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THE SOURCES OF INTERNATIONAL LAW

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SUMMARY

A rule of international law must derive from one of the recognized sources, namely: (1) treaties and conventions; (2) international custom; (3) general principles of law; and (4) the 'subsidiary sources' of judicial decisions and legal teachings. Treaties are binding only on the parties to them; custom (which pre-supposes an established practice and a psychological element known as the *opinio juris*) is in principle binding on all States, unless it is a 'special' or 'local' custom, and save for the exceptional case of the 'persistent objector'. The general principles of law (as evidenced by national legal systems) may be appealed to if a point is not settled either by treaty or custom. Other sources, or alternative conceptions of how law comes into being, have from time to time been suggested, but the traditional analysis continues to be used in practice, in particular by the International Court.

I. INTRODUCTION: WHAT ARE SOURCES OF LAW?

The essence of every legal system is a body of principles and rules that lay down the rights and obligations of the subjects of that system.[1] These may for convenience be called the primary rules' of the system. However, each system also contains rules which can be applied to determine what are the primary rules, how they come into existence and how they can be changed; these we may term 'secondary rules'.[2] In municipal legal systems, ie,

[1] The question whether international law is *solely* a set of principles and rules is controversial, but no-one denies that such principles and rules are comprised in it, and for present purposes it will be sufficient to limit our attention to those principles and rules. Cf the discussion of 'formalism' and 'anti-formalism' in Ch 2, Section V, above. The concept of 'sources' is in itself essentially formalist.

[2] The terminology is that employed by Hart, 1994 in the context of municipal systems; it is less commonly used in this context in international law, but makes for clarity. The distinction primary/secondary was also used by the International Law Commission in its study of State responsibility: the primary roles are

the legal systems applicable within individual States, the presence of these secondary rules is easy to overlook in the actual practice of the law. The landowner suing his neighbour for trespass, or the prosecution in a criminal case, normally do not need to stop and ask themselves, 'Why does encroachment on someone else's land invite legal consequences?', or 'Why is it an offence to do what the defendant has done?'—the law so provides, and that is all. The primary legal rules being applied in these cases did not however spring up from nowhere: they exist because the legislature passed particular legislation, or because a long line of judicial decisions has established that the common law is to this or that effect. Thus there exist secondary rules, to the effect that a Parliament, or other legislative body, has the power to make law; and that the common law as expressed in judicial precedents, constitutes the law of the land—the body of primary rules.

In international law, there exist similar secondary rules, but they are less clearly defined, for a number of reasons. There is, for example, at the international level neither a universal legislative body corresponding to a national Parliament, nor a system of universal judicial jurisdiction which has built up a wide-ranging body of precedent. At the municipal level, legal disputes are usually over the precise application or interpretation of rules, the existence of which is generally recognized: do the circumstances of the case fall within the rule enunciated by the judges in a particular line of cases, or within the purview of a particular statute, as correctly interpreted? At the international level, disputes may frequently turn on whether the legal rule relied on by one State exists at all as a legal rule,[3] since there are controversial aspects of the workings of the secondary rules. There may also be recognition of a rule, but dispute whether it is a rule binding on one or the other party to the dispute (since, as we shall see, not all rules of international law are binding on all States).

These secondary rules are referred to in international law as the *sources* of international law. This terminology highlights the idea that a rule must come *from* somewhere, as well as the idea that there is a flow, a process, which may take time: a rule may exist conceptually, as a proposal or a draft, and later come to be accepted as binding. The problem may then be to determine at what moment the rule acquired the status of a rule of existing, binding, law. Prior to that moment, it forms part of what is called *lex ferenda* (law which ought to be made, ie, developing or embryonic law); thereafter it is part of the *lex lata* (law which has been made, positive law).

It is traditional to distinguish between what are called the *material sources* of international law, and the *formal sources*. In relation to a particular rule which is alleged to be a rule of international law, the material source is simply the place—normally a document of some kind—in which the terms of the rule are set out. This may be a treaty, a resolution of the UN General Assembly, a proposal of the UN International Law Commission, a judicial decision, a 'restatement' by a learned body, or even a statement in a textbook. In identifying a material source, no account need be taken of the legal authority of the textual instrument: for example, a treaty which has never come into force at all, and is thus not binding

those imposing specific obligations on States; the secondary rules determine how those obligations are to be implemented, or what consequences flow from their breach.

[3] For example, the dispute between Hungary and Slovakia whether there exists in customary law a rule of automatic succession to a treaty by a successor State in case of dissolution of a State party to the treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, paras 116–121; and in a more narrow context, the *Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua*, judgment of 13 July 2009, paras 34–36.

on anyone as a treaty, may still be the material source for a rule which has acquired the force of binding law by another route.[4]

The question of the authority for the rule as a rule of law, binding on States, is determined by the *formal* source of the rule. The generally recognized formal sources are identified in Article 38 of the Statute of the International Court of Justice (ICJ), to be examined in more detail below, but the two most important sources in practice are treaties and international custom. If a rule is laid down in a treaty, then it is binding on the States parties to that treaty, and the treaty is at once the material source and the formal source of the rule. The rule may however be taken over and applied in the practice of other States, not parties to the treaty, in such a way, and to such an extent, that it takes on the character of a customary rule. For these States, the material source of the rule will still be the original treaty, but the formal source will be international custom.

If the secondary rule defining the recognized sources of international law operates to make it possible to determine what are the primary rules, governing the actual conduct of States, what rule—presumably a tertiary rule—determines the identification of the secondary rules? If the question is asked, 'Why should I comply with this primary rule?', the answer may be, 'Because it is a rule of treaty-law, laid down in a treaty to which you are a party'; but what then is the answer to the question, 'Why must I comply with treaty-law?' The classic answer is that there is a principle *pacta sunt servanda*, that what has been agreed to must be respected; this is an example of a secondary rule, one which defines treaties and agreements as formal sources of international law. Theoretically one may then ask, 'But why should I respect the principle *pacta sunt servanda*? Is there a higher principle still requiring me to respect it?' Article 38 of the ICJ Statute, already referred to, provides that the Court, in deciding disputes in accordance with international law, is to apply international treaties and conventions in force; but that is no more than a recognition of treaties as one of the formal sources of primary rules. The Statute is in fact a material source of the secondary rule that treaties make law, but not a formal source of that rule.

Much legal ingenuity has been deployed to discuss this problem, to avoid an infinite regression of secondary, tertiary, quaternary, etc, rules, by establishing, for example, a 'fundamental norm' on which all international law is based. None of the theories advanced commands universal assent; but nor are any of them actually essential to international legal relations in practice. The issue is fortunately one of purely academic interest. The realistic answer to the conundrum can probably only be that this is the way international society operates, and has operated for centuries, and probably the only way in which anything that can claim to be a society or community could possibly operate. This is particularly evident in the case of the principle *pacta sunt servanda*: if an agreement does not have to be respected, is there any point in making it?[5]

The doctrine of sources has attracted an enormous amount of discussion and criticism among international lawyers, and various proposals have been made for re-thinking the subject, or for getting rid of the idea of 'sources' altogether. While the traditional view presents some anomalies and difficulties, it has so far proved the most workable method

[4] For example, the 1933 Montevideo Convention on the Rights and Duties of States is regularly referred to as containing a convenient legal definition of a 'State', and of the conditions which must be met for that status to be acquired, despite the fact that for want of ratifications it never came into force as a treaty.

[5] There does of course exist a class of agreements not intended to be strictly legally binding: the obligations so created are known as 'soft law'. (See Ch 5 and Ch 6 Section IV, below.)

of analysing the way in which rules and principles develop that States in practice accept as governing their actions. The reasoning in the decisions of the International Court of Justice has used the traditional terminology and structure of source-based law, consistently with the requirements of Article 38 of the Court's Statute (which is commonly treated as an enumeration of 'sources' although the text does not use the term). At the present time, it seems unlikely that any other system will be able to replace the traditional approach. It is striking that such a comparatively recent development as international environmental law rests on the application of the traditional sources (see Ch 23, Section V, below).

II. ARTICLE 38 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

When the Permanent Court of International Justice was to be established in 1922, a Commission of Jurists was appointed to draw up its Statute, the legal instrument to govern its workings. The Permanent Court was to be the first standing international tribunal to decide disputes between States; if States were to be willing to accept it, one of the matters that had to be defined in advance was the nature of the law that the Court would apply. There was at the time an established tradition of referring inter-State disputes to binding arbitration, on an ad hoc basis, or of submitting groups of related disputes to a temporary standing body, usually called a Claims Commission; but the terms of reference of arbitral bodies or claims commissions were almost always defined in the international agreement (known as the *compromis*) by which they were established.

The text which was adopted as Article 38 of the Permanent Court Statute was re-adopted after the Second World War, when the Permanent Court was wound up and replaced by the International Court of Justice, with one change in the wording. The present text is as follows:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59,[6] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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

The clause in the first paragraph 'whose function is to decide in accordance with international law such disputes as are submitted to it' was added in 1946; its effect is to emphasize that, by applying what is mentioned in sub-paragraphs a to d, the Court will be

[6] Article 59 provides that 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

applying international law, ie, that the sources mentioned in those sub-paragraphs constitute recognized sources of international law, and (presumably) the sole sources of that law. That this was already the intention of the text is clear from the records of its drafting; but it also follows from the inclusion of paragraph 2. To decide a case *ex aequo et bono* is by definition to decide otherwise than in accordance with the applicable law: to decide simply what seems to the judge or arbitrator the fairest solution in the circumstances.[7] Since the Court only possesses the power to decide in this way when the parties agree to it, all other decisions must be in accordance with law—and law as derived from the sources mentioned in paragraph 1.

Article 38 has been much criticized as a definition of the sources of international law, and it has often been suggested that it is inadequate, out of date, or ill-adapted to the conditions of modern international intercourse. As already noted, there have been suggestions that the whole concept of 'sources' should be thrown overboard, to be replaced by, for example, the 'recognized manifestations of international law'; it has also been suggested that the existence of additional sources should be accepted. Some of these latter suggestions will be addressed in Section IV below; but the fact is that no new approach has acquired any endorsement in the practice of States, or in the language of their claims against each other; and the International Court has in its decisions consistently analysed international law in the terms of Article 38. It may of course be objected that this is not necessarily significant, because whether or not Article 38 is obsolete as a general statement, the Court remains bound by it; but if there had really been a substantive change in international legal thinking on the question of sources, the Court might have been expected at the least to have taken note of it, while drawing attention to its inability to go beyond the terms of its own Statute.

A. TREATIES AND CONVENTIONS IN FORCE

The principle *pacta sunt servanda* has already been mentioned as the basis for the binding nature of treaties. The whole point of making a binding agreement is that each of the parties should be able to rely on performance of the treaty by the other party or parties, even when such performance may have become onerous or unwelcome to such other party or parties. Thus a treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law. The 1969 Vienna Convention on the Law of Treaties,[8] which is to a very large extent the codification of pre-existing general law on the subject, states the principle in Article 26, under the heading '*Pacta sunt servanda*': 'Every treaty is binding upon the parties to it and must be performed by them in good faith'.

It has been argued that a treaty is better understood as a source of *obligation*, and that the only rule of *law* in the matter is the basic principle that treaties must be observed

[7] The Court has never been asked by the parties to a dispute to decide it in this way; but it has been suggested (by Judge Oda) that maritime delimitation cases, in view of the difficulty of basing any specified delimitation line on a framework of logically compelling legal argument, have in fact been decided on an unavowed *ex aequo et bono* basis, with the tacit consent of the parties.

[8] A multilateral convention adopted in 1969, on the basis of a draft prepared by the UN International Law Commission, and accepted by a large number of States. It codifies practically the whole of the law of treaties (see further Ch 7 below).

(Fitzmaurice, 1958). Certainly the content of, let us say, a bilateral customs treaty, setting rates of duties and tariffs on various goods, does not look much like 'law'. At the other extreme, there are more and more examples in modern law of so-called 'law-making' treaties: multilateral conventions that lay down for the parties to them a whole regime, as for example the Geneva Conventions in the field of humanitarian law, the Genocide Convention, or the Vienna Convention on the Law of Treaties itself. The principle in each case is however the same: that the States parties accept a commitment to certain behaviour that would not be legally required of them in the absence of the treaty. They may indeed by treaty vary or set aside the rules that general international law imposes on all States, though such variation or exclusion is only effective between the parties; and this power is subject to the limits imposed by *jus cogens*.[9] The traditional doctrine that treaties are sources of law is therefore recommended by logic and convenience.

If it is axiomatic that a party to a treaty is committed to what has been agreed in the treaty, it is equally axiomatic that a State which is not a party to a treaty is under no such obligation. The principle *res inter alios acta nec nocet nec prodest* (a transaction between others effects neither disadvantage nor benefit) is as valid as *pacta sunt servanda* and can in fact be regarded as a corollary of that principle. As the Vienna Convention on the Law of Treaties (Article 34) expresses the point: 'A treaty does not create either obligations or rights for a third State without its consent'. The Vienna Convention being itself a treaty, its codifying provisions are thus themselves only applicable *as treaty-law* to the States which have ratified it.

There are two apparent exceptions to this principle—but they are only apparent. First, the situation in which an obligation stated in a treaty is or becomes an obligation of general customary law (a process to be examined below), in which case the non-party State may be bound by the same substantive obligation, but as a matter of customary law, and not by the effect of the treaty. This is in fact the case of the Vienna Convention on the Law of Treaties itself; its provisions have frequently been applied by the International Court, on the basis that such provisions state rules which apply to all States as customary law, to a State not party to the Convention. Secondly, it is possible for a State not a party to a treaty to accept an obligation stated in the treaty, or to derive a benefit from the treaty, if all States concerned—the parties to the treaty and the outsider State—are so agreed. In effect a new treaty is concluded extending the scope of the original treaty to the third State.[10]

The normal way in which a State becomes bound by the obligations provided for in a treaty is by becoming a party to it, through the processes to be described in Chapter 7, Section III. Where the treaty is a multilateral convention of the 'law-making' type, it is possible that a State could, simply by conduct, indicate its acceptance of the regime of the convention as applicable to itself. In the *North Sea Continental Shelf* case before the International Court, it was argued by Denmark and the Netherlands that the Federal

[9] This concept is examined in Section IV B below, and will be dealt with more fully in Ch 6: briefly, international law is regarded as divided into *jus dispositivum*, the rules of law from which States may freely contract out, by treaty; and *jus cogens*, a category composed of a limited number of norms which, because of their importance in and to the international community, remain binding notwithstanding any agreement to the contrary (see Articles 53 and 64 of the Vienna Convention on the Law of Treaties). The concept is generally accepted, but there remains considerable controversy as to its application, as to how rules of *jus cogens* acquire that status, and which rules have in fact acquired it.

[10] See Articles 35 and 36 of the Vienna Convention on the Law of Treaties.

Republic of Germany, which had signed but not ratified the 1958 Geneva Convention on the Continental Shelf, had 'by conduct, by public statements and proclamations, and in other ways,... unilaterally assumed the obligations of the Convention; or... manifested its acceptance of the conventional régime.'[11] The Court rejected this contention on the facts of the case, but did not absolutely rule out any possibility of such a process; it did however make it clear, first that 'only a very definite, very consistent course of conduct on the part of [the] State' could have the effect suggested, and secondly that there could be no question of a State being permitted to claim rights or benefits under a treaty 'on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime'.[12]

Article 38 of the ICJ Statute refers to 'treaties and conventions in force', thus excluding treaties which have not, or not yet, come into force, or which have ceased to be binding on the parties.[13] The question whether a particular treaty is 'in force' between a particular pair of States is however not an absolute one, to be answered simply by checking that each of them has ratified it. A new State may be bound by certain treaties concluded by its predecessor, without a formal Act of Accession thereto. A further complication is due to the possibility of reservations made by parties when signing or ratifying the treaty: in the case of a complex multilateral treaty, there may in effect be a number of parallel regimes operating between different pairs of States, depending on the extent to which a State may have excluded certain provisions of the treaty by reservation, and the extent to which the reservation has been accepted (or more precisely, not objected to) by other States parties. The operation of the rules as to reservations will be explained more fully in Chapter 7, Section VI.

B. CUSTOM

1. Introduction

It is probably a universal characteristic of human societies that many practices which have grown up to regulate day-to-day relationships imperceptibly acquire a status of inexorability: the way things have always been done becomes the way things *must* be done. In treating custom as a source of legal rules, international law does not deviate from the pattern discernible in municipal legal systems. Historically, at the international level, once the authority of natural law, in the sense of what was given by God or imposed by the nature of an international society made up of independent princes, had weakened, it was natural to derive legal obligations from the legitimate expectations created in others by conduct. The precise nature and operation of the process have, however, always presented obscurities.

[11] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 27.

[12] Ibid, para 28. Underlying the distinction is of course the question of the consent of the original parties: they may be presumed to have no objection to other States accepting the *obligations* of the Convention, but if other States are to enjoy *benefits* under it there must be positive consent of the original parties, as indeed the Vienna Convention requires. This point was made by the ICJ in the *North Sea Continental Shelf* case, ibid, para 28.

[13] The question whether neglected treaties cease to be binding through 'desuetude' was raised, but not answered, before the ICJ in the *Nuclear Tests* and *Aegean Sea Continental Shelf* cases; it remains controversial.

One approach is to regard all custom as a form of tacit agreement: States behave towards each other in given circumstances in certain ways, which are found acceptable, and thus tacitly assented to, first as a guide to future conduct and then, little by little, as legally determining future conduct. The difficulty of this analysis is that if agreement makes customary law, absence of agreement justifies exemption from customary law. On that basis, a given rule would only be binding on those States that had participated in its development, and so shown their assent to the rule. Yet it is generally recognized that, subject to two exceptions, to be indicated below, a rule of general customary international law is binding on all States, whether or not they have participated in the practice from which it sprang. The problem is particularly acute in the case of new States: during the period of decolonization after the Second World War, some attempt was made by the newly independent States to argue that they began life with a clean slate, so far as rules of customary law were concerned. They claimed to be able to pick and choose which established rules of law they would accept, and which they would reject. This view was not accepted by other States, and later quietly abandoned by its adherents. It was probably realized that it could have been a two-edged sword; that most rules of general custom are such that a State which rejects one of them today in one dispute, may find it needs to invoke the same rule in its favour tomorrow in a different dispute.[14]

2. The two-element theory

The traditional doctrine is that the mere fact of consistent international practice in a particular sense is not enough, in itself, to create a rule of law in the sense of the practice; an additional element is required. Classical international law sees customary rules as resulting from the combination of two elements: an established, widespread, and consistent practice on the part of States; and a psychological element known as the *opinio juris sive necessitatis* (opinion as to law or necessity), usually abbreviated to *opinio juris*. The judicial *locus classicus* on the point is the ICJ judgment in the *North Sea Continental Shelf* case; the Court was discussing the process by which a treaty provision might generate a rule of customary law, but its analysis is applicable to custom-creation generally:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[15]

The idea that State practice, to be significant, must be accompanied by a conviction of adhering to an *existing* rule of law, is here merely re-stated; it had long been recognized in international law. It has however been frequently pointed out that it is paradoxical in its implications: for how can a practice ever develop into a customary rule if States have to believe the rule already exists before their acts of practice can be significant for the

[14] The question of the application to a new State of treaties concluded by its predecessor, where each treaty could be considered independently, continued to cause controversy.

[15] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 77. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p 13, para 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, paras 183 and 207.

creation of the rule? Or is it sufficient if initially States act in the *mistaken* belief that a rule already exists, a case of *communis error facit jus* (a shared mistake produces law)?

The problem has been argued over endlessly by legal writers,[16] some of whom have sought to escape the dilemma by denying the two-element theory itself. It is clear that the elements of practice and *opinio* are closely intertwined: the Court spoke of the practice as 'evidence' of the existence of the *opinio juris*, and for some authors only the psychological element is essential, the role of State practice being merely to prove the existence of that element. This makes it possible to see a rule of international customary law where there is insufficient practice, or none, but there is other evidence that States believe in the existence of a rule of law; this is particularly relied on by those who see General Assembly resolutions as law-creating. An alternative approach is to see custom as essentially practice, the only relevance of the beliefs or intention of the States involved in the practice being to exclude practices rendered legally binding by a treaty obligation, or regarded by all concerned as dictated merely by courtesy or comity, without any legal commitment to continued observance.

Since the *opinio juris* is a state of mind, there is an evident difficulty in attributing it to an entity like a State; and in any event it has to be deduced from the State's pronouncements and actions, particularly the actions alleged to constitute the 'practice' element of the custom. It should not be overlooked that State practice is two-sided; one State asserts a right, either explicitly or by acting in a way that impliedly constitutes such an assertion, and the State or States affected by the claim then react either by objecting or by refraining from objection. The practice on the two sides adds up to imply a customary rule, supporting the claim if no protest is made, or excluding the claim if there is a protest. The accumulation of instances of the one kind or the other constitutes the overall practice required for establishment of a customary rule.

It also follows from the psychological requirement of *opinio juris*, the consciousness of conforming to a rule, that if the acts of practice are to be attributed to a motive other than such consciousness, they cannot show *opinio juris*. This point also arose in the *North Sea Continental Shelf* case: the Court, when considering whether a rule of maritime delimitation laid down in the 1958 Geneva Convention on the Continental Shelf had become a customary rule, noted that a number of instances of delimitation complying with the rule were delimitations effected by States parties to the Convention. Those States 'were therefore presumably…acting…in the application of the Convention', and thus 'From their action no inference could legitimately be drawn as to the existence of a rule of customary law…'[17]

Similar reasoning may be applied to the situation of States which, for one reason or another, cannot participate in a practice giving rise to a customary rule: an obvious example is that of land-locked States in relation to a rule concerning the delimitation of maritime areas off the coasts of coastal States. Such States may have a view as to the existence of such a rule, but one which cannot be demonstrated by acts of practice, and thus not a true *opinio juris*. It was probably this consideration that led the International Court, in the *North Sea Continental Shelf* case, to refer to the importance, in assessing the law-creative effect of State practice, of the participation in it of 'States whose interests are

[16] For an idiosyncratic modern re-statement of the difficulties, see Kammerhofer, 2004.

[17] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 76.

specially affected'.[18] More controversial was the question that arose in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*:[19] was the practice of the States that actually possessed such weapons more significant than that of the States which did not? The Court did not, in its advisory opinion, comment directly on the point.

A further problem of a similar nature is the determination of customary law in a field in which there is no practice at all, because the subject matter is new. This was the case when the first satellites were launched into space, and the idea of a landing on the moon or other celestial bodies began to look like something more than an impractical dream. Did a satellite, in orbiting the earth, infringe the sovereignty of the States whose territory it overflew? Were celestial bodies open to appropriation and sovereignty in the same way as unoccupied territories on earth? On the first point, the only practice at the time of the Russian *Sputnik* was the launching of that object itself, and the reaction, or lack of reaction, of other States: on the second point, there was no practice, and unlikely to be any for a number of years. The problem was solved by international treaty;[20] but it was in this context that the suggestion was made that there had come into existence a new form of customary law, usually known as 'instant custom'. According to this view, first advanced in 1965 (Cheng, 1965), custom could be deduced from declarations in General Assembly resolutions, such resolutions constituting at once elements of State practice and evidence of the necessary *opinio juris*. This theory, though influential for a time, never gained full acceptance, and eventually it was implicitly rejected by the International Court in the cases of *Military and Paramilitary Activities in and against Nicaragua*[21] and *Legality of the Threat or Use of Nuclear Weapons*,[22] in which General Assembly resolutions were treated as evidence of *opinio juris*, but not as acts of State practice. The position appears to be that in a field of activity in which there has not yet been any opportunity for State practice, there is no customary law in existence.

3. Practice

Since international law, including custom, regulates the relationships between States, the practice that is relevant for establishing a rule of customary law is essentially the practice (action or inaction) of States in relation to each other, or in relation to other recognized international actors, such as international organizations. This follows from the nature of the process whereby custom grows from action by one subject of law which is either accepted, rejected, or tolerated by the other subjects of law. Consequently, the practice of a State in relation to its own citizens, a matter of 'domestic jurisdiction' within the meaning of Article 2 (7) of the United Nations Charter, is in principle without significance for the establishment of a customary rule.[23] This may appear to be in contradiction with the

[18] Ibid, para 74.

[19] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226.

[20] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967), 610 UNTS, p 205.

[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, paras 184 and 188.

[22] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, para 73.

[23] The treatment of foreign nationals, in particular those resident or present in the State's territory, may give rise to a claim of diplomatic protection by the national State, and is thus very relevant to the development of customary law in this field.

corpus of the modern law of human rights, which prescribes numerous limitations on the freedom of states in this domain. Human rights law has however grown very largely through the adoption of wide-ranging international conventions, precisely because of the difficulty in establishing a practice-based customary law.[24] Since many of these conventions have been ratified by almost all States, and in the view of the moral authority of the principles which they embody, it is widely argued that the conventional provisions, or some of those principles, are binding also on non-parties, and one of the grounds for this contention is that there is, despite the theoretical problem just noted, a customary law of human rights. The question remains controversial, though there are signs that many States recognize a compromise approach which is workable, even if it may be difficult to define legally.[25]

The controversy over customary human rights law also involves the problem whether non-binding resolutions of international bodies, particularly the United Nations General Assembly, rank as State practice: on this see Section IV B 3 below.

The settled practice required to establish a rule of customary law does not need to be the practice of every single State of the world, as long as it is widespread and consistent. A special problem is that of the divergence between States' assertion of the existence of a particular rule of customary law, and their practice inconsistent with it. In the field of human rights law, for example, it is probably the case that the municipal law of practically every State of the world prohibits torture, and States are generally agreed, in theory, that there is a rule of international law forbidding it; yet there is no doubt that torture continues to be widely practised. Can a rule which flies in the face of consistent practice still be said to have existence as one of customary law? An observation of the International Court in the case of *Military and Paramilitary Activities in and against Nicaragua*, in connection with the question of the existence of customary rules forbidding the use of force or intervention, is in point here:

> It is not to be 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 or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of recognition of a new rule. If a State acts in a way prima facie inconsistent with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, 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.[26]

[24] The problem is not merely whether other States *may* legally object to actions by a State regarded as contrary to human rights, but also whether they will have any interest in doing so, and thus in carrying out acts creative of State practice; the situation is very different in the field of, for example, international trade.

[25] See Byers, 1999, pp 43–35.

[26] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, ICJ Reports 1986*, p 14, para 186.

The Court here rules that conduct inconsistent with an existing rule is not necessarily an indication of the recognition, or even the emergence, of a new rule; but it does at the same time recognize that this is a way in which a new rule may be discerned. Later in the same decision, discussing the principle of non-intervention, it observed that 'Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend toward a modification of customary international law'.[27] The paradox of *opinio juris* is of course here emphasized: if a State decides to act in a way inconsistent with a recognized rule of custom, it will no doubt have good and sufficient reason for doing so, and perhaps even for thinking that its approach should be generalized—that the rule needs to be modified consistently with its action. It will however, almost by definition, not be acting because it is convinced that there is already a new rule. The process by which customary rules change and develop thus presents theoretical difficulties; but it is a process which does occur. Customary law, in the traditional conception of it, is not a rigid and unchangeable system, though it is sometimes criticized as being such.

An important difference between customary law and law derived from treaties is that, as already observed, in principle customary law is applicable to all States without exception, while treaty-law is applicable as such only to the parties to the particular treaty. A State which relies in a dispute on a rule of treaty-law has to establish that the other party to the dispute is bound by the treaty; whereas if a claim is based on general customary law, it is sufficient to establish that the rule exists in customary law, and there is no need to show that the other party has accepted it, or participated in the practice from which the rule derives.[28] There are two exceptions to this principle: alongside general customary law there exist rules of *special* or *local* customary law, which are applicable only within a defined group of States; and it is in principle possible for a State which does not accept a rule which is in the process of becoming standard international practice to make clear its opposition to it, in which case it will be exempted from the rule when it does become a rule of law, having the status of what is generally called a *persistent objector.*

As regards *local customary law*, perhaps the only clear and well-known example is that relating to the practice of diplomatic asylum in Latin America, whereby the States of the region recognize the right of the embassies of other States of the region to give asylum to political fugitives.[29] The rule is purely local in that it is not asserted in favour of, or against, States outside the region: for example, neither the British Embassy in Buenos Aires, nor the Argentine Embassy in London, would be regarded as entitled to offer asylum. The International Court had to consider the detailed application of the rule in the *Asylum* and *Haya de la Torre* cases, in which Colombia relied, against Peru, on 'an alleged regional or local custom peculiar to Latin-American States'. In the *Asylum* case the Court observed that:

[27] Ibid, para 207.

[28] If the dispute is subjected to arbitration or judicial settlement, there is theoretically no need even to establish the existence of the rule; according to the principle *jura novit curia* (the court knows the law), no proof of general rules of law is required. However, in practice litigant States do endeavour to prove the existence of the rules of law on which they base their claims.

[29] Another alleged rule of regional customary law was pleaded in the *Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua*, but the ICJ found it unnecessary to decide whether such a rule existed: Judgment of 13 July 2009, paras 34–36.

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[30]

Further on in its judgment, the Court held that 'even if such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has on the contrary repudiated it…'.[31] This has been held by some commentators to constitute a finding that Peru had the status of 'persistent objector', to be discussed in a moment; but it can also be understood as a finding that the regional custom, at least on the specific point in dispute, applied to a group of States which did not include Peru.

It has even been held that a special custom may exist between two States only: in the *Right of Passage over Indian Territory* case, Portugal relied on such a custom as regulating the relationship between itself and India concerning access to certain Portuguese enclaves in Indian territory. The Court held 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. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[32]

It would seem evident that two must be the minimum number of States to be subject to a special custom: if a single State claimed (otherwise than as a 'persistent objector'—see below) to be entitled in certain respects to rely on rules different from those generally in force, such a claim could only be maintained as the result of a general acceptance making it a matter of general customary law. Thus the suggestion that has from time to time been made that the USA, by reason of its position as sole remaining superpower, and self-appointed global policeman,[33] is not necessarily bound by such rules as that of non-intervention, cannot rest on the assertion of a special custom.

The notion of the '*persistent objector*' has been identified in the reasoning in the *Asylum* case; but the idea is usually traced back to the earlier *Fisheries* case between the UK and Norway, which concerned the legality of the baselines drawn by Norway around its coasts in order to calculate the breadth of its territorial sea. The UK argued that the Norwegian baselines were inconsistent with a rule of customary law referred to as the 'ten-mile rule', but the Court was not satisfied that any such general rule of customary law existed. However it then added, 'In any event the ten-mile rule would appear to be inapplicable

[30] *Asylum, Judgment, ICJ Reports 1950*, p 266 at p 276.

[31] Ibid, pp 277–278.

[32] *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p 6 at p 39. Cases of this kind are likely to be rare, since it would normally be more appropriate to analyse such a situation as one of tacit agreement, ie, in effect governed by treaty-law. In the *Right of Passage* case this interpretation would have raised problems of succession, the arrangement dating back to the Mughal period, and left undisturbed by the successive British and independent Indian governments.

[33] Cf the views of McDougal on hydrogen bomb testing, and (more recently) Murswiek, 2002, pp 195ff, rejecting the US approach as contrary to the principle of the sovereign equality of States.

as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'.[34]

As a result of, in particular, a very influential article by Sir Gerald Fitzmaurice (Fitzmaurice, 1953), it became accepted by most scholars that a State which objected consistently to the application of a rule of law while it was still in the process of becoming such a rule—in other words, while practice consistent with the possible rule was still accumulating, but before the rule could be regarded as established—could continue to 'opt out' of the application of the rule even after it had acquired the status of a rule of general customary law.

This is an attractive theory, since if there were no possibility of dissent from a nascent rule, customary law would be created by the majority of States and imposed willy-nilly on the minority; but there is little State practice to support it (and if it exists, it is itself a rule of customary law established by practice), and its very existence has been questioned by commentators (Charney, 1993). What is certain is that customary law is not made simply by majority: in the case of *Legality of the Threat or Use of Nuclear Weapons*, the Court accepted that the opposition of the handful of nuclear States to any customary rule prohibiting such weapons blocked the creation of such a rule, even though it was favoured by a substantial majority of the States of the world.[35]

C. THE GENERAL PRINCIPLES OF LAW

When Article 38 of the Statute of the Permanent Court was being drafted, the Commission of Jurists was concerned that in some cases the future Court might find that the issues in dispute before it were not governed by any treaty, and that no established rule of customary law either could be found to determine them. It was thought undesirable, and possibly inappropriate in principle, that the Court should be obliged to declare what is known as a *non liquet*—a finding that a particular claim could neither be upheld nor rejected, for lack of any existing applicable rule of law. This is to be distinguished from a finding that a particular claim is not supported by a positive rule of law, which is tantamount to a finding that there exists a negative rule of law. For example, in the *Barcelona Traction, Light and Power Co* case,[36] Belgium claimed that it could demand reparation from Spain for the economic loss suffered by Belgian shareholders in a Canadian company as a result of the bankruptcy of the company in Spain—allegedly brought about by unlawful action attributable to Spain. The Belgian claim was dismissed, on the ground that in customary law, only the national State of the company (Canada) could seek reparation; this was not a *non liquet*, a finding that there was no law on the point, but a finding as to the content of customary law.

The extent to which international legal relations were governed in the 1920s, at the time of the Commission's work, by anything beyond treaties and custom, was obscure, but the Commission was able to agree that, failing one of those sources, the Court should apply 'the general principles of law recognized by civilized nations'. Up to the present, neither the Permanent Court nor the ICJ has based a decision on such principles, though there are

[34] *Fisheries, Judgment, ICJ Reports 1951*, p 116 at p 131.

[35] *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996*, p 226, para 73.

[36] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p 3.

decisions by arbitral bodies (to whom, of course, Article 38 of the ICJ Statute has no direct application) which have relied on the concept. There is however no unanimity among scholars as to the nature of the principles which may be invoked under this head. There are broadly two possible interpretations.

According to one interpretation, the principles in question are those which can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them.[37] This interpretation gives force to the reference to the principles being those 'recognized by civilized nations'; the term 'civilized' is now out of place, but at the time it was apparently included inasmuch as some legal systems were then regarded as insufficiently developed to serve as a standard of comparison.[38] In line with this interpretation, parties to cases before the ICJ have at times invoked comparative studies of municipal law.[39] An alternative interpretation is to the effect that, while the Commission of Jurists may have had primarily in view the legal principles shared by municipal legal orders, the principles to be applied by the Court also include general principles applicable directly to international legal relations, and general principles applicable to legal relations generally. Many of these find expression in customary law, and therefore exist as rules derived from that source; others are in effect assertions of secondary rules (of the kind defined in the Introduction to this chapter), eg, the principle *pacta sunt servanda*. Some are applied unquestioningly as self-evident: for example the principles already mentioned for determining the relationship between successive treaties (and possibly successive legal rules generally)—the principles that the special prevails over the general, and that the later prevails over the earlier.

There is however a striking lack of evidence in international practice and jurisprudence of claims to a specific right of a concrete nature being asserted or upheld on the basis simply of the general principles of law.[40] It may be that such a phenomenon is inconsistent with the nature of such principles; in any event, this particular source of law is of less practical importance in determining the rights and obligations of States in their regular relations.

[37] A pioneering and influential work on this subject was Lauterpacht, 1927. A clearer statement of the derivation of general principles from national systems is to be found in the Rome Statute of the International Criminal Court: 'general principles of law derived by the Court from national laws of legal systems of the world' (Article 21(1)(c)). On the dangers of analogy from municipal systems, see Thirlway, 2002.

[38] In the *Abu Dhabi* arbitration in 1951, 18 ILR 144, the arbitrator found that the law of Abu Dhabi contained no legal principles that could be applied to modern commercial instruments, and could not therefore be applied to an oil concession.

[39] In the case of *Right of Passage over Indian Territory*, Portugal argued that general principles of law supported its right to passage from the coast to its enclaves of territory, and adduced a comparative study of the provisions in various legal systems for what may be called 'rights of way of necessity'. When for the first time an application was made by a State (Malta) to intervene in a case between two other States (Tunisia and Libya) on the basis of having an interest which might be affected by the decision in the case (a possibility referred to in Article 62 of the Court's Statute), Malta similarly relied on a comparative law study showing the conditions and modalities of intervention in judicial proceedings in various national courts.

[40] One field in which the existence of a general principle of law has been asserted is on the controversial question of the binding effect of provisional measures (see below, Ch 20, Section VI A). When the question was examined by the ICJ in the *LaGrand* case, the Court dealt with it purely as a question of interpretation of the Statute, without recourse to 'general principles', *LaGrand (Germany v United States of America), Merits, Judgment, ICJ Reports 2001*, p 466, para 99.