3

Sources

Ascertainment of the law on any given point in domestic legal orders is not usually too difficult a process.[1] In the English legal system, for example, one looks to see whether the matter is covered by an Act of Parliament and, if it is, the law reports are consulted as to how it has been interpreted by the courts. If the particular point is not specifically referred to in a statute, court cases will be examined to elicit the required information. In other words, there is a definite method of discovering what the law is. In addition to verifying the contents of the rules, this method also demonstrates how the law is created, namely, by parliamentary legislation or judicial case-law. This gives a degree of certainty to the legal process because one is able to tell when a proposition has become law and the

[1] See generally C. Parry, *The Sources and Evidences of International Law*, Cambridge, 1965; M. Sørensen, *Les Sources de Droit International*, Paris, 1946; V. D. Degan, *Sources of International Law*, The Hague, 1997; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 22; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, chapter 1; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 111; A. Boyle and C. Chinkin, *The Making of International Law*, Oxford, 2007; G. M. Danilenko, *Law-Making in the International Community*, The Hague, 1993; G. I. Tunkin, *Theory of International Law*, London, 1974, pp. 89–203; J. W. Verzijl, *International Law in Historical Perspective*, Leiden, 1968, vol. I, p. 1; H. Lauterpacht, *International Law: Collected Papers*, Cambridge, 1970, vol. I, p. 58; *Change and Stability in International Law-Making* (eds. A. Cassese and J. Weiler), Leiden, 1988; A. Bos, *A Methodology of International Law*, Amsterdam, 1984; A. Cassese, *International Law*, 2nd edn, Oxford, 2005, chapters 8–10; A. Pellet, 'Article 38' in *The Statute of the International Court of Justice: A Commentary* (eds. A. Zimmermann, C. Tomuschat and K. Oellers-Frahm), Oxford, 2006, p. 677; M. Virally, 'The Sources of International Law' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 116; C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 HR, 1993, p. 195; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 HR, 1994, p. 219; M. Mendelson, 'The International Court of Justice and the Sources of International Law' in *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 63; G. Abi-Saab, 'Les Sources du Droit International – Un Essai de Déconstruction' in *Le Droit International dans un Monde en Mutation*, Montevideo, 1994, p. 29, and O. Schachter, 'Recent Trends in International Law-Making', 12 Australian YIL, 1992.

necessary mechanism to resolve any disputes about the law is evident. It reflects the hierarchical character of a national legal order with its gradations of authority imparting to the law a large measure of stability and predictability.

The contrast is very striking when one considers the situation in international law. The lack of a legislature, executive and structure of courts within international law has been noted and the effects of this will become clearer as one proceeds. There is no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law. One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule. This perplexity is reinforced because of the anarchic nature of world affairs and the clash of competing sovereignties. Nevertheless, international law does exist and is ascertainable. There are 'sources' available from which the rules may be extracted and analysed.

By 'sources' one means those provisions operating within the legal system on a technical level, and such ultimate sources as reason or morality are excluded, as are more functional sources such as libraries and journals. What is intended is a survey of the process whereby rules of international law emerge.[2]

Article 38(1) of the Statute of the International Court of Justice is widely recognised as the most authoritative and complete statement as to the sources of international law.[3] It provides that:

> 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 recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 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.

Although this formulation is technically limited to the sources of international law which the International Court must apply, in fact since

[2] See also, e.g., M. S. McDougal and W. M. Reisman, 'The Prescribing Function: How International Law is Made', 6 *Yale Studies in World Public Order*, 1980, p. 249.

[3] See e.g. Brownlie, *Principles*, p. 5; *Oppenheim's International Law*, p. 24, and M. O. Hudson, *The Permanent Court of International Justice*, New York, 1934, pp. 601 ff.

the function of the Court is to decide disputes submitted to it 'in accordance with international law' and since all member states of the United Nations are *ipso facto* parties to the Statute by virtue of article 93 of the United Nations Charter (states that are non-members of the UN can specifically become parties to the Statute of the Court: Switzerland was the most obvious example of this until it joined the UN in 2002), there is no serious contention that the provision expresses the universal perception as to the enumeration of sources of international law.

Some writers have sought to categorise the distinctions in this provision, so that international conventions, custom and the general principles of law are described as the three exclusive law-creating processes while judicial decisions and academic writings are regarded as law-determining agencies, dealing with the verification of alleged rules.[4] But in reality it is not always possible to make hard and fast divisions. The different functions overlap to a great extent so that in many cases treaties (or conventions) merely reiterate accepted rules of customary law, and judgments of the International Court of Justice may actually create law in the same way that municipal judges formulate new law in the process of interpreting existing law.[5]

A distinction has sometimes been made between formal and material sources.[6] The former, it is claimed, confer upon the rules an obligatory character, while the latter comprise the actual content of the rules. Thus the formal sources appear to embody the constitutional mechanism for identifying law while the material sources incorporate the essence or subject-matter of the regulations. This division has been criticised particularly in view of the peculiar constitutional set-up of international law, and it tends to distract attention from some of the more important problems by its attempt to establish a clear separation of substantive and procedural elements, something difficult to maintain in international law.

[4] See e.g. G. Schwarzenberger, *International Law*, 3rd edn, London, 1957, vol. I, pp. 26–7.

[5] There are a number of examples of this: see below, chapter 4, p. 138.

[6] See e.g. Brownlie, *Principles*, p. 1. See also Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 111–12, where it is noted that 'les sources *formelles* du droit sont les *procédés* d'élaboration du droit, les diverses techniques qui autorisent à considérer qu'une règle appartient au droit positif. Les sources *matérielles* constituent les fondements sociologiques des normes internationales, leur base politique, morale ou économique plus ou moins explicitée par la doctrine ou les sujets du droit', and Pellet, 'Article 38' p. 714.

Custom[7]

Introduction

In any primitive society certain rules of behaviour emerge and prescribe what is permitted and what is not. Such rules develop almost subconsciously within the group and are maintained by the members of the group by social pressures and with the aid of various other more tangible implements. They are not, at least in the early stages, written down or codified, and survive ultimately because of what can be called an aura of historical legitimacy.[8] As the community develops it will modernise its

[7] See generally, A. D'Amato, *The Concept of Custom in International Law*, Cornell, 1971; M. Akehurst, 'Custom as a Source of International Law', 47 BYIL, 1974–5, p. 1; M. Mendelson, 'The Formation of Customary International Law', 272 HR, 1999, p. 159; B. Cheng, 'Custom: The Future of General State Practice in a Divided World' in *The Structure and Process of International Law* (eds. R. St J. Macdonald and D. Johnston), Dordrecht, 1983, p. 513; A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 AJIL, 2001, p. 757; H. Thirlway, *International Customary Law and Codification*, Leiden, 1972; *Sources of State Practice in International Law* (eds. R. Gaebler and M. Smolka-Day), Ardley, 2002; K. Wolfke, *Custom in Present International Law*, 2nd edn, Dordrecht, 1993, and Wolfke, 'Some Persistent Controversies Regarding Customary International Law', Netherlands YIL, 1993, p. 1; L. Kopelmanas, 'Custom as a Means of the Creation of International Law', 18 BYIL, 1937, p. 127; H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge, 1958, pp. 368–93; J. Kunz, 'The Nature of Customary International Law', 47 AJIL, 1953, p. 662; R. J. Dupuy, 'Coutume Sage et Coutume Sauvage', *Mélanges Rousseau*, Paris, 1974, p. 75; B. Stern, 'La Coutume au Coeur du Droit International', *Mélanges Reuter*, Paris, 1981, p. 479; R. Y. Jennings, 'Law-Making and Package Deal', *Mélanges Reuter*, p. 347; G. Danilenko, 'The Theory of International Customary Law', 31 German YIL, 1988, p. 9; Barberis, 'Réfléxions sur la Coutume Internationale', AFDI, 1990, p. 9; L. Condorelli, 'Custom' in *International Law: Achievements and Perspectives* (ed. M. Bedjaoui), Paris, 1991, p. 206; M. Byers, 'Custom, Power and the Power of Rules', 17 *Michigan Journal of International Law*, 1995, p. 109; H. Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–89 (Part Two)', 61 BYIL, 1990, pp. 3, 31, and Thirlway, 'The Law and Procedure of the International Court of Justice: 1960–89: Supplement, 2005: Parts One and Two', 76 BYIL, 2006, pp. 1, 92; J. Kammerhofer, 'The Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 EJIL, 2004, p. 523; P. M. Dupuy, 'Théorie des Sources et Coutume en Droit International Contemporain' in *Le Droit International dans un Monde en Mutation*, p. 51; D. P. Fidler, 'Challenging the Classic Conception of Custom', German YIL, 1997, p. 198; R. Müllerson, 'On the Nature and Scope of Customary International Law', *Austrian Review of International and European Law*, 1998, p. 1; M. Byers, *Custom, Power and the Power of Rules*, Cambridge, 1999, and A. Carty, *The Decay of International Law?*, Manchester, 1986, chapter 3. See also the 'Statement of Principles Applicable to the Formation of General Customary International Law' in *Report of the Sixty-Ninth Conference*, International Law Association, London, 2000, p. 713.

[8] See e.g. R. Unger, *Law in Modern Society*, London, 1976, who notes that customary law can be regarded as 'any recurring mode of interaction among individuals and groups,

code of behaviour by the creation of legal machinery, such as courts and legislature. Custom, for this is how the original process can be described, remains and may also continue to evolve.[9] It is regarded as an authentic expression of the needs and values of the community at any given time.

Custom within contemporary legal systems, particularly in the developed world, is relatively cumbersome and unimportant and often of only nostalgic value.[10] In international law on the other hand it is a dynamic source of law in the light of the nature of the international system and its lack of centralised government organs.

The existence of customary rules can be deduced from the practice and behaviour of states and this is where the problems begin. How can one tell when a particular line of action adopted by a state reflects a legal rule or is merely prompted by, for example, courtesy? Indeed, how can one discover what precisely a state is doing or why, since there is no living 'state' but rather thousands of officials in scores of departments exercising governmental functions? Other issues concern the speed of creation of new rules and the effect of protests.

There are disagreements as to the value of a customary system in international law. Some writers deny that custom can be significant today as a source of law, noting that it is too clumsy and slow-moving to accommodate the evolution of international law any more,[11] while others declare that it is a dynamic process of law creation and more important than treaties since it is of universal application.[12] Another view recognises that custom is of value since it is activated by spontaneous behaviour and thus mirrors the contemporary concerns of society. However, since international law now has to contend with a massive increase in the pace and variety of state activities as well as having to come to terms with many different cultural and political traditions, the role of custom is perceived to be much diminished.[13]

together with the more or less explicit acknowledgement by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied', p. 49. See also R. Dias, *Jurisprudence*, 5th edn, London, 1985, chapter 9, and H. L. A. Hart, *The Concept of Law*, Oxford, 1961.

9 See e.g. D. Lloyd, *Introduction to Jurisprudence*, 4th edn, London, 1979, p. 649, and H. Maine, *Ancient Law*, London, 1861.

10 See e.g. Dias, *Jurisprudence*.

11 See e.g. W. Friedmann, *The Changing Structure of International Law*, New York, 1964, pp. 121–3. See also I. De Lupis, *The Concept of International Law*, Aldershot, 1987, pp. 112–16.

12 E.g. D'Amato, *Concept of Custom*, p. 12.

13 C. De Visscher, *Theory and Reality in Public International Law*, 3rd edn, Princeton, 1960, pp. 161–2.

There are elements of truth in each of these approaches. Amidst a wide variety of conflicting behaviour, it is not easy to isolate the emergence of a new rule of customary law and there are immense problems involved in collating all the necessary information. It is not always the best instrument available for the regulation of complex issues that arise in world affairs, but in particular situations it may meet the contingencies of modern life. As will be seen, it is possible to point to something called 'instant' customary law in certain circumstances that can prescribe valid rules without having to undergo a long period of gestation, and custom can and often does dovetail neatly within the complicated mechanisms now operating for the identification and progressive development of the principles of international law.

More than that, custom does mirror the characteristics of the decentralised international system. It is democratic in that all states may share in the formulation of new rules, though the precept that some are more equal than others in this process is not without its grain of truth. If the international community is unhappy with a particular law it can be changed relatively quickly without the necessity of convening and successfully completing a world conference. It reflects the consensus approach to decision-making with the ability of the majority to create new law binding upon all, while the very participation of states encourages their compliance with customary rules. Its imprecision means flexibility as well as ambiguity. Indeed, the creation of the concept of the exclusive economic zone in the law of the sea may be cited as an example of this process. This is discussed further in chapter 11. The essence of custom according to article 38 is that it should constitute 'evidence of a general practice accepted as law'. Thus, it is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is 'law'. As the International Court noted in the *Libya/Malta* case, the substance of customary law must be 'looked for primarily in the actual practice and *opinio juris* of states'.[14]

It is understandable why the first requirement is mentioned, since customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do. It is the psychological factor (*opinio juris*) that needs some explanation. If one left the definition of custom as state practice then one would be faced with the

[14] ICJ Reports, 1985, pp. 13, 29; 81 ILR, p. 239. See also the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 253; 110 ILR, p. 163.

problem of how to separate international law from principles of morality or social usage. This is because states do not restrict their behaviour to what is legally required. They may pursue a line of conduct purely through a feeling of goodwill and in the hope of reciprocal benefits. States do not have to allow tourists in or launch satellites. There is no law imposing upon them the strict duty to distribute economic aid to developing nations. The bare fact that such things are done does not mean that they have to be done.

The issue therefore is how to distinguish behaviour undertaken because of a law from behaviour undertaken because of a whole series of other reasons ranging from goodwill to pique, and from ideological support to political bribery. And if customary law is restricted to the overt acts of states, one cannot solve this problem.

Accordingly, the second element in the definition of custom has been elaborated. This is the psychological factor, the belief by a state that behaved in a certain way that it was under a legal obligation to act that way. It is known in legal terminology as *opinio juris sive necessitatis* and was first formulated by the French writer François Gény as an attempt to differentiate legal custom from mere social usage.[15]

However, the relative importance of the two factors, the overt action and the subjective conviction, is disputed by various writers.[16] Positivists, with their emphasis upon state sovereignty, stress the paramount importance of the psychological element. States are only bound by what they have consented to, so therefore the material element is minimised to the greater value of *opinio juris.* If states believe that a course of action is legal and perform it, even if only once, then it is to be inferred that they have tacitly consented to the rule involved. Following on from this line of analysis, various positivist thinkers have tended to minimise many of the requirements of the overt manifestation, for example, with regard to repetition and duration.[17] Other writers have taken precisely the opposite line and maintain that *opinio juris* is impossible to prove and therefore

[15] *Méthode d'Interprétation et Sources en Droit Privé Positif*, 1899, para. 110.

[16] See e.g. R. Müllerson, 'The Interplay of Objective and Subjective Elements in Customary Law' in *International Law – Theory and Practice* (ed. K. Wellens), The Hague, 1998, p. 161.

[17] See e.g. D. Anzilotti, *Corso di Diritto Internazionale*, 3rd edn, 1928, pp. 73–6; K. Strupp, 'Les Règles Générales du Droit International de la Paix', 47 HR, 1934, p. 263; Tunkin, *Theory of International Law*, pp. 113–33, and 'Remarks on the Juridical Nature of Customary Norms of International Law', 49 *California Law Review*, 1961, pp. 419–21, and B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian Journal of International Law*, 1965, p. 23.

of no tremendous consequence. Kelsen, for one, has written that it is the courts that have the discretion to decide whether any set of usages is such as to create a custom and that the subjective perception of the particular state or states is not called upon to give the final verdict as to its legality or not.[18]

The material fact

The actual practice engaged in by states constitutes the initial factor to be brought into account. There are a number of points to be considered concerning the nature of a particular practice by states, including its duration, consistency, repetition and generality. As far as the duration is concerned, most countries specify a recognised time-scale for the acceptance of a practice as a customary rule within their municipal systems. This can vary from 'time immemorial' in the English common law dating back to 1189, to figures from thirty or forty years on the Continent.

In international law there is no rigid time element and it will depend upon the circumstances of the case and the nature of the usage in question. In certain fields, such as air and space law, the rules have developed quickly; in others, the process is much slower. Duration is thus not the most important of the components of state practice.[19] The essence of custom is to be sought elsewhere.

The basic rule as regards continuity and repetition was laid down in the *Asylum* case decided by the International Court of Justice (ICJ) in 1950.[20] The Court declared that a customary rule must be 'in accordance with a constant and uniform usage practised by the States in question'.[21] The case concerned Haya de la Torre, a Peruvian, who was sought by his government after an unsuccessful revolt. He was granted asylum by Colombia in its embassy in Lima, but Peru refused to issue a safe conduct to permit Torre to leave the country. Colombia brought the matter before

[18] 'Théorie du Droit International Coutumier', 1 *Revue International de la Théorie du Droit*, 1939, pp. 253, 264–6. See also P. Guggenheim, *Traité de Droit International Public*, Paris, 1953, pp. 46–8; T. Gihl, 'The Legal Character of Sources of International Law', 1 *Scandinavian Studies in Law*, 1957, pp. 53, 84, and *Oppenheim's International Law*, pp. 27–31.

[19] See D'Amato, *Concept of Custom*, pp. 56–8, and Akehurst, 'Custom as a Source', pp. 15–16. Judge Negulesco in an unfortunate phrase emphasised that custom required immemorial usage: *European Commission of the Danube*, PCIJ, Series B, No. 14, 1927, p. 105; 4 AD, p. 126. See also Brownlie, *Principles*, p. 7, and the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 43; 41 ILR, pp. 29, 72.

[20] ICJ Reports, 1950, p. 266; 17 ILR, p. 280.

[21] ICJ Reports, 1950, pp. 276–7; 17 ILR, p. 284.

the International Court of Justice and requested a decision recognising that it (Colombia) was competent to define Torre's offence, as to whether it was criminal as Peru maintained, or political, in which case asylum and a safe conduct could be allowed.

The Court, in characterising the nature of a customary rule, held that it had to constitute the expression of a right appertaining to one state (Colombia) and a duty incumbent upon another (Peru). However, the Court felt that in the *Asylum* litigation, state practices had been so uncertain and contradictory as not to amount to a 'constant and uniform usage' regarding the unilateral qualification of the offence in question.[22] The issue involved here dealt with a regional custom pertaining only to Latin America and it may be argued that the same approach need not necessarily be followed where a general custom is alleged and that in the latter instance a lower standard of proof would be upheld.[23]

The ICJ emphasised its view that some degree of uniformity amongst state practices was essential before a custom could come into existence in the *Anglo-Norwegian Fisheries* case.[24] The United Kingdom, in its arguments against the Norwegian method of measuring the breadth of the territorial sea, referred to an alleged rule of custom whereby a straight line may be drawn across bays of less than ten miles from one projection to the other, which could then be regarded as the baseline for the measurement of the territorial sea. The Court dismissed this by pointing out that the actual practice of states did not justify the creation of any such custom. In other words, there had been insufficient uniformity of behaviour.

In the *North Sea Continental Shelf* cases,[25] which involved a dispute between Germany on the one hand and Holland and Denmark on the other over the delimitation of the continental shelf, the ICJ remarked that state practice, 'including that of states whose interests are specially affected', had to be 'both extensive and virtually uniform in the sense of the provision invoked'. This was held to be indispensable to the formation of a new rule of customary international law.[26] However, the Court emphasised in the *Nicaragua* v. *United States* case[27] that it was not necessary that the

[22] *Ibid.* [23] See further below, p. 92.

[24] ICJ Reports, 1951, pp. 116, 131 and 138; 18 ILR, p. 86.

[25] ICJ Reports, 1969, p. 3; 41 ILR, p. 29.

[26] ICJ Reports, 1969, p. 43; 41 ILR, p. 72. Note that the Court was dealing with the creation of a custom on the basis of what had been purely a treaty rule. See Akehurst, 'Custom as a Source', p. 21, especially footnote 5. See also the *Paquete Habana* case, 175 US 677 (1900) and the *Lotus* case, PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

[27] ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

practice in question had to be 'in absolutely rigorous conformity' with the purported customary rule. The Court continued:

> 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 the recognition of a new rule.[28]

The threshold that needs to be attained before a legally binding custom can be created will depend both upon the nature of the alleged rule and the opposition it arouses. This partly relates to the problem of ambiguity where it is not possible to point to the alleged custom with any degree of clarity, as in the *Asylum* case where a variety of conflicting and contradictory evidence had been brought forward.

On the other hand, an unsubstantiated claim by a state cannot be accepted because it would amount to unilateral law-making and compromise a reasonably impartial system of international law. If a proposition meets with a great deal of opposition then it would be an undesirable fiction to ignore this and talk of an established rule. Another relevant factor is the strength of the prior rule which is purportedly overthrown.[29] For example, the customary law relating to a state's sovereignty over its airspace developed very quickly in the years immediately before and during the First World War. Similarly, the principle of non-sovereignty over the space route followed by artificial satellites came into being soon after the launching of the first sputniks. Bin Cheng has argued that in such circumstances repetition is not at all necessary provided the *opinio juris* could be clearly established. Thus, 'instant' customary law is possible.[30]

This contention that single acts may create custom has been criticised, particularly in view of the difficulties of proving customary rules any other way but through a series of usages.[31] Nevertheless, the conclusion must be that it is the international context which plays the vital part in the creation of custom. In a society constantly faced with new situations because of the dynamics of progress, there is a clear need for a reasonably speedy method of responding to such changes by a system of prompt rule-formation. In

[28] ICJ Reports, 1986, p. 98; 76 ILR, p. 432.

[29] See D'Amato, *Concept of Custom*, pp. 60–1, and Akehurst, 'Custom as a Source', p. 19. See also Judge Alvarez, the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 152; 18 ILR, pp. 86, 105, and Judge Loder, the *Lotus* case, PCIJ, Series A, No. 10, 1927, pp. 18, 34.

[30] Cheng, 'United Nations Resolutions'.

[31] See e.g. Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 325–6.

new areas of law, customs can be quickly established by state practices by virtue of the newness of the situations involved, the lack of contrary rules to be surmounted and the overwhelming necessity to preserve a sense of regulation in international relations.

One particular analogy that has been used to illustrate the general nature of customary law was considered by de Visscher. He likened the growth of custom to the gradual formation of a road across vacant land. After an initial uncertainty as to direction, the majority of users begin to follow the same line which becomes a single path. Not long elapses before that path is transformed into a road accepted as the only regular way, even though it is not possible to state at which precise moment this latter change occurs. And so it is with the formation of a custom. De Visscher develops this idea by reflecting that just as some make heavier footprints than others due to their greater weight, the more influential states of the world mark the way with more vigour and tend to become the guarantors and defenders of the way forward.[32]

The reasons why a particular state acts in a certain way are varied but are closely allied to how it perceives its interests. This in turn depends upon the power and role of the state and its international standing. Accordingly, custom should to some extent mirror the perceptions of the majority of states, since it is based upon usages which are practised by nations as they express their power and their hopes and fears. But it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.[33]

The influence of the United Kingdom, for example, on the development of the law of the sea and prize law in the nineteenth century when it was at the height of its power, was predominant. A number of propositions later accepted as part of international customary law appeared this way.

[32] De Visscher, *Theory and Reality*, p. 149. See also Lauterpacht, *Development of International Law*, p. 368; P. Cobbett, *Leading Cases on International Law*, 4th edn, London, 1922, p. 5, and Akehurst, 'Custom as a Source', pp. 22–3.

[33] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 42–3; 41 ILR, pp. 29, 71–3.

Among many instances of this, one can point to navigation procedures. Similarly, the impact of the Soviet Union (now Russia) and the United States on space law has been paramount.[34]

One can conclude by stating that for a custom to be accepted and recognised it must have the concurrence of the major powers in that particular field. A regulation regarding the breadth of the territorial sea is unlikely to be treated as law if the great maritime nations do not agree to or acquiesce in it, no matter how many landlocked states demand it. Other countries may propose ideas and institute pressure, but without the concurrence of those most interested, it cannot amount to a rule of customary law. This follows from the nature of the international system where all may participate but the views of those with greater power carry greater weight.

Accordingly, the duration and generality of a practice may take second place to the relative importance of the states precipitating the formation of a new customary rule in any given field. Universality is not required, but some correlation with power is. Some degree of continuity must be maintained but this again depends upon the context of operation and the nature of the usage.

Those elements reflect the external manifestations of a practice and establish that it is in existence and exhibited as such. That does not mean that it is law and this factor will be considered in the next subsection. But it does mean that all states who take the trouble can discover its existence. This factor of conspicuousness emphasises both the importance of the context within which the usage operates and the more significant elements of the overt act which affirms the existence of a custom.

The question is raised at this stage of how significant a failure to act is. Just how important is it when a state, or more particularly a major state, does not participate in a practice? Can it be construed as acquiescence in the performance of the usage? Or, on the other hand, does it denote indifference implying the inability of the practice to become a custom until a decision one way or the other has been made? Failures to act are in themselves just as much evidence of a state's attitudes as are actions. They similarly reflect the way in which a nation approaches its environment. Britain consistently fails to attack France, while Chad consistently fails to send a man to the moon. But does this mean that Britain recognises a

[34] See e.g. Cheng, 'United Nations Resolutions'; C. Christol, *The Modern International Law of Outer Space*, New York, 1982, and Christol, *Space Law: Past, Present and Future*, The Hague, 1991. See further below, chapter 10.

rule not to attack its neighbour and that Chad accepts a custom not to launch rockets to the moon? Of course, the answer is in the first instance yes, and in the second example no. Thus, a failure to act can arise from either a legal obligation not to act, or an incapacity or unwillingness in the particular circumstances to act. Indeed, it has been maintained that the continued habit of not taking actions in certain situations may lead to the formation of a legal rule.[35]

The danger of saying that a failure to act over a long period creates a negative custom, that is a rule actually not to do it, can be shown by remarking on the absurdity of the proposition that a continual failure to act until the late 1950s is evidence of a legal rule not to send artificial satellites or rockets into space. On the other hand, where a particular rule of behaviour is established it can be argued that abstention from protest by states may amount to agreement with that rule.

In the particular circumstances of the *Lotus* case[36] the Permanent Court of International Justice, the predecessor of the International Court of Justice, laid down a high standard by declaring that abstention could only give rise to the recognition of a custom if it was based on a conscious duty to abstain. In other words, states had actually to be aware that they were not acting a particular way because they were under a definite obligation not to act that way. The decision has been criticised and would appear to cover categories of non-acts based on legal obligations, but not to refer to instances where, by simply not acting as against a particular rule in existence, states are tacitly accepting the legality and relevance of that rule.

It should be mentioned, however, that acquiescence must be based upon full knowledge of the rule invoked. Where a failure to take a course of action is in some way connected or influenced or accompanied by a lack of knowledge of all the relevant circumstances, then it cannot be interpreted as acquiescence.

What is state practice?

Some of the ingredients of state activities have been surveyed and attempts made to place them in some kind of relevant context. But what is state practice? Does it cover every kind of behaviour initiated by the state, or

[35] See e.g. Tunkin, *Theory of International Law*, pp. 116–17. But cf. D'Amato, *Concept of Custom*, pp. 61–3 and 88–9.

[36] PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

is it limited to actual, positive actions? To put it more simply, does it include such things as speeches, informal documents and governmental statements or is it restricted to what states actually do?

It is how states behave in practice that forms the basis of customary law, but evidence of what a state does can be obtained from numerous sources. Obvious examples include administrative acts, legislation, decisions of courts and activities on the international stage, for example treaty-making.[37] A state is not a living entity, but consists of governmental departments and thousands of officials, and state activity is spread throughout a whole range of national organs. There are the state's legal officers, legislative institutions, courts, diplomatic agents and political leaders. Each of these engages in activity which relates to the international field and therefore one has to examine all such material sources and more in order to discover evidence of what states do.[38]

The obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse the many official publications. There are also memoirs of various past leaders, official manuals on legal questions, diplomatic interchanges and the opinions of national legal advisors. All these methods are valuable in seeking to determine actual state practice.

In addition, one may note resolutions in the General Assembly, comments made by governments on drafts produced by the International Law Commission, decisions of the international judicial institutions, decisions of national courts, treaties and the general practice of international organisations.[39]

[37] See e.g. Pellet, 'Article 38', p. 751, and *Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 23–4; 128 ILR, pp. 60, 78–80.

[38] See e.g. *Yearbook of the ILC*, 1950, vol. II, pp. 368–72, and the *Interhandel* case, ICJ Reports, 1959, p. 27. Note also Brierly's comment that not all contentions put forward on behalf of a state represent that state's settled or impartial opinion, *The Law of Nations*, 6th edn, Oxford, 1963, p. 60. See also Brownlie, *Principles*, p. 6, and Akehurst, 'Custom as a Source', p. 2.

[39] The United States has produced an extensive series of publications covering its practice in international law. See the Digests of International Law produced by Wharton (1887), Moore (1906) and Whiteman (1963–70). From 1973 to 1980 an annual *Digest of US Practice in International Law* has been produced, while three composite volumes covering the years 1981–8 have appeared. The series resumed with effect from the year 2000. See also H. A. Smith, *Great Britain and the Law of Nations*, London, 2 vols., 1932–5; A. D. McNair, *International Law Opinions*, Cambridge, 3 vols., 1956; C. Parry, *British Digest of International Law*, London, 1965, and E. Lauterpacht, *British Practice in International Law*, London, 1963–7. Several yearbooks now produce sections devoted to national practice, e.g. *British Yearbook of International Law* and *Annuaire Français de Droit International.*

International organisations in fact may be instrumental in the creation of customary law. For example, the Advisory Opinion of the International Court of Justice declaring that the United Nations possessed international personality was partly based on the actual behaviour of the UN.[40] The International Law Commission has pointed out that 'records of the cumulative practice of international organisations may be regarded as evidence of customary international law with reference to states' relations to the organisations'.[41] The International Court has also noted that evidence of the existence of rules and principles may be found in resolutions adopted by the General Assembly and the Security Council of the United Nations.[42]

States' municipal laws may in certain circumstances form the basis of customary rules. In the *Scotia* case decided by the US Supreme Court in 1871,[43] a British ship had sunk an American vessel on the high seas. The Court held that British navigational procedures established by an Act of Parliament formed the basis of the relevant international custom since other states had legislated in virtually identical terms. Accordingly, the American vessel, in not displaying the correct lights, was at fault. The view has also been expressed that mere claims as distinct from actual physical acts cannot constitute state practice. This is based on the precept that 'until it [a state] takes enforcement action, the claim has little value as a prediction of what the state will actually do'.[44] But as has been demonstrated this is decidedly a minority view.[45] Claims and conventions of states in various contexts have been adduced as evidence of state practice and it is logical that this should be so,[46] though the weight to be attached to such claims, may, of course, vary according to the circumstances. This

[40] The *Reparation* case, ICJ Reports, 1949, p. 174; 16 AD, p. 318. See also the *Reservations to the Genocide Convention* case, ICJ Reports, 1951, pp. 15, 25; 18 ILR, p. 364.

[41] *Yearbook of the ILC*, 1950, vol. II, pp. 368–72. See also Akehurst, 'Custom as a Source', p. 12.

[42] See the Court's advisory opinion in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 171; 129 ILR, pp. 37, 89–90.

[43] 14 Wallace 170 (1871). See also the *Nottebohm* case, ICJ Reports, 1955, pp. 4, 22; 22 ILR, p. 349, and the *Paquete Habana* case, 175 US 677 (1900).

[44] D'Amato, *Concept of Custom*, pp. 88 and 50–1. See also Judge Read (dissenting), the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 191; 18 ILR, pp. 86, 132.

[45] Akehurst, 'Custom as a Source', pp. 2–3. See also Thirlway, *International Customary Law*, p. 58.

[46] E.g. the *Asylum* case, ICJ Reports, 1950, pp. 266, 277; 17 ILR, p. 280; the *Rights of US Nationals in Morocco* case, ICJ Reports, 1952, pp. 176, 200, 209; 19 ILR, p. 255, and the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 32–3, 47 and 53; 41 ILR, p. 29. See also the *Fisheries Jurisdiction* cases, ICJ Reports, 1974, pp. 3, 47, 56–8, 81–8, 119–20, 135 and 161; 55 ILR, p. 238.

approach is clearly the correct one since the process of claims and counter-claims is one recognised method by which states communicate to each other their perceptions of the status of international rules and norms. In this sense they operate in the same way as physical acts. Whether *in abstracto* or with regard to a particular situation, they constitute the raw material out of which may be fashioned rules of international law.[47] It is suggested that the formulation that 'state practice covers any act or statements by a state from which views about customary law may be inferred',[48] is substantially correct. However, it should be noted that not all elements of practice are equal in their weight and the value to be given to state conduct will depend upon its nature and provenance.

Opinio juris[49]

Once one has established the existence of a specified usage, it becomes necessary to consider how the state views its own behaviour. Is it to be regarded as a moral or political or legal act or statement? The *opinio juris*, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certain way because they are convinced it is binding upon them to do so.

The Permanent Court of International Justice expressed this point of view when it dealt with the *Lotus* case.[50] The issue at hand concerned a collision on the high seas (where international law applies) between the *Lotus*, a French ship, and the *Boz-Kourt*, a Turkish ship. Several people aboard the latter ship were drowned and Turkey alleged negligence by the French officer of the watch. When the *Lotus* reached Istanbul, the French officer was arrested on a charge of manslaughter and the case turned on whether Turkey had jurisdiction to try him. Among the various

[47] But see Thirlway, *International Customary Law*, pp. 58–9.

[48] Akehurst, 'Custom as a Source', p. 10. This would also include omissions and silence by states: *ibid.*

[49] *Ibid.*, pp. 31–42, and D'Amato, *Concept of Custom*, pp. 66–72. See also Pellet, 'Article 38', p. 753; Mendelson, 'Formation', p. 245; Bos, *Methodology*, pp. 236 ff.; P. Haggenmacher, 'Des Deux Éléments du Droit Coutumier dans la Pratique de la Cour Internationale', 91 *Revue Générale de Droit International Public*, 1985, p. 5; O. Elias, 'The Nature of the Subjective Element in Customary International Law', 44 ICLQ, 1995, p. 501; I. M. Lobo de Souza, 'The Role of State Consent in the Customary Process', 44 ICLQ, 1995, p. 521, and B. Cheng, '*Opinio Juris:* A Key Concept in International Law that is Much Misunderstood' in *International Law in the Post-Cold War World* (eds. S. Yee and W. Tieya), London, 2001, p. 56.

[50] PCIJ, Series A, No. 10, 1927, p. 18; 4 AD, p. 153.

arguments adduced, the French maintained that there existed a rule of customary law to the effect that the flag state of the accused (France) had exclusive jurisdiction in such cases and that accordingly the national state of the victim (Turkey) was barred from trying him. To justify this, France referred to the absence of previous criminal prosecutions by such states in similar situations and from this deduced tacit consent in the practice which therefore became a legal custom.

The Court rejected this and declared that even if such a practice of abstention from instituting criminal proceedings could be proved in fact, it would not amount to a custom. It held that 'only if such abstention were based on their [the states] being conscious of a duty to abstain would it be possible to speak of an international custom'.[51] Thus the essential ingredient of obligation was lacking and the practice remained a practice, nothing more.

A similar approach occurred in the *North Sea Continental Shelf* cases.[52] In the general process of delimiting the continental shelf of the North Sea in pursuance of oil and gas exploration, lines were drawn dividing the whole area into national spheres. However, West Germany could not agree with either Holland or Denmark over the respective boundary lines and the matter came before the International Court of Justice.

Article 6 of the Geneva Convention on the Continental Shelf of 1958 provided that where agreement could not be reached, and unless special circumstances justified a different approach, the boundary line was to be determined in accordance with the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured. This would mean a series of lines drawn at the point where Germany met Holland on the one side and Denmark on the other and projected outwards into the North Sea. However, because Germany's coastline is concave, such equidistant lines would converge and enclose a relatively small triangle of the North Sea. The Federal Republic had signed but not ratified the 1958 Geneva Convention and was therefore not bound by its terms. The question thus was whether a case could be made out that the 'equidistance–special circumstances principle' had been absorbed into customary law and was accordingly binding upon Germany.

The Court concluded in the negative and held that the provision in the Geneva Convention did not reflect an already existing custom. It was

[51] PCIJ, Series A, No. 10, 1927, p. 28; 4 AD, p. 159.
[52] ICJ Reports, 1969, p. 3; 41 ILR, p. 29.

emphasised that when the International Law Commission had considered this point in the draft treaty which formed the basis of discussion at Geneva, the principle of equidistance had been proposed with considerable hesitation, somewhat on an experimental basis and not at all as an emerging rule of customary international law.[53] The issue then turned on whether practice subsequent to the Convention had created a customary rule. The Court answered in the negative and declared that although time was not of itself a decisive factor (only three years had elapsed before the proceedings were brought):

> an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[54]

This approach was maintained by the Court in the *Nicaragua* case[55] and express reference was made to the *North Sea Continental Shelf* cases. The Court noted that:

> for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.'[56]

It is thus clear that the Court has adopted and maintained a high threshold with regard to the overt proving of the subjective constituent of customary law formation.

The great problem connected with the *opinio juris* is that if it calls for behaviour in accordance with law, how can new customary rules be created since that obviously requires action different from or

[53] ICJ Reports, 1969, pp. 32–41.

[54] *Ibid.*, p. 43. See also e.g. the *Asylum* case, ICJ Reports, 1950, pp. 266, 277; 17 ILR, p. 280, and the *Right of Passage* case, ICJ Reports, 1960, pp. 6, 42–3; 31 ILR, pp. 23, 55.

[55] ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

[56] ICJ Reports, 1986, pp. 108–9; 76 ILR, pp. 442–3, citing ICJ Reports, 1969, p. 44; 41 ILR, p. 73.

contrary to what until then is regarded as law? If a country claims a three-mile territorial sea in the belief that this is legal, how can the rule be changed in customary law to allow claims of, for example, twelve miles, since that cannot also be in accordance with prevailing law?[57] Obviously if one takes a restricted view of the psychological aspects, then logically the law will become stultified and this demonstrably has not happened.

Thus, one has to treat the matter in terms of a process whereby states behave in a certain way in the belief that such behaviour is law or is becoming law. It will then depend upon how other states react as to whether this process of legislation is accepted or rejected. It follows that rigid definitions as to legality have to be modified to see whether the legitimating stamp of state activity can be provided or not. If a state proclaims a twelve-mile limit to its territorial sea in the belief that although the three-mile limit has been accepted law, the circumstances are so altering that a twelve-mile limit might now be treated as becoming law, it is vindicated if other states follow suit and a new rule of customary law is established. If other states reject the proposition, then the projected rule withers away and the original rule stands, reinforced by state practice and common acceptance. As the Court itself noted in the *Nicaragua* case,[58] '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law'. The difficulty in this kind of approach is that it is sometimes hard to pinpoint exactly when one rule supersedes another, but that is a complication inherent in the nature of custom. Change is rarely smooth but rather spasmodic.

This means taking a more flexible view of the *opinio juris* and tying it more firmly with the overt manifestations of a custom into the context of national and international behaviour. This should be done to accommodate the idea of an action which, while contrary to law, contains the germ of a new law and relates to the difficulty of actually proving that a state, in behaving a certain way, does so in the belief that it is in accordance with the law. An extreme expression of this approach is to infer or deduce the *opinio juris* from the material acts. Judge Tanaka, in his Dissenting Opinion in the *North Sea Continental Shelf* cases, remarked that there was:

[57] See Akehurst, 'Custom as a Source', pp. 32–4 for attempts made to deny or minimise the need for *opinio juris*.

[58] ICJ Reports, 1986, pp. 14, 109; 76 ILR, pp. 349, 443.

> no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice.[59]

However, states must be made aware that when one state takes a course of action, it does so because it regards it as within the confines of international law, and not as, for example, purely a political or moral gesture. There has to be an aspect of legality about the behaviour and the acting state will have to confirm that this is so, so that the international community can easily distinguish legal from non-legal practices. This is essential to the development and presentation of a legal framework amongst the states.[60]

Faced with the difficulty in practice of proving the existence of the *opinio juris*, increasing reference has been made to conduct within international organisations. This is so particularly with regard to the United Nations. The International Court of Justice has in a number of cases utilised General Assembly resolutions as confirming the existence of the *opinio juris*, focusing on the content of the resolution or resolutions in question and the conditions of their adoption.[61] The key, however, is the attitude taken by the states concerned, whether as parties to a particular treaty or as participants in the adoption of a UN resolution.[62] The Court has also referred to major codification conventions

[59] ICJ Reports, 1969, pp. 3, 176; 41 ILR, pp. 29, 171. Lauterpacht wrote that one should regard all uniform conduct of governments as evidencing the *opinio juris*, except where the conduct in question was not accompanied by such intention: *The Development of International Law*, p. 580; but cf. Cheng, 'Custom: The Future', p. 36, and Cheng, 'United Nations Resolutions', pp. 530–2.

[60] Note D'Amato's view that to become a custom, a practice has to be preceded or accompanied by the 'articulation' of a rule, which will put states on notice than an action etc. will have legal implications: *Concept of Custom*, p. 75. Cf. Akehurst, 'Custom as a Source', pp. 35–6, who also puts forward his view that 'the practice of states needs to be accompanied by *statements* that something is already law before it can become law': such statements need not be beliefs as to the truths of the given situation, *ibid.*, p. 37. Akehurst also draws a distinction between permissive rules, which do not require express statements as to *opinio juris*, and duty-imposing rules, which do: *ibid.*, pp. 37–8.

[61] See e.g. the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 254–5; 110 ILR, p. 163. See also the *Western Sahara* case, ICJ Reports, 1975, pp. 31–3; the *East Timor* case, ICJ Reports, 1995, pp. 90, 102; 105 ILR, p. 226; the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 100, 101 and 106; 76 ILR, p. 349; and the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 171–2; 129 ILR, pp. 37, 89–90.

[62] See the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 99–100.

for the same purpose,[63] and to the work of the International Law Commission.[64]

Protest, acquiescence and change in customary law[65]

Customary law is thus established by virtue of a pattern of claim, absence of protest by states particularly interested in the matter at hand and acquiescence by other states.[66] Together with related notions such as recognition, admissions and estoppel, such conduct or abstinence from conduct forms part of a complex framework within which legal principles are created and deemed applicable to states.[67]

The Chamber of the International Court in the *Gulf of Maine* case defined acquiescence as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent' and as founded upon the principles of good faith and equity.[68] Generally, where states are seen to acquiesce[69] in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate.[70]

Some writers have maintained that acquiescence can amount to consent to a customary rule and that the absence of protest implies agreement.

[63] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 28–32 with regard to the 1958 Continental Shelf Convention and e.g. among many cases, *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 429–30 with regard to the Vienna Convention on the Law of Treaties, 1969.

[64] See e.g. the *Gabčíkovo–Nagymaros* case, ICJ Reports, 1997, pp. 7, 38–42 and 46; 116 ILR, pp. 1, 47–51 and 55.

[65] See H. Lauterpacht, 'Sovereignty over Submarine Areas', 27 BYIL, 1950, p. 376; I. MacGibbon, 'Some Observations on the Part of Protest in International Law', 29 BYIL, 1953, p. 293, and MacGibbon, 'Customary International Law and Acquiescence', 33 BYIL, 1957, p. 115; Wolfke, *Custom*, pp. 157–65, and I. Sinclair, 'Estoppel and Acquiescence' in *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 104.

[66] See, for a good example, the decision of the International Court in the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 601; 97 ILR, pp. 266, 517, with regard to the joint sovereignty over the historic waters of the Gulf of Fonseca beyond the territorial sea of the three coastal states.

[67] See e.g. Sinclair, 'Estoppel and Acquiescence', p. 104 and below, chapter 10, p. 515.

[68] ICJ Reports, 1984, pp. 246, 305; 71 ILR, p. 74.

[69] Note that the Court has stated that 'the idea of acquiescence . . . presupposes freedom of will', *Burkina Faso/Mali*, ICJ Reports, 1986, pp. 554, 597; 80 ILR, p. 459.

[70] See e.g. *Grand-Duchy of Luxembourg* v. *Cie. Luxembourgeoise de Télédiffusion*, 91 ILR, pp. 281, 286.

In other words where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule. This means that actual protests are called for to break the legitimising process.[71]

In the *Lotus* case, the Court held that 'only if such abstention were based on their [the states] being conscious of having a duty to abstain would it be possible to speak of an international custom'.[72] Thus, one cannot infer a rule prohibiting certain action merely because states do not indulge in that activity. But the question of not reacting when a state behaves a certain way is a slightly different one. It would seem that where a new rule is created in new fields of international law, for example space law, acquiescence by other states is to be regarded as reinforcing the rule whether it stems from actual agreement or lack of interest depending always upon the particular circumstances of the case. Acquiescence in a new rule which deviates from an established custom is more problematic.

The decision in the *Anglo-Norwegian Fisheries* case[73] may appear to suggest that where a state acts contrary to an established customary rule and other states acquiesce in this, then that state is to be treated as not bound by the original rule. The Court noted that 'in any event the . . . rule would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempt to apply it to the Norwegian coast'.[74] In other words, a state opposing the existence of a custom from its inception would not be bound by it, but the problem of one or more states seeking to dissent from recognised customs by adverse behaviour coupled with the acquiescence or non-reaction of other states remains unsettled.

States fail to protest for very many reasons. A state might not wish to give offence gratuitously or it might wish to reinforce political ties or other diplomatic and political considerations may be relevant. It could be that to protest over every single act with which a state does not agree would be an excessive requirement. It is, therefore, unrealistic to expect every state

[71] See e.g. MacGibbon, 'Customary International Law', p. 131, and H. S. McDougal *et al.*, *Studies in World Public Order*, New Haven, 1960, pp. 763–72.

[72] PCIJ, Series A, No. 10, 1927, p. 28; 4 ILR, p. 159.

[73] ICJ Reports, 1951, p. 116; 18 ILR, p. 86.

[74] ICJ Reports, 1951, p. 131; 18 ILR, p. 93. See also the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 26–7; 41 ILR, pp. 29, 55–6, and the *Asylum* case, ICJ Reports, 1950, pp. 266, 277–8; 17 ILR, pp. 280, 285.

to react to every single act of every other state. If one accepted that a failure to protest validated a derogation from an established custom in every case then scores of special relationships would emerge between different states depending upon acquiescence and protest. In many cases a protest might be purely formal or part of diplomatic manoeuvring designed to exert pressure in a totally different field and thus not intended to alter legal relationships.

Where a new rule which contradicts a prior rule is maintained by a large number of states, the protests of a few states would not overrule it, and the abstention from reaction by other countries would merely reinforce it. Constant protest on the part of a particular state when reinforced by the acquiescence of other states might create a recognised exception to the rule, but it will depend to a great extent on the facts of the situation and the views of the international community. Behaviour contrary to a custom contains within itself the seeds of a new rule and if it is endorsed by other nations, the previous law will disappear and be replaced, or alternatively there could be a period of time during which the two customs co-exist until one of them is generally accepted,[75] as was the position for many years with regard to the limits of the territorial sea.[76] It follows from the above, therefore, that customary rules are binding upon all states except for such states as have dissented from the start of that custom.[77] This raises the question of new states and custom, for the logic of the traditional approach would be for such states to be bound by all existing customs as at the date of independence. The opposite view, based upon the consent theory of law, would permit such states to choose which customs to adhere to at that stage, irrespective of the attitude of other states.[78] However, since such an approach could prove highly disruptive, the proviso is often made that by entering into relations without reservation with other states, new states signify their acceptance of the totality of international law.[79]

[75] See also protests generally: Akehurst, 'Custom as a Source', pp. 38–42.

[76] See below, chapter 11, p. 568.

[77] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 38, 130; 41 ILR, pp. 29, 67, 137, and *The Third US Restatement of Foreign Relations Law*, St Paul, 1987, vol. I, pp. 25–6. See also T. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard International Law Journal*, 1985, p. 457, and J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 BYIL, 1985, p. 1.

[78] See e.g. Tunkin, *Theory of International Law*, p. 129.

[79] *Ibid.*

Regional and local custom[80]

It is possible for rules to develop which will bind only a set group of states, such as those in Latin America,[81] or indeed just two states.[82] Such an approach may be seen as part of the need for 'respect for regional legal traditions'.[83]

In the *Asylum* case,[84] the International Court of Justice discussed the Colombian claim of a regional or local custom peculiar to the Latin American states, which would validate its position over the granting of asylum. The Court declared 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'.[85] It found that such a custom could not be proved because of uncertain and contradictory evidence.

In such cases, the standard of proof required, especially as regards the obligation accepted by the party against whom the local custom is maintained, is higher than in cases where an ordinary or general custom is alleged.

In the *Right of Passage over Indian Territory* case,[86] Portugal claimed that there existed a right of passage over Indian territory as between the Portuguese enclaves, and this was upheld by the International Court of Justice over India's objections that no local custom could be established between only two states. The Court declared that it was satisfied that there had in the past existed a constant and uniform practice allowing free passage and that the 'practice was accepted as law by the parties and has given rise to a right and a correlative obligation'.[87] More generally, the Court stated that 'Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as

[80] See Akehurst, 'Custom as a Source', pp. 29–31; Thirlway, 'Supplement', p. 105; Pellet, 'Article 38', p. 762; D'Amato, *Concept of Custom*, chapter 8; G. Cohen-Jonathan, 'La Coutume Locale', AFDI, 1961, p. 133, and Wolfke, *Custom*, pp. 88–90. Local custom is sometimes referred to as regional or special custom.

[81] See e.g. H. Gros Espiel, 'La Doctrine du Droit International en Amérique Latine avant la Première Conférence Panaméricaine', 3 *Journal of the History of International Law*, 2001, p. 1.

[82] Note the claim by Honduras in the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 597; 97 ILR, pp. 266, 513 that a 'trilateral local custom of the nature of a convention' could establish a condominium arrangement.

[83] See the *Eritrea/Yemen (Maritime Delimitation)* case, 119 ILR, pp. 417, 448.

[84] ICJ Reports, 1950, p. 266; 17 ILR, p. 280.

[85] ICJ Reports, 1950, p. 276; 17 ILR, p. 284.

[86] ICJ Reports, 1960, p. 6; 31 ILR, p. 23.

[87] ICJ Reports, 1960, p. 40; 31 ILR, p. 53. See Wolfke, *Custom*, p. 90.

governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.'[88]

Such local customs therefore depend upon a particular activity by one state being accepted by the other state (or states) as an expression of a legal obligation or right. While in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule.[89] This is because local customs are an exception to the general nature of customary law, which involves a fairly flexible approach to law-making by all states, and instead constitutes a reminder of the former theory of consent whereby states are bound only by what they assent to. Exceptions may prove the rule, but they need greater proof than the rule to establish themselves.

Treaties[90]

In contrast with the process of creating law through custom, treaties (or international conventions) are a more modern and more deliberate method.[91] Article 38 refers to 'international conventions, whether general or particular, establishing rules expressly recognised by the contracting states'. Treaties will be considered in more detail in chapter 16 but in this survey of the sources of international law reference must be made to the role of international conventions.

Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants.[92] All these terms refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and

[88] ICJ Reports, 1960, p. 44. [89] See Cohen-Jonathan, 'La Coutume Locale'.

[90] See generally A. D. McNair, *The Law of Treaties*, Oxford, 1961; Pellet, 'Article 38', p. 736, and A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007. See further below, chapter 16.

[91] *Oppenheim's International Law* emphasises that 'not only is custom the original source of international law, but treaties are a source the validity and modalities of which themselves derive from custom', p. 31.

[92] See e.g. UKMIL, 70 BYIL, 1999, p. 404.