec laquelle elle a été émise'. Suy, *op. cit. supra* n.22, p.80.

⁴⁶ See Legal Status of Eastern Greenland, Permanent Court of International Justice, Recueil 1933, Series A/B, n.53, p.62. Fisheries Jurisdiction case, *op. cit. supra* n.22, p.136 (Diss. Op. of Judge Gros).

⁴⁷ In the *Minquiers and Ecrehos* case, Judge Levi Carneiro expressed the view that the 'mere periodical and ineffectual "paper" protests' presented by France were not sufficient to maintain its claim. In his words, while the British Government 'acted and continued to exercise its sovereignty, the French Government was satisfied to make a paper protest. Could it not have done anything else? It could have, and it ought to have, unless I am mistaken, proposed arbitration...'. See *The Minquiers and Ecrehos* case, Judgement of November 17th, 1953: ICJ Reports 1953, pp.106-108 (Indiv. Opin. of Judge Levi Carneiro).

⁴⁸ According to Prof. Suy and other writers cited in his book, those other acts may also be regarded as a form of protest. He calls it '*actes concluants*'. See Suy, *op. cit. supra* n.22, p.49-53.

⁴⁹ See, for instance, the several seizures of American-owned vessels by Peru and Ecuador's authorities as enforcement of their claims in *Whiteman, M.*, *op. cit. supra* n.13, pp.1198-1200. See also the fisheries dispute between Solomon Islands and the United States in *Tsamenyi, Martin*, *The Jeannette Diana Dispute*, 16 Ocean Development and International Law 1986, n.4, pp.356-367.

⁵⁰ See Brazil and United States of America, Agreement concerning shrimp, UN Treaty Series, Vol. 894, 1973, pp.35-39; United States of America and Republic of Korea, Agreement concerning cooperation in fisheries, *Ibid.*, Vol. 898, 1973, p.103.

⁵¹ Translated by the present writer. See Araujo Castro, Luiz Augusto, O Brasil e o Novo Direito do Mar (Brasília, Fundação Alexandre de Gusmão, 1989), p.27.

⁵² See, for instance, declarations by the United Kingdom representative in United Nations Doc. A/42/PV.70, p.38; Doc. A/AC.109/PV.1223, p.32; Doc. A/42/PV.72, pp.43-45; Doc. A/AC.109/PV.1223, p.32.

⁵³ For instance, it is less likely that the legal claims of powerful States will be challenged by small States.

⁵⁴ For instance, the Truman Proclamation on Coastal Fisheries sets forth, in its Preamble, that the Government of the United States viewed with concern 'the inadequacy of present arrangements for the protection and perpetuation of the fisheries resources contiguous to its coasts'. See Platzöder, *op. cit. supra* n.17, p.477.

⁵⁵ See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgement, ICJ Reports 1985, p.33.

⁵⁶ Consider the following statements: 1)'Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise...' (*Military and Paramilitary Activities in and against Nicaragua* case, Merits, Judgement, I.C.J. Reports 1986, pp.103); 2)'A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations is found...' (*Ibid.*, p.100); 3)'...the Court considers that it (the principle of non-intervention) part and parcel of customary international law' (*Ibid.*, p.106); 4)'...customary international law merely contains a general requirement of the application of equitable criteria and the utilization of practical methods capable of implementing them' (*Gulf of Maine* case, *op. cit. supra* n.22, p.300); 5)'There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law...' (*Frontier Dispute*, *op. cit. supra* n.22, p.566); 6)'...but these provisions on bays might be found to express general customary law' (*Land, Island and Maritime Frontier Dispute*, *op. cit. supra* n.22, p.588).

⁵⁷ See Lauterpacht, Sir Hersch, The Development of International Law by the International Court (London, Stevens & Sons, 1958), p.8.

⁵⁸ See Yearbook of the International Law Commission 1966, Vol. II, p.257.

⁵⁹ See Reports of the Practice of the United Nations Organs, Supplement n.5, Vol. I, 1970-1978, p.38.

⁶⁰ See Security Council Res. 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990), 677 (1990) and 678 (1990), in *Resolutions and Documents of the Security Council 1990*, New York, 1991, pp.19-28.

⁶¹ That is a proposition which seems to have been advanced by the Court. Consider the following statement: 'However, so far from having constituted a marked departure from a customary international law still unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in subsequent decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it'. Emphasis added. See *Military and Paramilitary Activities in and against Nicaragua case*, *op. cit. supra* n.56, pp.96-97. Prof. Brownlie thinks that this type of practice provides 'evidence of the state of the law and also of the meaning of texts, and has considerable legal significance'. See Brownlie, Ian, *Principles of Public International Law* (Oxford, Clarendon Press, 1990), p.700.

⁶² For example, in Resol. 670 (25.09.90) the Security Council refers to Iraq's flagrant violation of 'international humanitarian law'.

⁶³ See *United Nations Juridical Yearbook* 1970, Chapter VI, Legal Opinions of the Secretariat of the United Nations, p.184.

⁶⁴ Cf. Art 105 of the OAS Charter, as reformed by the Protocol of Buenos Aires (1967). For the text of the Charter, see Treaty Series n.1-C, OAS Official Records, OEA/Ser.A/2 (English) Rev.

⁶⁵ See Inter-American Juridical Committee, Report of the Inter-American Juridical Committee on the Work Accomplished during its 1965 Meeting, *OAS Official Records*, OEA/Ser.I/VI.1, CIJ-83, pp.2-3. This rule was then considered to admit of an important exception, whereby it should 'in no way prejudice the breadth that may be fixed in each case for the adjacent zone of the high seas in which the coastal state has a special interest in maintaining the productivity of the living resources of the sea and a preferential right to utilize them, and it shall therefore be empowered to take the necessary measures to ensure the conservation of such resources' (p.4).

⁶⁶ See Gros, Leo, *States as Organs of International Law and the Problem of Autointerpretation*, in *Law and Politics in the World Community* (California, Univ. of California Press, 1953), G. Lipsky (ed.), pp.74-87.

⁶⁷ See *Gulf of Maine case*, *op. cit. supra* n.22, p.299.

⁶⁸ For instance, in the *Rainbow Warrior case*, the Arbitral Tribunal relied on the International Law Commission's draft on State Responsibility as an indication of the customary law on the issue. For the relevant text of the award, see Pinto, Roger, *L'affaire du Rainbow Warrior*, 4 *Journal du Droit International* 1990, pp.878-882 (annexe).

⁶⁹ Sir Fitzmaurice classified as instances of judicial innovation, among others, some conclusions arrived at by the Court in the *Reparations for Injuries to the United Nations Servants case*, and the *Reservations to the Genocide Convention case*. See Fitzmaurice, Sir Gerald, *Judicial Innovation - Its Uses and Perils - As exemplified in some of the Work of the International Court of Justice during Lord McNair's Period of Office*, in *Cambridge Essays in International Law* (London, Stevens & Sons, 1965), pp.24-47. For cases where individual Judges have indicated that the Court was 'legislating', see *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: ICJ Reports 1949, p.190 (Ind. Op. of Judge Alvarez) and p.199 (Diss. Op. of Judge Hackworth); *International Status of South-West Africa*, Advisory Opinion: ICJ Reports 1950, p. 162 (Diss. Op. of Judge McNair).

⁷⁰ See Lauterpacht, *op. cit. supra* n.57, p.368.

⁷¹ Emphasis added. See *Gulf of Maine case*, *op. cit. supra* n.22, p.293.

⁷² This is also used for communications between States which do not maintain formal diplomatic relations. See Ferrari Bravo, Luigi, *La coutume internationale dans la pratique des Etats*, 192 *Recueil des Cours de l'Académie de Droit International* 1985, p.257. Consider the following statement by Judge Tanaka in the *South West Africa case* (Second Phase, Judgement, 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'.

⁷³ The relevant text runs as follows: 'As is well known under long-standing standards of customary international law and State practice, historic waters are recognized as valid if the following prerequisites are satisfied: (A) the State asserting claims thereto has done so openly and notoriously; (B) the State has effectively exercised its authority over a long and continuous period; and (C) other States have acquiesced therein'. See *The Law of the Sea*, Current Developments in State Practice n° II (New York, United Nations, 1989), Office for Ocean Affairs and the Law of the Sea, p.86.

⁷⁴ See Virally, Michel, *The Sources of International Law*, in *Manual of Public International Law* (London, Macmillan & Co Ltd, 1968), Max Sørensen (ed.), p.139.

⁷⁵ See, for instance, Brownlie, *op. cit. supra* n.61, p.685.

⁷⁶ See Review of the Multilateral Treaty-Making Process (New York, United Nations, 1985), Doc. ST/LEG/SER.B/21, pp.7-38. The codification effort at the regional level is not studied here. For an overview of the procedures adopted at the Inter-American System, see Canyes, Manuel, The Codification of International Law in America, Anuario Juridico Interamericano 1955-1957, pp.60-80.

⁷⁷ See arts 16 (c), (h), (j), 19 (2), 20, 21 (2), 22 of the Statute of the International Law Commission. On the relationship between the Commission and the Governments, see The Work of the International Law Commission (New York, United Nations, 1980), pp.17-20.

⁷⁸ The expression 'unratified convention' is used in this work to refer to a convention which has not yet come into force or has only a very small number of parties to it. This may be due to the fact that, for example, the convention has not received the specified number of instruments of ratification and accession (if the convention is subject to ratification and accession) or because it has not received the signatures and accessions (if the convention only requires signature and accession).

⁷⁹ See Sinclair, Sir Ian, The Impact of the Unratified Codification Convention, in Realism in Law-Making (Dordrecht, Martinus Nijhoff, 1986), A. Bos and H. Siblesz (eds.), p.228.

⁸⁰ See Ago, Roberto, Nouvelles réflexions sur la codification du droit international, in International Law at a Time of Perplexity (Dordrecht, Martinus Nijhoff, 1989), Y. Dinstein (ed.), pp.8-9.

⁸¹ See Schachter *et alii*, Toward Wider Acceptance of Multilateral Treaties (New York, United Nations, 1971), UNITAR study, pp.15-65. As an example of a United Nations General Assembly resolution which performs the function of a follow-up mechanism, see Res. 40/73 of 11 December 1985, on the 'consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives'. This resolution urged all States to observe and to implement the principles and rules of international law governing diplomatic and consular relations and requested, *inter alia*, that all States report to the Secretary-General as promptly as possible serious violations of the protection, security and safety of diplomatic and consular missions and representatives. Although the Conventions on Diplomatic and Consular Relations were not expressly mentioned, the resolution certainly included them.

⁸² See Aréchaga, J. de, Customary International Law and the Conference on the Law of the Sea, in Essays in International Law in Honour of Judge Manfred Lachs (The Netherlands, Martinus Nijhoff, 1984), J. Makarczyk (ed.), pp.576-585; Sohn, Louis, Unratified Treaties as a Source of Customary International Law, in Realism in Law-Making (Dordrecht, Martinus Nijhoff, 1986), A. Bos and H. Siblesz (eds.), pp.245-246; Caminos, Hugo and V. Marotta-Rangel, The Sources of the Law of the Sea, in A Handbook on the New Law of the Sea (Dordrecht, Martinus Nijhoff, 1991), René-Jean Dupuy *et alii* (eds.), pp.77-81.

⁸³ See 11 Law of the Sea Bulletin (July 1988), Office for Ocean Affairs and the Law of the Sea (United Nations), pp.51-53; Churchill, *op. cit. supra* n.40, Vols. V (pp.107-141), VI (pp.845-868), VII (pp.363-390), VIII (8-).

⁸⁴ One might question how typical was UNCLOS III of a codifying conference. It is not claimed that UNCLOS III is the typical case of a multilateral codifying conference under the auspices of the United Nations. What is claimed is that a multilateral codifying conference which extends over a reasonably long period of time may (though not necessarily will) give rise to the same effects which UNCLOS III produced.

⁸⁵ See Churchill, *op. cit. supra* n.40, Vol. VIII, p.8.

⁸⁶ *Ibid.*, Vol. V, p.118. Another example is the Decree Law n° 126/77, by which the Republic of Cape Verde established an Exclusive Economic Zone. The preamble of this Decree stated the following: 'Considering changes in the Law of the Sea'. See *Ibid.*, Vol. VII, p.363.

⁸⁷ Fisheries Jurisdiction case, *op. cit. supra* n.22, p.23. Consider also this statement by Tunisia's Counsel, Prof. Abi-Saab, in interpreting the applicable law in the *Continental Shelf* case (Tunisia/Libya), ICJ Pleadings, Vol. IV, p.431: 'Some of the solutions formulated in the Conference are already largely followed in practice and command a wide measure of consensus, thus serving as a catalyst for the crystallization of new rules of customary law, even before the final adoption of the text by the Conference and a fortiori before its coming into force'.

⁸⁸ See Oda, Shigeru, The International Law of the Ocean Development (The Netherlands, Sijthoff & Noordhoff, 1979), Vol. I, III.C.11, p.1. See also the following passage from the 1975 Agreement regarding Fisheries in the North-Eastern Pacific Ocean off the Coast of the United States (Poland and United States of America): '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 on the Law of the Sea...', *Ibid.*, Vol. II, VI.B.vii.6, p.1.

⁸⁹ See Churchill, *op. cit. supra* n.40, Vol. V, p.107. Consider also the following statement made by the representative of Mexico in the closing session of UNCLOS III: 'Even before these protracted and difficult negotiations came to an end, a broad consensus had already been reached as to the basic rules of law governing the exclusive economic zone. This made it possible for Mexico... to decide to establish its exclusive economic zone as of the year 1976, elevating its rules of law to the constitutional level' (cf. Third United Nations

Conference on the Law of the Sea, Official Records, Plenary Meetings, Resumed Eleventh Session and Conclusion of the Conference, p.20).

⁹⁰ This is a position in which Prof. Jimenez de Aréchaga (*op. cit. supra* n.82) does not seem to concur. He seems to hold that consensus alone may produce this law-making effect. See, for example, the following extracts: 'A consensus achieved in those plenipotentiary conference confers to the resulting provisions an authority of their own, even prior to the formal entering into force of the conventions so elaborated' (p.576); '...the conclusions formulated as a result of negotiations in a plenipotentiary conference, even before the adoption of a convention, may in themselves constitute evidence of a consensus of States which declares, crystallizes or generates customary law' (p.577). The practice of States, however, is not entirely discarded by him, since in another passage he says, with regard to UNCLOS III, that 'the views expressed by States..., the consensus resulting from these views, and in some cases the practice followed by States in accordance with such consensus, have already resulted in certain customary rules' (p.577). Emphasis added. However, it must be said that, since his article is not very clear about this, the interpretation just offered may be wrong.

⁹¹ See Dispute Concerning Filleting within the Gulf of St Lawrence (Canada/France), 82 *International Law Reports*, p.627.

⁹² See Churchill, *op. cit. supra* n.40, Vol. VII, p.385.

⁹³ *Ibid.*, Vol. V, p.141.

⁹⁴ *Ibid.*, Vol. V, p.118.

⁹⁵ Translated by the present writer. See Cançado Trindade, A.A., *Repertório da Prática Brasileira do Direito Internacional Público* (Brasília, Fundação Alexandre Gusmão, 1986), Período 1961-1981, p.206. For a statement of the Brazilian representative at UNCLOS III in which the territorialist position is defended, see *The Law of the Sea - Exclusive Economic Zone* (New York, United Nations, 1992), p.60.

⁹⁶ *Ibid.*, p.36. Another example is the Mexican legislation on the Exclusive Economic Zone. A Law enacted on 1976 in the Exclusive Economic Zone was incorporated into a Federal Act of 1986, whose text seems to reflect more closely the relevant provisions of the 1982 Convention. Compare the Law Regulating the eighth paragraph of article 27 of the Constitution, concerning the Exclusive Economic Zone, in Churchill, *op. cit. supra* n.40, Vol. V, pp.293-294, with the 1986 Federal Act relating to the Sea, Chapter IV, in *The Law of the Sea, op. cit. supra* n.35, pp.65-67.

⁹⁷ Sir Ian Sinclair has pointed out (citing also the views of Prof. O'Connell and Prof. Cahier to the same effect) that this provision 'in all probability constitutes at least a measure of progressive development'. See Sinclair, I., *The Vienna Convention on the Law of Treaties* (Manchester, Manchester Univ. Press, 1984), p.43. On the other hand, Dr. Villiger has maintained that Art 18 is declaratory of customary law. See Villiger, Mark, *Customary International Law and Treaties* (Dordrecht, Martinus Nijhoff, 1985), pp.320-321. What has not been considered properly is whether since the adoption of the Vienna Convention on the Law of Treaties a customary rule has evolved in the terms of that Article.

⁹⁸ See Reuter, P., *Introduction to the Law of Treaties* (London, Pinter Publ, 1989), Translated by J. Mico and P. Haggemacher, p.52.

⁹⁹ For a good analysis of the reasons which may underlie the poor performance of a codifying convention in terms of ratification, see Sinclair, *op. cit. supra* n.79, pp.213-216.

¹⁰⁰ See North Sea cases, *op. cit. supra* n.15, p.244 (Dissenting Opinion of Judge Sørensen).

¹⁰¹ See *op. cit. supra* n.73, Foreword (iii).

¹⁰² *Ibid.*, p.36; see also the Territorial Sea and Exclusive Economic Zone Act, enacted by the United Republic of Tanzania in 1989, Part I (2), p.76. See also Act n. 15/1984 on the Territorial Sea and Exclusive Economic Zone of the Republic of Equatorial Guinea, Part II (Additional Provisions, 4), *op. cit. supra* n.35, p.11.

¹⁰³ As examples of declaratory conventions, one could cite the 1958 Geneva Convention on the High Seas, the preamble of which states that 'Recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally established principles of international law'. Also, the 1982 Convention has been considered to partly declare existing international law; see the Joint Statement by the United States and the USSR on the Uniform Interpretation of Rules of International Law Governing Innocent Passage, in Simmonds, K., *op. cit. supra* n.8, C.27, pp.1-2.

¹⁰⁴ The Committee on the Progressive Development of International Law and its Codification produced a report in which it stated as follows: 'For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments'. See Doc A/Ac.10/50, p.7. Even if it were possible to distinguish clearly the two tasks, the International Law Commission has cogently argued that codification should not be confined to a mere registration of the existing law. See International Law Commission, *Survey of International Law in relation to the Work of Codification of the International Law Commission*, 1949, Doc. A/CN.4/1/Rev.1, pp.8-11.

¹⁰⁵ Art 38 of the Vienna Convention on the Law of Treaties refers to this effect as follows: 'Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such'.

¹⁰⁶ See North Sea cases, *op. cit. supra* n.15, p.177 (Diss. Op. of Judge Tanaka).

¹⁰⁷ See, for instance, Art 13 of the UN Charter, and UN General Assembly Resolution 171 (II), Resolution 95 (I), and Resolution 375 (IV).

¹⁰⁸ Following Prof. Baxter, Dr. Villiger has maintained the view that progressive development also covers 'the substantial alteration, or the complete reform, of existing rules'. See Villiger, *op. cit. supra* n.97, p.124. That notion, however, goes beyond the terms of Art. 15. It is also questionable whether this type of progressive development would ever be realized in practice. The reason is that the complete reform of a generally established customary rule by way of a codifying treaty presupposes too great (and sudden) a change in the legal position and the vested interests of the generality of States.

¹⁰⁹ It is true that the drafters of the Statute had not in mind, when they made this distinction, the generation or crystallization of customary law as opposed to the formulation of conventional rules. But that does not undermine the point which is being made here, namely, that those two types of conventional rules can only give rise to two types of effects on the customary process.

¹¹⁰ See *Repertory of Practice of United Nations Organs* (New York, United Nations, 1955), Vol. I, p.424.

¹¹¹ See Third United Nations Conference on the Law of the Sea, *op. cit. supra* n.89, p.80. Consider also the following statement by the Japanese representative: 'The Convention's provisions represent either codification of the existing rules of international law applied to the various aspects of the use of the sea or rules newly established in order to regulate new problems relating to the use of the sea' (p.46). See also similar statements by the representatives of Trinidad and Tobago (p.22), Mexico (p.20), Canada (p.15), Kenya (p.47), Guyana (p.81), Tunisia (p.79), Egypt (p.19).

¹¹² A similar provision is found in the preamble to the 1982 Convention.

¹¹³ See North Sea cases, *op. cit. supra* n.15, p.38.

¹¹⁴ *Ibid.*, pp.39-41, 45. Judges Ammoun and Padilla Nervo also seemed to envisage only the possibility of a declaratory effect and a generating effect. Cf. *Ibid.*, pp.87, 103.

¹¹⁵ *Ibid.*, pp.38-41.

¹¹⁶ *Ibid.*, p.41.

¹¹⁷ *Ibid.*, pp.42-43.

¹¹⁸ After having referred to the requisite, it stated: 'In the present case, however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient'. Emphasis added. *Ibid.*, p.42.

¹¹⁹ After noting that the number of ratifications of the Geneva Convention was 'hardly sufficient', the Court noted that 'That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain'. *Ibid.*, p.42.

¹²⁰ *Ibid.*, p.43. The same weight seems to be attributed by Judge Lachs to State practice; representativity and participation in the convention would constitute only the basis upon which subsequent practice develops. *Ibid.*, p.228 (Diss. Opin. of Judge Lachs).

¹²¹ Consider the following passages: 'The Court must now consider whether State practice... has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement'; '... some fifteen cases have been cited... occurring mostly since the signature of the 1958 Geneva Convention...'. *Ibid.*, p.43.

¹²² *Ibid.*, p.43. The observations which follow do not raise the question whether the type of evidence adduced (mostly bilateral treaties on delimitation) is appropriate or not.

¹²³ To quote the relevant passage: 'To begin with, over half the States concerned... were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention'. *Ibid.*, p.43.

¹²⁴ To cite a more recent example, some western countries have signed the 1982 Law of the Sea Convention and not only have failed to ratify it but have expressly declared that they will not go into the second stage unless some provisions of the Convention or their regulation are altered.

¹²⁵ See *op. cit. supra* n.35, p.137.

¹²⁶ See Schachter, Oscar, *Entangled Treaty and Custom*, in *International Law at a Time of Perplexity* (Dordrecht, Martinus Nijhoff, 1989), Y. Dinstein (ed.), p.729.

¹²⁷ See Sepulveda, Cesar, *El Sistema Interamericano* (Mexico, Ed. Porrúa, 1974), pp.15-17.

¹²⁸ See the 1928 Resolution on Aggression, adopted at the Sixth International Conference of American States, and the 1933 Resolution on the Peace Code, adopted at the Seventh International Conference of American

States, in The International Conferences of American States 1889-1928 (Washington, Carnegie Endowment for International Peace, 1931), pp.441-442, 50-65. See also the Declaration of Principles of Inter-American Solidarity and Co-operation, and the Convention for the Maintenance, Preservation and Reestablishment of Peace (and Additional Protocol Relative to Non-Intervention), adopted at the 1936 Inter-American Conference for the Maintenance of Peace; the Declaration on Non-Recognition of the Acquisition of Territory by Force, and the Declaration of American Principles, adopted at the Eighth International Conference of American States (1938), in The International Conferences of American States 1933-1940, First Supplement (Washington, Carnegie Endowment for International Peace, 1940), pp.160, 188-192, 254-255, 309-310.

¹²⁹ See Comité Jurídico Interamericano, Recomendaciones e Informes - Documentos Oficiales, Vol. III, 1949-1953, São Paulo, Ed. Rev. dos Tribunais, 1955, pp.172-183.

¹³⁰ See Fenwick, Charles, The Organization of American States (Washington, Kaufman, 1963), pp.152-157.

¹³¹ *Ibid.*, p.157. Judge Padilla Nervo has also perceived the role of such declarations in the following way: 'In international regional conferences, important declarations of principles were proclaimed, which advance the progressive development of the law of the sea'. See *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgement, ICJ Reports 1973, p.88.

¹³² See Anuario Jurídico Interamericano 1955-57, pp.192-193.

¹³³ See Araujo Castro, *op. cit. supra* n.51, p.30. This document was also referred to in the Declaration of Santo Domingo (cf. *infra*).

¹³⁴ See National Legislation and Treaties Relating to the Law of the Sea (New York, United Nations, 1974), Doc. ST/LEG/SER.B/16, p.587. They also declared the right 'of coastal States to avail themselves of the natural resources of the sea adjacent to their coasts and of the soil and subsoil thereof in order to promote the maximum development of their economies and to raise the levels of living of their peoples'.

¹³⁵ *Ibid.*, p.586.

¹³⁶ See Churchill, *op. cit. supra* n.40, Vol. I, pp.233-234.

¹³⁷ For instance, in the negotiations that followed the first disputes, Chile, Ecuador and Peru negotiated as one with the United States, calling themselves the 'CEP Delegations'. See Whiteman, *op. cit. supra* n.13, Vol. IV, pp.1198-1208.

¹³⁸ See Oda, *op. cit. supra* n.88, Vol. I, III.B.1/77, pp.1-2.

¹³⁹ See *op. cit. supra* n.134, pp.587-588. They declared five rights for coastal States, one of which was the right 'of the coastal State to establish the limits of its maritime sovereignty or jurisdiction in accordance with reasonable criteria, having regard to its geographical, geological and biological characteristics, and the need to make rational use of its resources'.

¹⁴⁰ *Ibid.*, pp.588-592.

¹⁴¹ For the text of the Declaration, see *Ibid.*, pp.599-601.

¹⁴² The Declaration contained a separate section under the heading 'Patrimonial Sea'. Some of its relevant items read as follows: '1)The coastal State has sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, in the sea-bed and in the subsoil of an area adjacent to the territorial sea called the patrimonial sea...3)The breadth of this zone should be the subject of an international agreement, preferably of a worldwide scope. The whole of the area of both the territorial sea and the patrimonial sea, taking into account geographic circumstances, should not exceed a maximum of 200 nautical miles'. *Ibid.*

¹⁴³ *Ibid.*, p.595.

¹⁴⁴ See Oda, *op. cit. supra* n.88, Vol. I, III.A.4, pp.1-4.

¹⁴⁵ See Ferrero Costa, Eduardo, La Zona Económica Exclusiva, XII Curso de Derecho Internacional, Comité Jurídico Interamericano (Washington, Organization of American States, 1986), p.21. See also Araujo Castro, *op. cit. supra* n.51, p.43.

¹⁴⁶ In the *Fisheries Jurisdiction* case, the Joint Separate Opinion of Judges Forster, Bengzon, Aréchaga, Singh and Ruda described this process in the following words: 'It is a fact that a continually increasing number of States have made claims to extent and have effectively extended their fisheries jurisdiction beyond 12 miles. While such a trend was initiated in Latin America, it has been lately followed not only in that part of the world, but in other regions as well. A number of countries in Africa and Asia have also adopted a similar action'. See *Fisheries Jurisdiction* case, *op. cit. supra* n.22, p.47.

¹⁴⁷ Perhaps the attitude of the Latin American States is justified by the fact that the United States, which opposed their claims, was a member of the Organization of American States. It should be borne in mind, however, that informal procedures have traditionally been used within the Inter-American System.

¹⁴⁸ On this subject, see Virally, Michel, Unilateral Acts of International Organizations, in International Law: Achievements and Prospects (Paris, Martinus Nijhoff, 1991), M. Bedjaoui (ed.), pp.246-255.

¹⁴⁹ In reality, this argument is very misleading. It seems to confound the nature of the means with the nature of its by-product. The reality of State practice, however, shows that 'soft instruments' may well convey 'hard law' just as much as 'hard instruments' may embody 'soft law'. The Helsinki Act has been regarded as an example of

the first situation (see remarks by Profs. Brownlie, Virally, Yankov, Condorelli and Arangio-Ruiz in Change and Stability in International Law-Making (Berlin, de Gruyter, 1988), A. Cassese and J. Weiler (eds.), pp.69-83). Thus, in response to this objection, it may be argued that the binding force of the instrument is unsatisfactory as a criterion for characterizing whether it may be a source of legal rules. The relevant point in discussion seems to rest on one's own conception of law. Is a legal rule that which has been created by a specific procedure or instrument, the binding force of which is clearly determined, or is a legal rule that which functions as such in the legal system irrespective of the legal nature of its source?

¹⁵⁰ See, *inter alia*, Castañeda, Jorge, Valeur juridique des résolutions des Nations Unies, 129 Recueil des Cours de l'Académie de Droit International 1970-I, pp.211-331; Gross, Leo, Essays on International Law and Organization (The Hague, Martinus Nijhoff, 1984), Vol. I, pp.214-220; Arangio-Ruiz, Gaetano, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles on Friendly Relations, 137 Recueil des Cours de l'Académie de Droit International 1972, pp.434-467; Sepúlveda, Cesar, Methods and Procedures for the Creation of Legal Norms in the International System of States: An Inquiry into the Progressive Development of International Law in the Present Era, 33 German Yearbook of International Law 1990, pp.444-447; Schwebel, Stephen, United Nations Resolutions, Recent Arbitral Awards and Customary International Law, in Realism in Law-Making (Dordrecht, Martinus Nijhoff, 1986), A. Bos and H. Siblesz (eds.), pp.203-210; Johnson, D.N., The Effect of Resolutions of the General Assembly of the United Nations, The British Year Book of International Law 1955-1956, pp.95-122; Goodrich, L. and E. Hambro, The Charter of the United Nations (London, Stevens & Sons, 1949), pp.151 *et seq.*

¹⁵¹ See the following extracts from the Nicaragua case (*op. cit. supra* n.56): '...the adoption by States of this text (Res. 2625) affords an indication of their *opinio juris* as to customary international law on the question' (p.101). The Court also concedes the possibility that a statement by the representative may convey a State's *opinio non-juris*: 'It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (p.107). For a criticism of this finding, see Mendelson, M.H., The Nicaragua Case and Customary International Law, 26 Coexistence 1989, pp.91-93.

¹⁵² Consider the following statements: 'Resolution 2625 (XXV) was adopted by consensus. There can be no doubt that it reflects *opinio juris* of the participating Governments' (Nicaragua's Memorial, ICJ Pleadings, Border and Transborder Armed Actions (Nicaragua v. Costa Rica), p.62); 'Resolutions of the General Assembly can be expressions of an *opinio juris generalis* and therefore make an important contribution to the development of customary law' (Argument by Australia's Counsel, Mr. Byers, cf. Nuclear Tests cases, Pleadings, Vol. I, p.509). There may be a difference between what the Nicaraguan Government said and what the Australian Government said. Note that while Nicaragua stated that the resolution reflected the *opinio juris* of the participating States, the Australian Counsel may have envisaged something beyond that, since he refers to the *opinio juris generalis*.

¹⁵³ See Skubiszewski, K., Law-making by International Organizations, in Sources of International Law, Thesaurus Acroasium 1992, Vol. XIX, p.378; Schachter, Oscar, Non-Conventional Concerted Acts, in International Law: Achievements and Prospects (Paris, Martinus Nijhoff, 1991), M. Bedjaoui (ed.), p.267; MacGibbon, I., Means for the Identification of International Law, in International Law: Teaching and Practice (London, Stevens & Sons, 1982), Bin Cheng (ed.), pp.19-22..

¹⁵⁴ For instance, in the debate held within the Sixth Committee on the proposed Res. 3314 (XXIX), which contained a definition of aggression, Italy, Iraq, (Federal Republic of) Germany, Guatemala, Israel, and the United States, among others, expressly put on the record that they regarded the said resolution as a non-binding instrument or merely recommendatory in character. See Official Records of the General Assembly, Twenty-Ninth Session, Sixth Committee, Summary Records of Meetings, 18 Sept. - 9 Dec. 1974, Doc. A/C.6/SR.1460-1521, pp.46, 75, 82, 94, 95. This type of statement is most common in those cases where a State (or a group of States) considers that its interests are being threatened by the norm or prescription enunciated in the resolution.

¹⁵⁵ It was Prof. Cheng who first used the expression 'instant international customary law'. See his article "United Nations Resolutions on Outer Space: "Instant" International Customary Law?", 5 Indian Journal of International Law 1965, pp.23-48. Contrary to what some writers have maintained, Cheng does not seem to argue that a resolution may produce 'instant customary law'. In his view, a resolution may be used 'as a means for identifying the existence and contents of a new *opinio juris*' (emphasis added, p.47). It is therefore the *opinio juris* of States in relation to the norms enunciated by the resolution that may cause the 'instant' creation of a new customary rule (p.46).

¹⁵⁶ Perhaps an illustration of one of such resolutions might be Res. 1514 (XV) of 1960, containing a Declaration on the Granting of Independence to Colonial Countries and Peoples. According to the Court in its Advisory Opinion on Western Sahara, 'General Assembly resolution 1514 (XV) provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations'. See ICJ Reports 1975, p.31.

¹⁵⁷ In the words of Prof. Mendelson: '...legal advisers of foreign offices... have to have some sense of what other legal advisers, who also are diplomats, are going to regard as acceptable... Here, General Assembly resolutions can be a very good guide, because they articulate what is acceptable to other States'. See Mendelson, M.H., *The Legal Character of General Assembly Resolutions: Some Considerations of Principle*, in Hossain, K., *Legal Aspects of the New International Economic Order* (London, F. Pinter, 1980), p.106. Of course, the converse is also possible, that is, a resolution may also manifest what is unacceptable to all or most or some States.

¹⁵⁸ An example of that is given by resolution 3281 (XXIX) proclaiming the Charter of Economic Rights and Duties of States. The sole arbitrator in the *Texaco Overseas Petroleum et al v. Libyan Arab Republic* Arbitration made this point in the following words: '...it appears essential to this Tribunal to distinguish between those provisions stating the existence of a right on which the generality of the States has expressed agreement and those provisions introducing new principles which were rejected by certain representative groups of States...'. See 17 *International Legal Materials* 1978, p.30. This problem is more likely to occur in those cases where the consensus procedure is used for adoption of the resolution.

¹⁵⁹ See Schachter, Oscar, *International Law in Theory and Practice*, 178 *Recueil des Cours de l'Académie de Droit International* 1982-V, pp.114-121.

¹⁶⁰ See Fitzmaurice, Sir Gerald, *The Future of Public International Law, in Evolution et perspectives du droit international*, Livre du Centenaire 1873-1973, Institut de Droit International, p.269.

¹⁶¹ See Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, ICJ Reports 1955, p.115.

¹⁶² Perhaps this proposition is consonant with the following view expressed by Sir Francis Vallat: '...there is always likely to be a strong presumption that action taken by a State in accordance with a recommendation of the General Assembly is lawful'. See Vallat, F., *The Competence of the United Nations General Assembly*, 97 *Recueil des Cours de l'Académie de Droit International* 1959-II, p.231.

¹⁶³ See comments by Prof. Abi-Saab and Prof. Condorelli in this respect, in *Change and Stability in International Law-Making*, *op. cit. supra* n.149, pp.50, 61.

¹⁶⁴ See *op. cit. supra* n.161, p.88.

¹⁶⁵ See Tunkin, G., *The Role of Resolutions of International Organizations in Creating Norms of International Law, in International Law and the International System* (Dordrecht, Martinus Nijhoff, 1987), W. Butler (ed.), p.9. See also the concurring opinion of other writers cited by him in that article.

¹⁶⁶ See *The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective - Resolutions of the General Assembly of the United Nations*, K. Skubiszewski (Rapporteur), *Annuaire de l'Institut de Droit International* 1987, p.70.

¹⁶⁷ See Chapter V, p.138-139.

¹⁶⁸ *Ibid.*, pp.139-140.

¹⁶⁹ *Ibid.*, p.138.

CHAPTER VII

A NOTE ON THE INDUCTIVE METHOD

The ascertainment of the existence and content of a customary rule is a practical problem in the solution of which great theoretical and methodological questions are involved. The theoretical issues arise from the fact that, in order to identify something, one needs first to know what it is, i.e., its nature and definition. It is to be hoped that this task has already been accomplished in the preceding chapters. The main effort must be devoted now to the development and description of a method by which a customary rule is to be identified. The object of this chapter is to adduce, in a tentative way, some general features of this method.

I. The Inductive Principle

A method is to be chosen according to the object of the inquiry and its end(s). The object of the inquiry is State practice or inter-State relations. The end of the inquiry is the identification of a customary rule. As customary law grows out of State practice, the identification of a customary rule is only possible by drawing an inference from the practice of States. The argument may be advanced that the general principles by reference to which that inference would be best achieved are those which inform the inductive method. The authority of the Court could be invoked in support of this argument. In the *Gulf of Maine* case, the Court's Chamber noted: 'A body of detailed rules is not to be looked for in customary international law which 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 sufficiently extensive and convincing practice, and not by deduction from preconceived ideas'.¹ If one understands 'test' in the sense of 'identify or confirm the existence of', then the Chamber seems to be espousing induction as the proper ascertaining method, at least in relation to the second group of customary rules (assuming

the Chamber was making a distinction between two groups of customary rules). Unfortunately, apart from saying that induction was not 'deduction from preconceived ideas', and pointing out that the material for induction was State practice, the Chamber did not explain further what it meant by 'induction' or which steps are to be taken in the inductive method. It is necessary, therefore, to add a few words about the general nature of the principle of induction before the applicability of this method to the identification of customary law is examined.

Bertrand Russell defined the 'principle of induction' as follows: '(a)when a thing of a certain sort A has been found to be associated with a thing of a certain other sort B, and has never been found dissociated from a thing of the sort B, the greater the number of cases in which A and B have been associated, the greater is the probability that they will be associated in a fresh case in which one of them is known to be present; (b)under the same circumstances, a sufficient number of cases of association will make the probability of a fresh association nearly a certainty, and will make it approach certainty without limit'. To state the principle in other words, a relation of association between two things which form a phenomenon may, if verified repeatedly, justify a general conclusion that the same relation will probably recur in the future. The inductive principle, in Russell's view, can justify 'any inference from what has been examined to what has not been examined'.² In this sense, induction allows one to forecast or predict the recurrence of the phenomenon. But induction can only lead to a probable conclusion. According to Hume, Russell and others, the notion of induction necessarily carries with it the notion of probability, since there is hardly a perfect induction. An inference drawn from a phenomenon which has been found repeatedly may be proven false in the future, when, for example, the phenomenon fails to repeat itself in the future as the inference predicted. That explains why the final conclusion or hypothesis is usually formulated in terms of probability. The notion of probability is used to describe the uniformity stated in the hypothesis and the hypothesis itself.³ The latter follows from the former.

From the point of view of the observer, the recurrence of the phenomenon gives rise to **expectations** that it will continue to repeat itself again in the future. Those expectations are termed by Russell '**expectations of uniformity**'.⁴ It is the principle of induction which rationalizes those expectations. If a great number of observers share the same expectations, one may say that induction justifies general expectations regarding the recurrence of a particular phenomenon.

In addition to justifying general expectations and forecasts concerning the recurrence of a type of phenomenon, induction can have another (related) function: it may be used to demonstrate the existence of uniformities or laws. This is indeed its main function. The inductive method consists in an act of generalization arrived at by inference from particular phenomena. Aristotle put it in those simple words: 'induction is a passage from particulars to universals'.⁵

J.S. Mill envisaged another type of role for induction. On the basis of some five canons of induction, which he himself developed, he thought that a causal relation between two instances could be demonstrated.⁶ Therefore, apart from showing that whenever thing A occurs, thing B follows, Mill thought that inductive procedures could also demonstrate that A, as opposed to C or D, was the cause or antecedent of B.

In inductive reasoning, facts play a fundamental role. As J.S. Mill has observed, they constitute the real premises of the reasoning. But not any fact is to be taken into account: in his opinion, those facts must belong to the same class, so that the generalization may apply to all other facts which resemble them in what are regarded as the material circumstances.⁷ Bearing in mind that inductive reasoning leads to a conclusion which applies to the generality of the cases included in a given class of facts, other conclusions can be derived from it on the basis of syllogistic reasoning. Thus, if from observation that Peter and John are men and are mortal, one reaches the conclusion that all men are mortal, the syllogistic reasoning may now be applied to other instances in the following way: All men are mortal

(premise already proved), Paul and Mark are men, therefore Paul and Mark are mortal. The logical problem of syllogism is, therefore, resolved by inductive reasoning so far as the latter supplies (or proves) the major premise of the former.⁸ There are, in addition, other conclusions which can be derived from the major conclusion; this is a possibility which arises whenever the facts to which the conclusion refers have any connection with facts which do not belong to the same class. In a word, inductive reasoning may be a first stage in a process where other conclusions can be derived from the major conclusion arrived at.

After this brief and tentative introduction to the inductive method, it is now time to see whether this method (as described above) would be applicable and useful to the ascertainment of a customary rule. Two main arguments could be developed against this idea. They could be summarized as follows: 1) the inductive method can only be applied to the natural and physical sciences as opposed to the social sciences; 2) even if it is equally applicable to the social sciences, it is unsuitable for the end proposed here, namely, the identification of a customary rule.

The first argument is based on the assumption that the social sciences are very much different from the natural and physical sciences. It follows that a (scientific) method developed for the latter cannot be applicable to the former. According to Prof. Deutsch, this assumption is contradicted by the views of major philosophers, such as Plato, Aristotle, Locke, Kant, Hegel, Marx and Pareto: they all asserted the unity of the natural and social sciences. He also argued that there is a strong case for the existence of significant similarities between both sciences (such as formal rationality, limits of validity, and so forth); the differences, though conceded, are not fundamental.⁹ That this view is shared by some social scientists is showed by the application of the scientific method to the major branches of the social sciences, notably international relations, political science, economics, psychology, anthropology and sociology.

In international relations theory, for example, the use of scientific method in the investigation of international relations was introduced by the 'behavioural school'. Behaviourism places emphasis on the systematic investigation of reality. Different approaches and methods of investigation have developed within this school: there is the systemic approach as opposed to the individualist approach, and the quantitative method as opposed to the inductive method.¹⁰ Behaviourism is not the only theoretical position (there are others such as Marxism, functionalism and realism), and it has been very criticized; yet it has had a substantial influence in contemporary international relations theory.¹¹ The point to bear in mind, therefore, is that the scientific method has been advocated for the analysis of international relations even though the discipline is regarded as part of the social sciences.

The contention that in the social sciences the complexity of the phenomenon is aggravated by the intermixture of subjective factors such as will, feelings, and so forth has not prevented some social scientists from endorsing the application of the scientific method, particularly the inductive method, to their investigations. This has been the case even in fields where such subjective notions are considered to play a more prominent part, such as sociology. Prof. Durkheim, for example, has put forward, in a very influential work, a sociological method which suggests the application of induction (and the principle of causality) to social phenomena.¹²

There is no doubt that the scientific method has been applied to the social sciences. A different question is whether the inductive method has proved to be the only applicable and valid method, or the one that has achieved the best results, regarding all disciplines included in the social sciences. The general performance of the inductive method is not a matter for discussion here. The point in question is whether the inductive method is applicable or valid for the identification of a customary rule. That is the second objection mentioned above. The main argument which could be developed in support of this objection is that all social phenomena are the result of a great number of different causes; thus, it is impossible to determine the specific relation of causation or association which forms each phenomenon.

For the same reason, the existence of uniformities in a given area or the recurrence of the same phenomenon is rarely (if ever) possible. If there is indeed a plurality of causes, and they have nothing in common, then surely there has to be a plurality of effects as well, and one is no longer speaking of the same phenomenon but of various phenomena. When each phenomenon is distinguished, its particular cause may also be identified.

Another way of putting this objection is by saying that circumstances vary considerably in a social environment: not one social phenomenon is like another, which makes the formation of patterns of uniformity impossible. But the formation of an uniform behaviour within a community, be it a community of individuals or a community of States, is surely a real possibility. The widely accepted notion of custom both in anthropology and law is an evidence of that. All the objections against the application of this method to the ascertainment of customary law have been dealt with. What remains to be seen is how this method is applied to identify a customary rule.

It is submitted that this method could be employed to justify the existence of 'expectations of uniformity' regarding a given course of conduct, a forecast as to the likelihood of the recurrence of the phenomenon, and the operation of a 'law' (*latu sensu*) in that field. Thus, at close investigation of the facts (i.e., the various instances of State practice), the analyst may attest that whenever the same or similar set of circumstances arose the generality of States acted or reacted in a given way.¹³ Having recourse to an inductive reasoning, the analyst could then conclude that it is **likely** that whenever in the future that same situation be characterized, those States will continue to act or react as they have done so far. Following Mill's approach, the analyst would also understand that the particular situation is the factor which causes those States to act or react in that way, or that their action and the situation are connected in a causal way. The overall inference could be that there is a 'law' (*latu sensu*) in motion amongst States in this particular case and this 'law' is manifested in or proved by a common pattern of conduct. This finding provides the analyst with some degree of foreseeability in the conduct of those States on this matter.¹⁴ Also, the analyst would feel

justified in holding that States in general expect others to behave in that particular way whenever the situation arises. Do those inferences, however, warrant the view that a customary rule on the matter exists?

There is a great bar to this finding. The mere existence of a common pattern of conduct amongst States does not suffice to prove the existence of a customary rule. Leaving aside other requirements, it is now widely accepted that without the presence of the subjective element a customary rule can not be distinguished from any other social rule. The fact that States act in the same way may be due to a non-legal social rule or another reason just as much as to a legal rule. Thus, although the inductive method is generally speaking capable of being applied to the determination of a common practice amongst States, it would seem inappropriate for leading the analyst into the second stage, i.e., revealing whether that general practice bears the mark of a conduct under a legal rule.

This difficulty is only removed if two conditions are met. First, the subjective element should be capable of objective observation, i.e., of being identified by reference to some objective, external qualities of the State practice concerned. Second, the inductive method would have to comprehend a preliminary selection of the relevant evidence (or data), in order to separate those pieces of State practice which show the presence of the subjective element. Once those conditions are satisfied, the uniformity of behaviour in the same set of circumstances would be looked for; if found, the analyst could conclude that a common pattern of behaviour exists and is **likely** to be continued in the future, and that this is due to the operation of a customary rule.

This is the general description of the inductive reasoning. It is proposed now to develop in further detail a method for the identification of a customary rule.

II. A Proposal for an Ascertaining Method

To identify a customary rule is to establish three things: the existence of the rule, its

content and its state of development. The first thing one ought to be aware of in the consideration of how to identify a customary rule is that a customary process goes through different stages of development. This fact entails the consequence that the identification process will arrive at different results according to the stage of the customary process. This study is concerned solely with the identification of an established customary rule, and the method which is presented below has this objective in mind.

There are three general steps in the identification of a customary rule: (1)collection and selection of data; (2)evaluation of data; (3)formulation of conclusions. In that order, those steps reflect the inductive method. There is, however, nothing to prevent the analyst from proceeding in the inverse order. In that way, he would first formulate a conjecture (in this case, that a customary rule, with a given general scope, exists and is in operation), and then he would test it by way of steps (1) and (2); if the conjecture is proven true, or better still, likely true, then what was a conjecture turns into a **conclusion**. This latter approach resembles Popper's solution for what he regards as the 'problem of induction'.¹⁵ He has proposed a theory which he describes as the 'theory of the deductive method of testing' in the following way: he submits that scientific knowledge consists of 'guesses or hypotheses' which are controlled or verified by 'criticism and experiment'.¹⁶ In his view, 'a hypothesis can only be empirically tested - and only *after* it has been advanced'.¹⁷ Thus, the formulation of a hypothesis comes first, and then what he calls a critical discussion (which includes observation and experiment) of the merits of the hypothesis.

Indeed, in most cases, writers, judicial or arbitral tribunals, and other law-determining agencies alike seem to adopt (consciously or not) this approach. For example, it would seem that writers usually start the investigation of the state of the general law on a given matter with a preliminary idea (even though they may not state it expressly) that a given customary rule with a given scope might exist and they proceed just to verify whether this is the case or not. Thus, they begin their law-finding task with their conjecture or hypothesis already formulated. It also happens that in judicial proceedings the existence of a specific customary

rule as formulated by one of the parties is being contested by the other party to the case, and the Court or Tribunal has to verify it before it decides the case.¹⁸ Thus, the Court would start its investigation with a hypothesis the contents of which have already been formulated in the case by one of the parties.

The problem with this latter approach is that it may easily be used to certify a customary rule which, in the opinion of the analyst, ought to exist; thus, in order to 'demonstrate', or better still, to persuade others of its existence, he employs a rather uncertain methodology. That kind of attitude can only be detected, and the findings which result from it can only be falsified, if the ascertaining method employed is submitted to a critical analysis. Therefore, in order to avoid altogether the peril of justifying a 'desirable hypothesis', or to dispel any doubts about this, the analyst has to apply a rigorous method of ascertainment. It is time now to consider each step in the method which is being suggested here.

1. Collection and Selection

In a sense, one should not consider the collection of evidence as part of an ascertaining method, since it requires more effort and determination than technique to collect material. It is important to note, however, that the obstacles in the performance of this task are formidable. A good discussion of the problems which an analyst may face in collecting evidence has already been made by some writers.¹⁹ They may be described (though not exhaustively) as follows: limited number of national digests of State practice (either official or particular), and their highly selective contents; difficult access or inaccessibility to diplomatic archives; ill-documented decision-making process; sparse records of the practice of organs other than those responsible for the conduct of foreign affairs (such as judicial practice, the legislative practice, the administrative practice). Admittedly, since the preparation of the Memorandum entitled 'Ways and Means of Making the Evidence of Customary International Law More Readily Available', by the International Law Commission and the UN Secretariat, the situation has improved, but there is still some room for further improvement.²⁰ Perhaps the most important development in this field took place

with the emergence and activities of international institutions. It should be recalled that many contemporary developments in international law have been achieved through the medium of the international institutions. State practice in multilateral fora which is associated with those developments has been reasonably well recorded. One could, for example, cite the records of State practice on the law of the sea. The United Nations has now made available to analysts a good amount of evidence on the practice of States, both internal and external, which would otherwise remain inaccessible. However difficult this task may be, it must be said that, as the definition of a general customary rule is the aim of the process, the analyst should ideally strive for collecting as much data as possible from the various geographical regions and political systems of the world.

In contrast with the collection of material, the selection process is a much more complex endeavour and it certainly needs a certain amount of technique. Selection of data involves two steps: firstly, the analyst determines the admissibility of the evidence, i.e., whether a given instance may be counted as an evidence of the practice of that State. The admissibility criterion may be stated as follows: the range of admissible evidence corresponds to the types of act which constitute State practice and to the organs of the State which are considered to represent the State in their actions, so far as the customary process is concerned. This topic has been already examined in Chapter IV. After having passed the admissibility stage, the analyst undertakes the second operation, namely, the separation of the relevant from the irrelevant, distinguishing those instances of State practice which may throw some light on the identification of the customary rule from those which may not. The factors which may guide us in this selection will now be examined.

A legal rule is designed to guide, control or regulate a given behaviour. Often, the legal rule will require or permit a particular behaviour whenever a determined set of circumstances or situation, as generally defined by the rule, arises. Thus, if there is a legal rule, one must look for a relation of association between a particular instance of behaviour and a given set of circumstances or situation. This exercise aims at proving the hypothesis

which is 'unknown' (the existence of a customary rule) by looking at the **consequences** which would flow from it if it were true, and which are known to the analyst (i.e., facts which may establish the existence of a relation of association between a behaviour and a situation as regulated by the rule).²¹ All instances of State practice which reflect such relationship in the relevant field are to be considered as *prima facie* relevant material. It is to be noted that this relation of association covers not only acts which would confirm the existence of the rule but also acts which would negate it. In both cases, there is a relation of association between a situation and an act, although each one gives a different indication regarding the falsity or not of the analyst's conjecture. Thus, even if the instances of State practice indicate that whenever the situation arose the States or some of them behaved in a manner which revealed the non-existence of the hypothetical rule, or the existence of a different rule, their value as evidence *a contrario* is clear and they must be selected. If the analyst were to select only the evidence which in his opinion could potentially prove his case ('potentially' because he has not yet embarked upon the second step, namely, the evaluation of the evidence), then the test he employed would have lacked the minimum of scientific rigour and therefore his analysis would have had little value.

2. Evaluation of Evidence

The evaluation of a piece of evidence aims primarily at ascertaining the State's general attitude regarding the identification of the hypothetical customary rule, i.e., its existence, its content, and its state of development. Generally speaking, an evaluation consists in examining a particular piece of evidence with a view to determining (1) its comparative weight, i.e., how it stands in relation to the other pieces of evidence; and (2) its individual weight, i.e., how persuasive it is. The definition of the comparative value or weight of a piece of evidence in relation to the other pieces of evidence (1) is necessary for the resolution of cases of contradiction between, or ambiguity in the pieces of evidence. When various pieces of evidence corroborate one another, there is no need for weighing their particular value as against one another: they add up to evince the same thing. The ways in

which the comparative value of a piece of evidence is established are considered in the discussion of conflicting or ambiguous evidence (cf. *infra*).

With regard to the individual weight of a piece of evidence (2), this is a test to which every piece of evidence is to be submitted, independent of whether it contradicts or confirms the other pieces of evidence. The individual weight of a piece of evidence is not measured by comparing it with other pieces of evidence. It is simply a question of how strong or persuasive that piece of evidence, **taken in isolation**, is. A criterion which could be suggested for establishing this is how clearly the piece of evidence indicates the legal position of the State and how representative it is of that State. Of course, the application of the admissibility criterion has already ensured that every piece of evidence which has been selected is related to an act of the State concerned. But a piece of evidence which relates to an act of a hierarchically superior organ or official of that State, acting in his official capacity, must be regarded as being very representative of the State, and thus carrying a great weight. The extent to which a piece of evidence is representative (and, therefore, persuasive) is determined by the hierarchical position of the organ that performed the act to which the evidence relates. The considerations made below on the hierarchy of evidences would seem to apply to this case.

Another criterion for establishing the individual value of a piece of evidence is the interests at stake. Thus, an act performed by a State against its own interests (such as an admission) should be more persuasive; an act accomplished in the State's own interest, should count less; an act performed by a State which has no interest in the outcome or in the question to which the act relates (a 'third party'), should count more. There are, however, several difficulties in this criterion. First, it relies on a notion which is not only subjective but also difficult to ascertain; after all, how can an observer learn what were the real interests of a State when it acted in a particular way? Second, it could be based on very questionable assumptions. For instance, why should an admission be considered as a disinterested act? Indeed, how could a State deliberately and generously (out of no immediate or long-term

interest) admit a claim against its own interests? That is only conceivable if a gross mistake is made by this State's officials. In all other cases, it must be assumed that this State had in mind the attainment of a specific goal, and that it did not act against its own interests. This possibility (admission) goes against the basic assumptions regarding the nature of States: that States are egocentric and rational actors. The fact, for example, that States would rather make payments *ex gratia* than admit of their responsibility is a confirmation of their nature. In the same way, one should question why an act performed by a State in pursuance of its own interests should have less evidential value. The customary process is not formed by unselfish acts of States; States tend to promote through their behaviour the rule which they favour most. Given that the customary process develops on the basis of 'selfish acts', it follows that they should count more (as evidence), or at least not less than other acts. Finally, an act of a State 'which has no interest in the outcome or in the question to which the act relates' seems to be an impossibility. The very fact that the State acted shows that it had some interest in the outcome or in the question to which the act relates. This interest could be indirect, when, for example, the State concerned lends its support for the claim of another State in return for legal, economic or political favour. For instance, the fact that many States outside the Arab or Islamic world (including those which face existing or potential separatist movements) seem to show support for the Palestinians' self-determination, can be attributed (though perhaps not exclusively) to political and economic interests.²² If there is always an interest underlying the act which is performed by a 'third party', then on account of the other criterion (selfish acts count less), that act should count less and not more. But the validity of this last criterion has already been questioned. Having said that, it is now time to set out the general procedure of this evaluation.

The evaluation of the selected evidence is to be made in a two-stage process. Firstly, the analyst undertakes a microanalysis of State practice, examining the practice of individual States. Afterwards, he performs a macroanalysis of State practice, examining the aggregate of the practices of the States. In each analysis, a distinct set of criteria and objectives is adopted (cf. *infra*). This procedure does not admit of inversion: one has to examine the

particulars before examining the general, if only because if the criteria to be looked for in the particulars are not satisfied then it is unnecessary to go into the next stage: the formulation of a conclusion would already be feasible.

2.1 The Microanalysis of State Practice

In examining separately the practice of each individual State (the particulars), the analyst should look for the presence of a quality, namely, material consistency, and of the subjective element. Both elements have already been defined in the preceding chapters, so that what is sought here is solely to describe how one should assess the evidence which may express or give indications of them.

It would seem very unrealistic for the analyst to expect that the preliminary task of selecting the evidence which he has performed will make the evaluating process much easier. Assuming that the evidence regarding the conduct of a particular State on a given matter is reasonably or sufficiently documented so as to allow for a proper examination by the analyst, the evidence may still give rise to various difficulties in the evaluating process. For example, many or some of the materials collected may be ambiguous; many or some of the materials may be mutually contradictory; the materials may be only or mostly of the second degree type.²³ All those difficulties may lead the analyst into a wrong conclusion as to the consistency of that particular practice or the presence in it of the subjective element. As has been suggested above, in the determination of the comparative weight of the pieces of evidence lies the key to the solution. It is, therefore, necessary to consider, if rather tentatively, some ways in which one could establish that.

. *Ambiguous Evidence*: a piece of evidence is ambiguous when it may be interpreted in more than one way, sometimes in contradictory ways. In that case, the analyst should seek to know whether all the evidence is ambiguous or only some of it. If only some pieces of evidence are ambiguous, then their interpretation should follow the other unequivocal pieces of evidence; the latter, therefore, would have a greater comparative weight. But there is a

condition attached to this: the unequivocal pieces of evidence should be capable of an uniform interpretation (that is, should indicate the same thing), and their interpretation should be one of the possible interpretations of the ambiguous evidence. If the ambiguous pieces of evidence and the unequivocal pieces of evidence cannot possibly be interpreted in the same way, then one is faced with a case of contradicting evidence (which is considered below).

If all evidence is ambiguous (this should not be very usual), the analyst should seek to adopt the most likely interpretation. One option is to adopt the interpretation which would be in harmony with the presumed interests of the State which pursued the course of conduct. However, as pointed out above, it is hardly feasible to learn with any reliability the interests underlying an act of a State. Perhaps a better option is to consider the 'most likely interpretation' of the ambiguous evidence as that which reflects the general interpretation given by the other States to the conduct of the particular State concerned. A third possibility is that the ambiguous evidence be simply discounted. That is, however, the least desirable option, because it disregards the fact that every act of State may give rise to legal effects, no matter how ambiguous it may seem.

. *Contradicting Evidence*: the analyst may find that different pieces of evidence contradict each other. The evidence is contradicting when it indicates that the State concerned (1)maintains contrasting legal opinions while behaving in a consistent manner; or (2)maintains the same legal view while behaving in an inconsistent way; or (3)maintains the same legal opinion but consistently behaves in an entirely different manner.²⁴ Each of those three situations gives rise to complex problems in the evaluation process. In order to arrive at a general conclusion regarding the practice of the State concerned, the analyst may have recourse to the particular and general rules of interpretation which are described below. The application of those rules should enable the analyst to determine the comparative weight of each piece of evidence and decide which is to prevail over the other.

A particular rule which could be suggested for situation (1) is that the uniform behaviour should be ascribed greater comparative weight than the contrasting legal opinions. The State's course of conduct alone would therefore indicate to the analyst its legal position. The reasoning underlying this rule is that two contradictory pieces of evidence of the same nature (statements of legal views) cancel each other, whereas two or more concordant pieces of evidence of the same nature (actual conduct) strengthen each other. It is possible that one of the contrasting legal opinions coincides with the consistent conduct of the State. In this case, the resulting conclusion would be the same.

A similar reasoning applies to the particular rule of situation (2). Thus, the uniform legal opinion should be given greater comparative value and prevail over the inconsistent behaviour. The only addition to this rule is that the legal opinion should necessarily be reflected in one of the contrasting courses of conduct adopted. Otherwise, one would have a situation where the State maintains 'A' in international fora and behaves in a manner which evidences 'B' and 'C'. Such degree of inconsistency could hardly be verified in practice. The rule as stated makes the analysis much simpler. There is, however, a more complex alternative. The analyst would seek first to determine the comparative weight of the contrasting courses of conduct, then establish which should prevail over the other, and finally compare it with the uniform legal opinion. This type of analysis is particularly suitable for the case where there is behaviour which contrasts with a consistent line of conduct. It is fair to presume that a line of conduct which has otherwise been followed uniformly by that State should prevail over separate instances of discordant behaviour. The fact that the Government of a State deviates from a previous regular pattern of conduct may sometimes be attributed to reasons of political expediency. The contrasting behaviour shows that it is deliberately disregarding what it considers to be a conduct under a customary rule. In that case, the analyst could and perhaps should give preference to those pieces of evidence which in his opinion could reflect the subjective element, that is, to those acts which have been regularly performed along the years. One should not be surprised to learn that the uniform line of conduct which has been adopted by the State corresponds to the

uniform legal opinion. A different situation is created if the State concerned deviates too much or too often from the uniform line of conduct. In this case, there is in reality no consistent behaviour; therefore, the whole practice should be discounted.

With regard to the particular situation where the 'evidence of words' is contradicted by the 'evidence of deeds' (3), the essential factor will be whether the conduct was accompanied by any legal justification. As the Court has said in the *Nicaragua* case: 'If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.²⁵ The only alteration which could be made to that pronouncement is that, for this stage of the ascertaining process, it is irrelevant whether the rule is 'recognized' (or generally regarded as established) or not. It should be borne in mind that the analyst is concerned here only with the attitude of the particular State. For the analyst, when a State justifies its conduct by appealing to the customary rule, either as an exception or as an action in accordance with its interpretation of the rule, that State is in reality upholding the existence of the rule (regardless of what other States think), and therefore the evidence of words should be considered to prevail over the evidence of deeds.

It might be argued that a rule is not a legal rule unless it is effective, and that therefore this sort of discrepancy between words and deeds testify to the non-existence of the alleged rule in the view of the State. This form of reasoning, however, seems to confound the validity of the legal rule with its *de facto* effectiveness.²⁶ If a generally recognized rule (to use the Court's words) is disregarded by a great number of States, that fact could only indicate that it may be coming into desuetude; the rule's existence would not have been in question. In the same way, a State which engages in an apparently contradictory behaviour but maintains a legal justification by reference to the rule is not denying the validity of the rule. It is true, however, that if the views manifested by a State disagree with its conduct, and it offers no

legal justification for that, then its conduct may justify the estimate that the State's general legal position is indicative of the non-existence of the customary rule.

So far, only particular rules have been discussed. It is time to consider the general rules which could be applied in the analysis of all those three situations. It is suggested, firstly, that the time element may sometimes provide a solution for the problem of contradicting evidences. Thus, between two contrasting pieces of evidence, the analyst may give greater comparative weight to the more recent one, for it is more sound to presume that a State has changed its position than to presume that it has committed a mistake when it behaved in a form which is contrary to its past behaviour. This is particularly so if the State announces and/or explains the change of policy, or behaves in a way which makes it clear that the past precedents should no longer be relied upon by the other States. It is possible that a change of conduct may be expressly attributed by the State concerned to the existence of a customary rule. For instance, in 1974 Australia, amongst others, made strong opposition to the forthcoming French nuclear tests. Apart from diplomatic pressures, it brought a case before the Court against France in which it contended that a customary rule had developed by which atmospheric nuclear tests were prohibited.²⁷ Australia did not hesitate to take this position even though in the fifties it had allowed Britain to conduct nuclear tests in its own territory. Another example is the position of the United States on the question of the extent of the coastal States' fisheries jurisdiction. After a consistent pattern of opposition to any unilateral extension of fisheries jurisdiction beyond twelve miles, in 1976 the United States enacted the Fishery Conservation and Management Act, which established a 200-mile fishery conservation zone.²⁸ One can understand, of course, the case of those States which relied upon the past record of the State, but that does not affect the fact that, for evidential purposes, a new conduct like this clearly indicates that the State considers that a new customary rule exists and is in operation. If, however, there is one new piece of evidence against numerous old pieces of evidence, and the State concerned fails to adduce any justification, this general rule would seem inapplicable. The analyst would seem justified in treating that new act as a deviation from a uniform pattern of conduct.

The second general rule to which the analyst may have recourse in the resolution of discrepancies is the notion of hierarchy of evidence.²⁹ This notion would mean that between two contradictory pieces of evidence, the hierarchically superior one should prevail over the other in the assessment of the State's general attitude. The hierarchical position of a piece of evidence is determined by the hierarchical position of the State organ from which it originates. It has already been seen in the previous chapters that the organs of the State which are considered to represent the State in their actions, so far as the customary process is concerned, comprise any organ of the three main branches of the State, namely, the legislative, the executive and the judiciary; and that it is not unusual that the practice of a State on a given matter is manifested by the acts of various organs of all those branches. It is submitted that an hierarchy between those organs, for evidential purposes, could follow the organic and administrative hierarchy (i.e., the relations of subordination or co-ordination between them) established by the internal legal system of that State. For example, within the Executive branch of a Republic which adopts Presidentialism as a form of Government, an act by the President such as a Proclamation or a Decree should be regarded as of greater (comparative) evidential value than a regulatory act enacted by one of the Ministries, should they contradict each other. Similarly, within the Judiciary, a decision made by the Supreme Court should be of greater (comparative) evidential value than a decision made by a lower Tribunal. Should the same organ undertake two contradictory actions, then the time element would be applicable in the way indicated above, particularly if the action was of a legislative or regulatory nature.

A problem might arise, however, if the contradictory pieces of evidence emanate from organs which belong to different branches of the State. For example, State 'A' enacts by an act of Parliament, or by a Presidential Decree a law on, say, the prohibition of torture, or simply ratifies a multilateral convention against torture. In the international fora, it unequivocally condemns the perpetration of any act of torture as contrary to the 'principles of international law'. Suppose that there is evidence that its own law is being disregarded or misapplied by the competent administrative or military authorities, and there is a suspicion

that the Government may be conniving at this practice. In the case of a national legislation or a ratified treaty which is being disregarded in practice by some organs of the State, it would seem clear enough that the discordant practice is to be given a lesser evidential value. The reason is this. In this case, the discordant practice raises the question of internal or international responsibility, since the acts performed by the organs of the State are *prima facie* illegal or invalid, either in relation to the internal legal system or to the international legal system. It would seem unwarranted, therefore, to endorse an illegal or invalid act to the detriment of the valid and licit one (the act of ratification of the treaty or the legislative act). Anyway, it is clear by the application of the hierarchy criterion that the organ which enacts a law is normally hierarchically superior to the organ which applies it.

. Second Degree Evidence: The great majority of States fail to maintain a systematic and public record of their practice on matters touching upon international law. It is no secret that States which do so tend to publicize only a carefully selected and limited record of their conduct. In general, the written account of the decision-making process (when there is one) is kept out of the reach of the public, at least for a period of time which renders an analysis of contemporary State practice on the basis of it impossible.³⁰ That means that the motives and aims which led a State to pursue a given course of conduct as opposed to any other, and, more importantly, the role that legal considerations played in its decision are all concealed from the public. This might be held by some commentators as a bad thing, since it prevents the analysts of State practice from putting their hands on what they consider as the real and relevant material evidence. It may be argued that this view is groundless, since it is not the intention or the aims that led a State to act which shape or have any bearing on the legal process, but the impact of its conduct and how the other States interpret it. Of course, the knowledge of a State's legal considerations regarding a proposed course of action may shed some light on the State's view on the definition of a customary rule. But that may be inferred from the act itself. Therefore, the external manifestations of the decision-making process, rather than that process itself, may be held as sufficient evidence for the ascertainment of the State's general attitude regarding a customary rule.

On the basis of all the evidence selected, the analyst will draw a conclusion regarding the consistency of the practice of that particular State, and whether the subjective element is present in it or not. The conclusion does not have to be an all or nothing proposition, especially with regard to the quality of the practice concerned. Thus, the analyst could well conclude that on the basis of the evidence, the practice of that State displayed a general consistency as opposed to an absolute consistency.

2.2 The Macroanalysis of State Practice

In this analysis, the analyst would ascertain whether some general features are found in the practice of States, considered as a whole, which may help to define the hypothetical customary rule. In particular, he would look for a quality in the international practice, namely, uniformity, and would attempt to find out whether that international practice is indeed general and involves the participation of the most interested States.

The notion of uniformity has already been defined in Chapter IV. What needs to be emphasized at this moment is that, for the definition of a customary rule, uniformity in the international practice does not have to be absolute, but only general. A general uniformity in the international practice is attested by comparing the result of the microanalysis of each individual practice one with the other.

The other object of investigation is simply a matter of counting, although it is to be done not without a certain criterion. The relevant questions which the analyst would have to ask himself are as follows: 1) out of those States which could potentially engage in the international practice, how many of them are actually involved?; 2) out of those States which could potentially be negatively affected by the international practice, how many of them have opposed it? Putting the question in those terms seems to be more plausible, since it includes the most interested States and possibly the most powerful States (for the powerful States have global interests), and at the same time excludes the need for the practice of those States which could not be expected to follow it. It is inconceivable that a proper definition of

a customary rule be attained without having regard for the practice of the States which are most affected by the rule, either in the positive sense (because the operation of the rule would serve their interests) or in the negative sense (because the rule would be detrimental to their interests). This inquiry should make it possible for the analyst to find out whether the international practice is general or not, as opposed to bilateral or special.³¹

3. Formulation of Conclusions

In the *Fisheries* case, the Counsel for the United Kingdom recalled that the Court, in determining whether the inference as to the existence of a customary rule ought to be drawn, 'has held itself free to make a *broad appreciation* of all the relevant facts and circumstances of the international practice invoked in the particular case'. He then maintained that the Court was 'entitled' to decide the question 'on a *broad review* of all the circumstances of the relevant State practice'.³² In short, this view is an admission that the Court enjoys some degree of discretion or flexibility in, having regard to the evidence adduced, making a finding on the existence or not of the customary rule which is in dispute. Indeed, the very criteria of generality of, and general consistency in the practice (not to mention general uniformity) are plainly a recognition that a measure of discretion is recognized in the ascertaining process.³³ This is perhaps (partly) justified by the difficulties alluded to above concerning the general state of evidence in any particular case.

Given that some degree of discretion is recognized in the microanalysis and macroanalysis of State practice, the question which could be asked is whether discretion would play any part in the final stage of the analysis, i.e., the formulation of the conclusion regarding the identification of the customary rule. It is submitted that some degree of discretion is only employed in the final stage when the analyst feels unable to assert with absolute conviction that, on the basis of the evidence available, there is an established customary rule whose content is 'X'. The fact that perhaps some degree of discretion may in the end be assigned to the analyst in formulating its conclusion does not mean that he is free to adopt a conclusion which he personally favours, or that he is not required to employ any proper method in the

preliminary steps of selecting and evaluating the evidence. Instead, the discretion of the analyst must be understood in the sense that, if after the performance of steps 1 and 2 (selection and evaluation), he is confronted with a rather difficult decision as to whether an established customary rule with a specific content may be said to 'exist' or not, he is justified in choosing the alternative which in his view is the more likely one. Indeed, as it has already been noted, the results produced by the employment of the inductive method, or by the deductive method of testing, should be better described in terms of probability. In scientific knowledge, as Popper said, one ought to say that a given theory is 'nearer to the truth' rather than it is the truth.³⁴ To assert that a finding is the truth is to reject in advance any attempt at its falsification, which is an unjustified position, particularly in this area of law-finding.

It is not until the conclusion of the analyst (regarding the identification of a customary rule) has been reached that the law-determining agencies described in Art. 38 (1)(d) of the Court's Statute would have a role to play in the method suggested here. 'Judicial decisions and the teachings of the most qualified publicists' should be regarded, as the Statute says, as 'subsidiary means for the determination of rules of law'. They are subsidiary because their conclusions are presumably, or at any rate should be, the result of a careful investigation of the primary means, namely, State practice. It would seem wrong for an analyst to regard the findings of those agencies as evidence of the hypothetical customary rule. The only evidence possible of a customary rule is the evidence offered by State practice. Their findings are no more than conclusions drawn from an exercise of ascertainment, which should not be taken for granted, uncritically. Their conclusions stand side by side with the conclusion of the analyst, and one of them is the best conclusion, i.e., the conclusion which is more likely to be true.³⁵ What would be then the role of those agencies in the law-finding task of the analyst? If those agencies employed a rigid, well-developed, and clearly stated ascertaining method, their conclusions could well serve as a test for the conclusion reached by the analyst on the basis of the method which is being suggested here. Unfortunately, that is not always the case. As noted above, in the absence of any such method, one might question whether the ascertaining process was really conducted in an objective manner or

was used with a view to justifying the existence of a desirable rule. In view of this possibility, the more reasonable position is to ascribe to those agencies a subsidiary role, by which their conclusions would carry less weight than the conclusion of the analyst (should they contradict each other), or corroborate it (should they agree with each other). On the other hand, the conclusion of the analyst could potentially falsify the conclusion of the other law-ascertaining agencies, simply because it has been arrived at by an express and rigid ascertaining method. Of course, this is a proposition which assumes that the analyst has effectively and faithfully applied the ascertaining method. When and if the conclusions of the law-determining agencies confirm the conclusion of the analyst, the latter could be considered as the closest approximation to the truth, or simply as the best conclusion as yet.

Once the analyst has reached the conclusion that a customary rule exists (or is established), he would also be in a position, on the basis of the results of the analysis, to attest the content of that customary rule. By contrast, if he concludes that the customary rule does not exist, then he might also be in a position to conclude whether there is at any rate a customary rule in evolution.

Finally, a conclusion regarding the definition of a customary rule may substantiate other conclusions regarding other rules with which it is connected in a substantive way. For example, from the finding that there is a customary rule on the Exclusive Economic Zone, the conclusion may be drawn that the principle of the freedom of the high seas, whose area of application used to include the area of the EEZ rule, may have been affected in some way by the existence of that rule. As the content of the customary rule on the Exclusive Economic Zone would be known to the analyst, it would be feasible for him to determine whether the EEZ rule has affected the sphere of application of the high seas rule, or instead whether the EEZ rule stands as a sub-category of the high seas rule.

¹ Emphasis added. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement*, ICJ Reports 1984, p.299.

² *Ibid.*, pp.152-153.

³ See Harrod, Roy, *Foundations of Inductive Logic* (London, Macmillan, 1956), p.242.

⁴ See R. Egner and L. Dennon (eds.), The Basic Writings of Bertrand Russell (London, Routledge, 1992), pp.150-151.

⁵ See *Topics*, Book I, 12, in The Complete Works of Aristotle (New Jersey, Princeton Univ. Press, 1984), J. Barnes (ed.), Vol. I, p.175.

⁶ See Mill, J.S., Philosophy of Scientific Method (New York, Hafner, 1950), E. Nagel (ed.), pp.204-233.

⁷ *Ibid.*, p.181.

⁸ On the discussion of the inter-relation between the inductive reasoning and the syllogistic reasoning, see Mills, *Ibid.*, pp.120-144.

⁹ See Deutsch, Karl, What Do We Mean by Advances in the Social Sciences?, in Advances in the Social Sciences, 1900-1980 (Cambridge, Univ. Press of America, 1986), ed. by K. Deutsch, A. Markovits and J. Platt, pp.5-9.

¹⁰ See Luard, Evan, Types of International Society (London, Macmillan, 1976), pp.5-24 (esp. at 5, 14-16); Little, Richard, The Evolution of International Relations as a Social Science, in The Study and Teaching of International Relations (London, Frances Pinter, 1980), R. Kent and G. Nielsson (eds.), pp.14-17.

¹¹ See Little, Richard, *Ibid.*; Mitchell, C., Analysing the "Great Debates": Teaching Methodology in a Decade of Change, *Ibid.*, pp.28-46.

¹² 'Our method', he said, 'is objective. It is wholly dominated by the idea that social facts are things and must be treated as such'. See Durkheim, Emile, The Rules of Sociological Method (London, Macmillan, 1982), ed. by S. Lukes, Translated by W. Halls, pp.50-163 (esp. at 159-163).

¹³ Throughout this study, 'the analyst' is an expression used to describe a person who is engaged in a law-ascertaining exercise. Perhaps one ought to define the observational standpoint of the analyst, as suggested by Prof. Mendelson and others. See International Law Association, 63rd Conference (Warsaw 1988), 1st Interim Report of the Committee on the Formation of Customary (General) International Law, Appendix to 1st Report of the Rapporteur (1986), pp.6-12. However, it is considered that the borderline between the different types of standpoint is sometimes blurred. Considering, for instance, the standpoints suggested by Prof. Mendelson, although the objective of the analyst as understood here would be similar to the objective of a third-party decision-maker, that is, to provide a 'still photograph' of the state of the law at a given time, he is also recognized a more general and elastic view of the legal process, more akin to the one which would be assigned to a detached observer.

¹⁴ Commenting on social customs, de Jouvenel described their role in this way: 'A social order based on custom provides the individual with optimal guarantees that his human environment is foreseeable'. See de Jouvenel, Bertrand, The Art of Conjecture (London, Weidenfeld & Nicolson, 1967), Transl. by N. Lary, p.9.

¹⁵ Popper has made a very strong criticism of induction as the proper scientific method. It is beyond the aim of this work, however, to describe in detail Popper's thesis on this.

¹⁶ See Popper, Karl, Realism and the Aim of Science (London, Hutchinson, 1983), pp.5-110 (esp. at 13, 55). It is to be observed that he makes it clear (p.13), in anticipation of criticisms from those who advocate induction, that guesses are not 'induced from observations', although they 'may... be suggested to us by observations'.

¹⁷ See Popper, Karl, The Logic of Scientific Discovery (London, Hutchinson, 1959), p.30. For a good discussion of Popper's theory, see Miller, David, Falsification versus Inductivism, in Applications of Inductive Logic (Oxford, Clarendon Press, 1980), L. Cohen and M. Hesse (eds.), pp.109-129.

¹⁸ A good example seems to be the *North Sea Continental Shelf* cases, where Denmark and the Netherlands contended that a customary rule on the delimitation of continental shelf areas existed, and the Court proceeded to examine whether that was the case. See *North Sea Continental Shelf* cases, I.C.J. Reports 1969. A similar situation is found in the *Fisheries* case (on the alleged 10-mile limit rule for bays), and in the *Asylum* case (on the right of diplomatic asylum, including the alleged rule of unilateral qualification). See *Fisheries* case, Judgement of December 18th, 1951: I.C.J. Reports 1951, and *Colombian-Peruvian Asylum* case, Judgement of November 20th, 1950: I.C.J. Reports 1950.

¹⁹ See Mendelson, M.H., Practice, Propaganda and Principle in International Law, Current Legal Problems 1989, pp.11-15; Parry, Clive, The Sources and Evidences of International Law (Manchester, Manchester Univ. Press, 1965), pp.67-70; Ferrari Bravo, Luigi, La coutume internationale dans la pratique des Etats, 192 Recueil des Cours de l'Académie de Droit International 1985-III, pp.310-311.

²⁰ See Ways and Means of Making the Evidence of Customary International Law More Readily Available, Memorandum submitted by the Secretary-General, United Nations, Lake Success, New York, 1949, Doc. A/CN.4/6.

²¹ When the consequences are verified, the analyst embarks on a 'return journey' whose destination is the establishment of the proposition. But there are some limitations in this type of analysis. See Leibniz, G.W., New Essays on Human Understanding (Cambridge, Cambridge Univ. Press, 1981), Translated and Edited by P. Remnant and J. Bennett, p.484.

²² The influence of the oil cartel over the oil importing countries, and the political weight of the group of Islamic countries within the United Nations organs, should not to be minimized. For an account of how this may have affected the legal and political development of the Palestine question, see Stone, Julius, Israel and Palestine (Baltimore, John Hopkins Univ. Press, 1981), pp.1-93.

²³ Evidence of the second degree type concerns acts which are not *interna corporis*, such as internal memoirs. In general terms, they do not evince the internal decision-making process.

²⁴ It is important to note a relevant distinction which is being made here: a legal opinion means a statement made by the State regarding its legal view on a given issue; behaviour is simply its actual conduct on the same issue.

²⁵ Military and Paramilitary Activities in and against Nicaragua case, Merits, Judgement, I.C.J. Reports 1986, p.98.

²⁶ Prof. Kelsen has drawn attention to this attitude. See Kelsen, Hans, General Theory of Law and State (New York, Russell & Russell, 1961), Translated by A. Wedberg, pp. 29-42 (esp. at 41-42).

²⁷ See Nuclear Tests cases, Pleadings, Vol. I, pp.184-194, 503-513.

²⁸ See Oda, Shigeru, The International Law of the Ocean Development (The Netherlands, Sijthoff & Noordhoff, 1979), Basic Documents, Vol. I, III.C.9, pp.1-8. For an instance of protest (in this case, against Senegal's establishment of a 110-mile exclusive fishing zone in 1972), see Rovine, A., Digest of the United States Practice in International Law (Washington, Department of State, 1973), p.256.

²⁹ The hierarchy of evidences was originally proposed by Prof. Schwarzenberger. See The Inductive Approach to International Law (London, Stevens & Sons, 1965), esp. at pp.39-40, 44-45. His proposal, however, differs from the notion advanced here in that he proposes a hierarchy between the law-ascertaining agencies defined in art 38 of the ICJ's Statute, while this study is concerned solely with the hierarchy of the evidences which originate from the organs of a State.

³⁰ See Parry, Clive, The Sources and Evidences of International Law (Manchester, Manchester Univ. Press, 1965), pp.67-70. According to Prof. Cançado Trindade, 'a survey undertaken in the Ministries of External Relations of 124 countries all over the world reveals that, from that total, 80 countries still do not count on clear and specific rules or provisions to govern the access to their diplomatic archives; 20 countries adopt the guideline of releasing their diplomatic archives after a period which extends, in principle, from 50 to 75 years; and 24 countries release their diplomatic archives after a period of less than 50 years (many of these adhering to the period of 30 years for the liberation of their documents). To that total one is to add the recently-emancipated States, with few years of independent life, which endeavour to organize the first files of their documentation and which have not yet reached a definition as to the criteria to rule their release'. See Cançado Trindade, A.A., Contemporary International Law-Making: Customary International Law and the systematization of the practice of states, in Sources of International Law, Thesaurus Acroasium 1992, Vol. XIX, p.102.

³¹ See the definition of the different types of international practice in Chapter IV.

³² Emphasis added. See Fisheries case, Pleadings, Vol. II, pp.427, 430-431.

³³ See Lauterpacht, Sir Hersch, The Development of International Law by the International Court (London, Stevens & Sons, 1958), p.368.

³⁴ See Popper, *op. cit. supra* n.16, p.27.

³⁵ The fact that their conclusions may play a certain law-making role, as explained in Chapter VI, is a different question altogether. What is being discussed here is the validity or truth of the Court's pronouncements taken as a law-finding conclusion.

CONCLUSIONS

Many issues were examined in this study, some in more detail than others. No doubt there are still some unresolved problems regarding the nature of the customary process and the customary rule. On many points, however, a tentative answer has been suggested. It would seem unnecessary to reproduce here all the conclusions arrived at in each chapter. It is proposed to make, in conclusion, the following general points.

1. This study has shown that a good understanding of the way in which the customary process operates may shed some light on the nature of the customary rule. That is possible, however, only when the customary process is fully understood. It must be realized, in particular, that the customary process goes through different phases, and that each phase gives rise to a different situation, depending on the general state of the law on the matter. The components of the customary rule have been defined on the basis of this fundamental distinction. Thus, it has been suggested that there are four possible expressions of the subjective element, and the qualities of the international practice concerned vary according to the state of the customary process.

Provided that this connection between the nature of the customary process and the nature of the customary rule is not challenged, one can draw the following general conclusion: that, in the same way as the components of the customary rule assume different expressions according to the phase of the customary process, the customary rule undergoes different stages of development and has distinct expressions according to the phase of the customary process. This conclusion may seem self-evident, but a good deal of misconception about the customary process and the customary rule seems to spring from the failure to perceive it.

This way of viewing the customary process has also proved useful in defining the role of international institutions within it, including the normative impact that their instruments may have upon it. With regard to resolutions of the UN General Assembly, for example, it has

been suggested that the impact that a normative resolution may have on the customary process depends on the time in which it was formulated and adopted (particularly whether the resolution was adopted in the initial, intermediate or final phase of a customary process). The reasoning underlying this approach has already been stated: each phase in a customary process gives rise to a different situation.

2. A second general point examined in this study is that there are several types of customary rules (bilateral, sectional, general and/or universal). They seem to differ from each other on a number of criteria, such as the degree of participation, the binding range and perhaps on the type or content of the *opinio juris* held by the participating States. It is therefore important to bear in mind that customary law (*genus*) comprises different 'species' of custom; they all share some common features, yet they also seem to display significant peculiarities. It would seem that the perception of this distinction has already had an impact on the field of proof in judicial and arbitral proceedings. States and tribunals have been inclined to invoke more rigorous requirements of proof when the case involved an alleged bilateral or sectional custom.

Those categories of custom, however, are not necessarily static or permanent: a sectional custom, for example, could develop into a general custom. States seem to realize this possibility for, as has been shown in Chapter VI, there are cases in which States have made use of regional systems to gradually expand the range of a desirable custom (e.g., on the Exclusive Economic Zone or on the principle of non-intervention), first within the region, then towards other regions or generally.

3. Another point which this study has made is that the legal process is part of a wider political process, and its final outcome is dependent upon the social and structural environment within which States behave. This proposition has been elaborated upon in this study by recourse to the concept of international system. In a way, this is not a mere statement: it offers a different approach to the study of State behaviour within the customary

process. What purpose is served by this approach? Perhaps one is to broaden the frame of legal analysis. Exclusive attention to legal considerations underlying the behaviour of a State may neglect the fact that they are not the only factor to guide that State's behaviour (sometimes they play only an *ex post facto* role). The approach suggested would thus help explain or clarify fully the behaviour of a State. Secondly, a more comprehensive understanding of how States behave may enlighten the analyst on the role that legal considerations play in any given behaviour. Thirdly, this approach could perhaps fulfil a corrective function. A short-sighted legal analysis may in some cases lead to conclusions which misrepresent the true reality. In considering the behaviour of a State as a whole, it is possible then to ascertain with a higher degree of reliability, for example, the legal effects intended by the State concerned.¹ Finally, this approach could perhaps portray a different picture of the customary process: it is no longer a series of unrelated and autonomous acts performed by States, but a process shaped by acts which are performed under the influence of some social and structural factors. The full potentialities of such type of analysis are yet to be explored.

4. This study has endeavoured to explain in considerable detail the two main types of legal effects produced by State acts and interactions within the customary process: (1) the creation of particular legal relationships in the initial stages of the customary process; and (2) the strengthening of, or change in the general state of the law. If the customary process is to be fully understood, it is indispensable to learn how legal relationships are established in the initial stages of the customary process. There seems to be a tendency to study the customary process only from the perspective of the ultimate effects on the general state of the law. This way of viewing the customary process does not seem to be the most appropriate. It restricts the customary process to its final phase (as defined in this work), leaving aside the more dynamic and complex initial phase.

¹ This is particularly helpful for those who welcome the association between the State's intention and the legal effects to be derived from its behaviour.

5. The existence of great theoretical debates on customary law should not mislead the researcher into thinking that the problems raised are of a mere abstract nature. There are many practical problems associated with customary law, particularly for those who engage in the task of ascertaining the existence, content, and state of development of a customary rule. A method for ascertaining customary law was proposed in this thesis to help solve these problems. This study reached the conclusion that, although a solution to hard evidential problems could be suggested, a minimum degree of discretion is still needed for the identification of a customary rule. This is explained by the fact that there is an element of relativity in the components of the customary rule (such as the requirement of general uniformity).

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