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CHAPTER I

CUSTOM AS A SOURCE OF INTERNATIONAL LAW

The subject of custom as a source of international law will be examined with particular reference to the approach of the Court in recent years to customary law, a question which Wilfred Jenks rightly considered the crucial test for an international tribunal. This is one aspect of the Court's work which has been somewhat unnoticed despite being of more lasting significance for the development of the law than the settlement of a particular dispute or the actual contents of a specific judgment or opinion. It is a matter of record that, while the Permanent Court, and also the International Court of Justice in the fifties and early sixties, had to deal mostly with cases concerning the interpretation and application of treaties, the International Court of Justice, during the last decade, has had to grapple, practically in every case, with what has been described as "the amorphous but formidable jelly-fish of customary international law".

The current tendency began with the 1969 Judgment in the *North Sea Continental Shelf* cases. In this Judgment the Court not only had to apply rules of customary international law; it was also called upon to make a number of pronouncements about the nature of customary international law and the process of its formation and upon its relations with treaty provisions. This Judgment has been justly praised for the richness of its analysis of custom as a source of international law¹.

In subsequent cases before the Court questions relating to customary international law were also raised and debated by the parties or constituted an important part of the Court's Judgment: the rules governing State responsibility in the *Barcelona Traction, Light and Power Company, Limited* case; the régime of fisheries in the high seas adjacent to a State in the *Icelandic Fisheries (Fisheries Jurisdiction)* cases; the responsibility of States for nuclear fall-out resulting from atmospheric tests in the *Nuclear Tests* cases; the law evolved in the United Nations concerning decolonization and self-determination in the *Namibia* and *Western Sahara* Advisory Opinions. The merits in the *Appeal Relating to the Jurisdiction of the ICAO Council* and in the *Namibia* cases also involved the interpretation and application of customary rules governing the termination of a treaty on account of its alleged breach. Finally, the

issues raised in the pending *Aegean Sea* case, between Greece and Turkey, concern the customary rules on the legal nature and delimitation of the continental shelf. The only recent case not involving any rule of customary law was the *Fasla Advisory Opinion (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal)*.

It is true that, as Clive Parry has observed, the doctrine of the sources of international law, considered as a whole, should not be examined only through the eyes of the Court, but should be looked at through other eyes as well².

On the other hand, it is difficult to deny the interest of an inquiry into the ways in which, in recent cases, the International Court of Justice has confronted and solved various questions concerning custom as a source of international law.

A judgment, as Alf Ross has put it, is "the pulse of legal life" where "the analysis of the legal sources comes into play"³. The problem of the sources of law is ultimately the simple question: whence does a judge obtain the rules by which he decides actual cases? To use the metaphor implicit in the term "source", how does he harness those underground waters which have filtered through to constitute the fountain and origin of a legal rule?

Such a study may be useful from both a theoretical and a practical point of view. The accepted method for a scientific study of international law is the empirical one. As Sørensen has put it, this method describes as rules of international law only those which would be applied in a given case by an international tribunal, should it possess jurisdiction to decide the case⁴.

This is in fact the approach adopted by counsel for Foreign Offices or practising international lawyers when giving advice on a question of international law. Leading practitioners have given testimony that, when being consulted on a concrete question, they consider how a competent court would in their view probably decide that question. Sound legal advice in international legal matters, as in municipal law, consists, to adapt Holmes' phrase, in a prophecy of what a competent court would do in fact if the case were brought before it.

Even in diplomatic negotiations concerning legal questions, each party sits in judgment on the contentions of the other and compares them with its own prophecies of what a competent tribunal would do. Thus a negotiated compromise or a diplomatic settlement is made up of the claims of each party discounted to the prophecy of the other. One

of the functions of an international court is to be available as a possible alternative to make certain that "the discount in the discounted law which is applied in settlement by negotiation shall be figured on true value and not on some arbitrary sum".

It follows that in answering any international legal question, either from an academic or a practical point of view, it is as well to take into account from what sources the international court draws its law, and what are the methods and legal techniques which it follows in assessing whether a certain rule has or has not received that sort of official seal of approval which enables it to take its place in the legal domain.

Such a study of sources is at the same time of assistance in discerning the tendencies which govern the dynamic process of the adaptation of law to changing social needs. For the analysis of sources not only serves to determine the law which is in force at a given moment; it is at the same time a mechanism for adjusting and adapting that law to new circumstances and social conditions which are in constant change.

General Considerations

A general consideration which may be advanced at this stage is that in dealing with customary international law the Court, during the last decade, has shown what may be considered as an innovative and potentially fruitful approach, without falling into the extremes of legal heterodoxy.

It has searched for the general consensus of States instead of adopting a positivist insistence on strict proof of the consent of the defendant State, thus sounding the deathknell of the voluntarist conception of custom and placing in a broader perspective earlier dicta concerning regional and local custom; it has accepted in appropriate circumstances a quickly maturing practice as a basis for customary rules, thus subscribing to the view that the development of custom is to be measured by the rhythm of contemporary life rather than by what is shown to have been established from time immemorial; it has recognized that customary law does not necessarily grow up independently of treaties, but may also be expressed in general multilateral conventions or in widely attended codification conferences, thus ensuring the transition from what many regard as the international law of the European or Western World, to the universally accepted international law of today. The Court has further recognized that this kind of customary law which finds expression in conventions may operate in three different ways: the

conventional text may merely restate a pre-existing rule of custom ; it may crystallize an emergent rule, *in statu nascendi* ; or finally, a treaty provision *de lege ferendae* or a proposal at a conference may become the focal point of a subsequent practice of States and, in due course, harden into a customary rule.

Similar effects may attach to certain General Assembly resolutions. Some of these, like the 1970 Declaration of Principles of International Law concerning Friendly Relations, might be considered as expressing the general consensus of States Members in respect of certain corollaries resulting from the basic principles of the Charter ; others, like the 1963 Declaration of Legal Principles in Outer Space, for example, may be viewed as crystallizing emergent rules which had until then a twilight existence. Finally, Resolution 1514, on the Granting of Independence to Colonial Countries and Peoples has been recognized by the Court, on the basis of the subsequent practice of States and of the United Nations itself, as having generated a rule of customary law which has abolished the legitimacy of colonial title and of colonial domination. The Court has further admitted that a custom-creating practice of international organizations, akin to the practice of States, may grow in the interstices of the Charter provisions—as has occurred in respect of voluntary abstention by Permanent Members of the Security Council.

This progressive yet orthodox approach to customary law has bridged what Wilfred Jenks described in 1968 as “the generation gap between the architects and craftsmen who are determined to rebuild the law and those who determine it judicially in international courts and tribunals”.

Customary International Law and Treaty Law

Article 38, paragraph 1, of the Statute of the Court establishes a clear-cut distinction, in separate clauses, between the two main sources of international law : treaties and custom.

Under the influence of this provision, and of a jurisprudential approach developed mainly on the basis of municipal law, the prevailing tendency is to consider these two sources as entirely separate and independent. Some writers even emphasize their antithetical features : international treaty law is identified as written law, or *lex scripta*, and is described as being the result of a deliberate intellectual effort and as having the characteristics of being precise, clear and orderly. Customary international law, defined as unwritten law or *lex non scripta*, is described as spontaneous or implicit law and qualified as disorderly and

uncertain. Some writers describe the law-creating process of custom as a “procédé artisanal” not well adapted to the rapid pace of evolution in the modern world⁷. Such an antithesis may be correct in the municipal field where statute law is rightly opposed to customary law ; this is not true to the same degree in the international legal field.

One main conclusion which may be drawn from the jurisprudence of the International Court on the subject of sources during the last decade is that such an opposition or differentiation between treaty law and customary international law is not one to be made or applied too rigidly, since a rule contained in a treaty may be or become a rule of customary law. In this sense a rigid distinction between the two, as though they existed in sealed compartments, would be incorrect.

It has been recognized for a long time that rules of law formulated in the text of a treaty may at the same time constitute or become rules of customary international law. The Court has recognized that this process has acquired a greatly increased significance in recent times.

The reason for this is that in the last 30 years the international community has been engaged, under the auspices of the United Nations, in the task of codification and progressive development of international law on an unprecedented scale.

General multilateral conventions on various subjects, including some covering whole branches of international law, have been adopted in plenipotentiary conferences or in United Nations organs with the participation of a large number of States, including, with respect to the most recent ones, the new States of Africa and Asia. Most of these conventions have been carefully drafted by an expert body, the International Law Commission. The process of elaboration comprises observations from governments on the initial drafts of the Commission and discussions in the Sixth Committee of the General Assembly. These procedures give all States ample opportunity to take an active part in the codification and progressive development of customary international law ; as Professor Reuter has put it, this has led to a sort of “re-baptisation” or confirmation of customary international law⁸.

As Judge Lachs has said, “States with different political, economic and legal systems, States of all continents participate in the process”. No longer can “a general rule of international law be established by the fiat of one or of a few or—as it was once claimed—by the consensus of European States only”.

It is a part of customary law to which new States have freely and voluntarily subscribed and not something “developed before the time

when they were in control of their own destinies, and in the formation of which they played little or no part¹⁰”.

The procedure of adoption of these instruments confers on them an authority of their own even prior to their formal entry into force. The rules established in a general convention elaborated in accordance with such a procedure—as is the case with customary rules—arise from the consensus of the parties subject to them, instead of being imposed upon them by some legislator or outside authority.

Indeed, the deliberations in a plenipotentiary conference itself, even before and independently of the adoption of a convention, may themselves result in the emergence of a consensus of States which, followed by their actual practice, crystallizes in a customary rule. Thus the views expressed by States in successive meetings of the Third United Nations Conference on the Law of the Sea, and the practice followed by them in accordance with those views, have already resulted in certain customary rules which radically altered the pre-existing law of the sea.

In this way, the contemporary process of codification and progressive development of international law—far from pushing customary law into the background, as some writers have feared—has on the contrary reinvigorated it, increased its “tempo” and combined customary and conventional law into a harmonious whole.

The Three Modalities of Customary Law resulting from General Codification Conferences

Recent decisions of the International Court of Justice have recognized or attributed to general conventions adopted at codification conferences important effects with respect to the formation of customary international law. It has even been recognized that proposals which did not achieve formal acceptance but encountered a large measure of consensus at these conferences may have such an effect. As already indicated these effects have taken three forms or modalities which could be described as: (1) declaratory effect; (2) crystallizing effect, and (3) constitutive or generating effect.

(1) A first possibility is that the conventional rule may be admittedly no more than a declaration, the formal and written expression, of a pre-existing rule of customary law. In this case the provision in the treaty is purely and simply a codification or restatement of a customary rule already in force.

(2) A second possibility is that the provision in the treaty constitutes

the first textual statement of a custom which had not previously reached full maturity, but was what the Court has called an emerging rule, a rule *in statu nascendi*. As a consequence of being embodied in a treaty adopted at a conference of the character already indicated, that rule *in statu nascendi* or that emerging rule crystallizes as a rule of law.

(3) A third possibility is that the treaty provision, at the time of its adoption, is clearly a proposal *de lege ferenda* and not an existing rule or even one *in statu nascendi*; that it represents, not a codification of existing law, but a potential progressive development of that law. However, it has long been admitted, and the Court has had occasion to confirm, that such a treaty provision may constitute the focal point for a consistent subsequent practice of States in harmony with that provision to such an extent that the provision in question in due course generates or becomes a rule of customary law.

Concrete examples will now be given, taken from the recent jurisprudence of the Court, of these three processes of declaring, of crystallizing or of generating a rule of customary international law.

Declaratory Effect

In the *Namibia* Advisory Opinion the Court had to consider and apply the general principles of international law regulating the termination of a treaty relationship on account of breach.

Where did the Court look for the source of the customary rules regulating this subject?

The Court relied on Article 60 of the Vienna Convention on the Law of Treaties as stating customary law on the subject, despite the fact that this instrument is not yet in force nor has it been accepted by all the States appearing before the Court in that case.

The Court stated in this respect:

“The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting voice) may in many respects be considered as a codification of existing customary law on the subject¹¹.”

Likewise, in the *ICAO Council* case between India and Pakistan the Court expressly invoked the same Article 60 of the Vienna Convention in support of the conclusion that only a material breach, as defined in that provision, could cause the termination of the treaty¹².

In the Judgments in which the Court established its jurisdiction in the Icelandic Fisheries cases the Court had to examine the allegation that the agreement providing for the jurisdiction of the Court had lapsed by reason of change of circumstances. Such an allegation had to be considered in the light of the rules of general international law regulating the termination of a treaty on the ground of change of circumstances.

The Court stated in this respect :

“International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty¹³.”

What was the ground on which the Court rested this statement? Again, the Court recognized that an article of the Vienna Convention on the Law of Treaties—Article 62—declared or restated the pre-existing rules of customary international law on the subject. The Court said :

“This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances¹³.”

Crystallizing Effect

In the *North Sea Continental Shelf* cases, Denmark and the Netherlands contended :

“... that although prior to the [1958] Conference [on the Law of the Sea], continental shelf law was only in the formative stage, and State practice lacked uniformity, yet ‘the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference’; and this emerging customary law became ‘crystallized in the adoption of the Continental Shelf Convention by the Conference’¹⁴”.

The Court accepted the validity of this contention with respect to Articles 1 to 3 of the Convention, although not in regard to Article 6 providing for the method of delimitation. The Court remarked that Articles 1 to 3 of the Convention, containing the basic provisions defining the notion of the continental shelf and the rights of States in that respect were “the ones which, it is clear, *were then regarded* as reflecting, or *as crystallizing*, received or at least *emergent rules of customary international law* relative to the Continental Shelf¹⁵”.

Similarly, in its 1973 Judgment in which the Court established its jurisdiction in the Fisheries case between the United Kingdom and Iceland, the Court recognized a rule of customary law as one which had been emerging and which became established beyond dispute by its incorporation in a General Convention.

The Court had to consider “a veiled charge of duress” made by Iceland against the validity of the Agreement providing for the jurisdiction of the Court.

While rejecting the charge for the reason that it was “unfortified by evidence in its support”, the Court made a statement of a general character on the subject of duress as a ground for the invalidity of treaties :

“There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void¹⁶.”

The Court thus reached the conclusion that Article 52 of the Vienna Convention had made explicit or recognized a consequence resulting from Article 2, paragraph 4, of the United Nations Charter and that under contemporary international law, a treaty “procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations” is void.

These two pronouncements constitute examples of what the Court described as “emergent rules”, which crystallized through their general acceptance by States in the process of codification. Certain concepts such as that of the rights of the coastal State over its own continental shelf, forcibly suggested by parallel unilateral claims and lack of protest, or certain rules such as the invalidity of treaties procured by force, implicitly discernible from the Charter, may not yet have taken shape as undisputed rules of law. They crystallized however through the catalytic

effect of their incorporation in a General Convention. Adapting Justice Cardozo's well-known pronouncement, these rules had a twilight existence until the imprimatur of a Convention attested to their juridical character.

Generating Effect

The process of codification and progressive development of international law, in addition to declaring a pre-existing customary rule or crystallizing an emerging one, may also have a generating or constitutive effect, thus playing an important role in precipitating a more rapid growth of custom.

Certain provisions of a multilateral convention, or even a proposal which has gained a wide measure of support at a plenipotentiary conference, may become an agreed focal point of the subsequent conduct of States, having such an impact or possessing such a persuasive force that the practice of States is drawn to such provisions "like iron filings to a magnet"¹⁷.

Sørensen has well described this process :

"The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized legal rules may crystallize"¹⁸.

This subsequent practice of States, if sufficiently uniform and general, transforms a provision or a proposal originally *de lege ferenda* into a customary rule of law.

In the *North Sea Continental Shelf* case, the Court had to examine what it described as the last stage in the argument put forward by Denmark and the Netherlands, namely, that Article 6 of the Geneva Convention on the Continental Shelf providing for the principle or rule of equidistance in the delimitation of the shelf had had, after 1958, such a constitutive effect, and that its impact had generated a new rule which had become incorporated in the general fabric of customary international law by 1969, at the time of the Judgment.

The Court did not accept this contention ; it held that the rule of equidistance did not possess a norm-creating character, since its application was secondary to a primary obligation to effect delimitation by agreement, and was subject to exceptions in case of special circumstances. The Court further took into account that the subsequent practice of States was inconclusive and insufficient.

But while denying in this particular instance that there was a customary rule of equidistance binding on States which had not ratified the Convention, the Court made a statement of a general character recognizing the existence and legitimacy of what we have described as the generating or constitutive effect.

The Court said in this respect :

"In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur : it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained"¹⁹.

In two Judgments delivered in 1974 in the Icelandic Fisheries cases the Court had occasion to make a positive finding as to the existence of customary rules which had been generated through such a process of transformation. In these cases the Court recognized and applied customary rules which had become established in the practice of States centring on the nucleus of a proposal submitted *de lege ferenda* at the 1960 Conference on the Law of the Sea and which had failed by a single vote to be adopted.

The Court said in this respect :

"The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. However, after that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea ; the

extension of that fishery zone up to a 12-mile limit from the base-lines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries . . .²⁰”

The Court added that “State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights . . .²¹”.

In the light of these pronouncements it may be asserted that the International Court of Justice has, in the last decade made a significant contribution to the evolution of a more flexible concept of the source of customary international law, based on the recognition of an established consensus of States and irrespective of the formal requirements of adoption of a text, signature and ratification of a convention. The Court gave considerable weight to what it termed “the general consensus revealed” at the Second United Nations Conference on the Law of the Sea “which had crystallized as customary law in recent years”, on the basis of the subsequent practice of States. The implications of these judicial pronouncements in respect of the more widely attended Third United Nations Conference on the Law of the Sea may be far-reaching.

Comparison of this affirmative conclusion with the negative one in the *North Sea Continental Shelf* cases has prompted the observation that for the Court a proposal which failed of acceptance at a codification conference had more force than one adopted and embodied in a convention: that the Court attached more importance to failure than to success²².

This criticism misses the essential point of the problem of sources we are examining. The answer to the question does not depend on the success or failure of a given proposal at the conference. It depends on the nature of the provision itself, on whether it possesses or not a “norm-creating character” and, above all, on whether States have or have not followed the provision or proposal as a model or guide for their subsequent and uniform conduct. Obviously this did not occur, and could not occur, with Article 6 of the Continental Shelf Convention and the rule of equidistance provided therein in a subordinate form. On the other hand, it did happen with the concept of the fishery zone beyond the territorial sea, accepted and recognized by all maritime States, and with the concept of preferential rights incorporated in various bilateral and multilateral agreements²³.

It is true that these two concepts have been superseded by, or rather incorporated into, the wider notion of the 200-mile economic zone which has now become established in respect of fisheries as a result of the practice of States based on the consensus which emerged in July and August 1974 at the Caracas meetings of the Third Conference on the Law of the Sea. But in July 1974 when the Court had to decide the Icelandic Fisheries cases this development had not yet been completed. Consequently, as the Court stated, “in the circumstances, the Court as a court of law, cannot render judgment *sub specie legis ferendae* or anticipate the law before the legislator has laid it down²⁴”.

However, in my view, the proceedings in the Seabed Committee and at the Caracas Conference had already had, in July 1974, an unsettling effect on the pre-existing customary law which provided for absolute freedom of fishing in adjacent waters beyond 12 miles, regardless of the interests of the coastal States. It is perfectly possible that in the process of development of law, a certain rule, such as that providing for absolute freedom of fishing beyond 12 miles, becomes obsolete in respect of adjacent waters, before a new rule, such as that of an exclusive fishery zone of 200 miles, has matured²⁵. Nothing prevents an established rule of custom from becoming extinct if an increasingly extended State practice contradicts it. The requirement of uniformity of State conduct necessary for the emergence of a customary rule also applies to its continuance in force. It is not a requirement of customary law that a customary rule may only be abrogated by the establishment of another customary or treaty rule to replace it.

The view has been expressed however that to achieve the modification or abrogation of a customary rule “a new rule, customary or treaty, is necessary. It is not modification or withdrawal of consent, but the making of a new rule which supersedes the old²⁶”. This view imposes an excessive rigidity upon customary international law. It is true that the modification or withdrawal of assent by a single State, or a group of States, cannot abrogate an existing customary rule. But the evidence of the absence of general consensus in respect of a customary rule causes its disappearance even before the replacing customary rule has matured. This occurred, for instance, with the rejection, during the process of elaboration of the Charter of Economic Rights and Duties of States, of the proposal emanating from the industrialized States requiring “adequate, prompt and effective compensation” in case of nationalizations.

A similar situation existed in 1974, in the view of various judges when the Court had to decide the Icelandic Fisheries cases²⁷. It was thus ne-

cessary to find a legal answer to the case which should be based not on a rule of maritime law which, in the opinion of a large number of judges, had become inapplicable in respect of adjacent waters, but rather on other rules especially appropriate to the circumstances of the case: the preferential right of the coastal State and the traditional rights of a long-distance fishing State.

This example confirms the correctness of Edmund Burke's dictum on judicial decisions: "The major premise makes a pompous figure in the battle, but victory depends upon the little minor of circumstances."

The Requirements for the Establishment of a Customary Rule on the Basis of a Treaty Provision Having Generating Effect

Professor D'Amato, who has made valuable studies of custom as a source of international law has stated, on the basis of an examination of the 1969 Judgment, that:

"... All that matters with respect to the question whether a treaty provision generates customary international law... is what we can infer from the face of the treaty. If the treaty manifests an intent to have a particular provision create customary law, that manifest intent is controlling²⁹."

In my view, this conclusion is not warranted by the Court's Judgment in the *North Sea Continental Shelf* cases, when one takes into account both the Judgment itself and the dissenting opinions.

It is true that the Court paid special attention to the "norm-creating character" of the provision invoked, as it might appear from its text and from the structure of the treaty as a whole. But this was considered by the Court merely as a first requirement²⁹; even if this should be satisfied other requirements remained to be satisfied. These are the traditional ones for the creation of customary international law; the existence of both an extended and general practice in accordance with the terms of the treaty, and of *opinio juris* or a conviction that such practice is rendered obligatory by the existence of a rule of law requiring it. Far from discarding these traditional requirements, and establishing, as D'Amato says "a short cut to customary law", the Judgment was criticized by the dissenters as being too cautious and conservative in this respect. In fact the Court proceeded to consider the other elements usually regarded as necessary before a practice may be deemed to harden into a customary rule and found them also lacking.

In short, the Judgment neither says nor implies that if the form and structure of a provision were of a satisfactorily "norm-creating character" that would be the end of the matter; the Court still required *consuetudo* and *opinio juris* and despite its negative conclusion as to the first requirement, it proceeded nevertheless to analyse the other two. The Court said in this respect that:

"... an indispensable requirement would be that within the period in question... 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 involved³⁰."

Tunkin has remarked that the Court in its judgment has excluded "intermediary stages in the process of a treaty norm becoming generally recognized with the aid of the customary process". He points out that "the process of recognition of a treaty norm as binding upon States which are not parties to the treaty is a gradual one. Not all the States recognize such a norm as legally binding upon them on the same date." He asks then "what is the situation if the *opinio juris* has formed in some States non-parties to the treaty only, whereas others still linger³¹?"

The answer—admittedly a partial one—may be found in Article 38, paragraph 1, of the Statute. A State party to a case may have expressly recognized, in its diplomatic correspondence or by other means, a rule established by a convention although it has not become a party to it. In accordance with the terms of Article 38 (1), *litt. a*, such a treaty provision may be applicable to the State in question, before it has become a generally accepted rule of customary law. This is another example of the interpenetration of treaty law and customary law.

The Need for "Opinio Juris"

The requirement of the subjective element or *opinio juris*—rejected by some doctrinal writers³²—was categorically insisted upon in the *North Sea Continental Shelf* Judgment. The Court said in this respect:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by

the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty³³.”

Some of the dissenters pointed out the difficulties involved in obtaining evidence of the existence of *opinio juris* in concrete cases. “This factor, relating to internal motivation and being of a psychological nature, cannot be ascertained very easily³⁴”.

This difficulty may be somewhat exaggerated. A large amount of what is described as the material element of State practice contains in itself an implicit subjective element, an indication of *opinio juris*. Documents which are considered as evidence of State practice, such as the arguments a State advances in support of a claim, the protests made against another State’s conduct, diplomatic representations and pleadings before international tribunals, often contain indications not only relating to that State’s conduct but also about the motivations, legal or otherwise, behind it. For instance, when a State claims from another State that a certain behaviour is due as a matter of law, it is by the same token recognizing the obligation to follow that same course of conduct in identical but opposite circumstances.

These express or implicit indications of *opinio juris* are particularly significant and frequent when a State participates in the process of codification and progressive development of international law under United Nations auspices. When commenting on drafts prepared by the International Law Commission, making statements in a plenipotentiary conference, voting on a text, and signing or ratifying a convention, States may often furnish, expressly or implicitly, valuable indications not just about their objective conduct but also as to their *opinio juris* in respect of the legal rules in question. Consequently, Judge *ad hoc* Sørensen may have been right in pointing out in this respect that the proper approach “is to examine the relevant elements as interlocking and mutually interdependent parts of a general process” and “that it should be considered as a relevant element that a convention has been adopted in the process

of codification and development of international law under the United Nations Charter³⁵”.

The Time Required for the Elaboration of a Customary Rule

The Court’s Judgment in the *North Sea Continental Shelf* cases admitting that the main provisions of the 1958 Convention crystallized customary law on the basis of a practice of States which began in 1945, and the Judgments in the Icelandic Fisheries cases accepting that certain proposals at the 1960 Conference had hardened into customary rules in 1974, constitute authoritative pronouncements on the time element which is now required for the elaboration of a customary rule.

The requirement of the traditional doctrine was that a long and protracted practice was necessary for the emergence of a customary rule: some authorities even referred to “a continuous practice from time immemorial³⁶”.

The traditional doctrine has been in fact revised by these recent decisions.

Without agreeing with what has been described as “instant custom³⁷” the Court accepted that State practice of around 15 years was sufficient for the purpose. The Court’s acceptance of a quickly maturing practice shows that the traditional requirement of duration is not an end in itself but only a means of demonstrating the generality and uniformity of a given State practice.

Today, the simultaneous appearance of similar problems between various States, the immediate knowledge of the attitudes taken by other governments, the pooling of information at plenipotentiary conferences and the whole process of codification, all account for the present acceleration of the development of customary law.

This in turn enables new rules of customary international law to be created in compliance with the requirements of the dynamic process of evolution of the contemporary international community.

The Court referred expressly to this aspect of the question of sources in the *North Sea Continental Shelf* Judgment, a case in which it took every available opportunity to clarify the significance of each particular feature in the process of elaboration of customary law.

The Court said in this respect:

“... the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary inter-

national law on the basis of what was originally a purely conventional rule³⁸".

Ways and Means of Obtaining Information about the Practice of States

A related practical consequence of the importance acquired by the process of codification in connection with the elaboration of customary law is the change this has brought about in the ways and means of ascertaining the practice of States.

Before the current developments, in order to determine whether a certain practice had the required generality and uniformity, a difficult and complex process of research was unavoidable. It was necessary to obtain information about the practice actually followed by a large number of States by studying the most unwieldy materials such as their diplomatic communications, the instructions of their Foreign Offices, their "livres à couleur", etc. Such were the complications of this study that States were asked in the Statute of the International Law Commission to publish digests of their diplomatic practice in order to make the evidence of international law more readily available.

Today, the process of codification furnishes an easy and convenient way of discovering the actual practice of States.

The observations of governments on drafts elaborated by the International Law Commission, the discussions in the Sixth Committee of the General Assembly, the statements of representatives of States in plenary codification conferences constitute a sort of public enquiry about the practice of States and about their views as to the rules which are followed or ought to be followed on a certain subject; this is an evidence "free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice³⁹".

This development was well brought out in the dissenting opinion of Judge Koretsky in the *North Sea Continental Shelf* cases, where he said:

"Where it used to be considered indispensable, for determining certain general principles of international law, to gather the relevant data brick by brick, as it were, from governmental acts, declarations, diplomatic notes, agreements and treaties, mostly on concrete matters, such principles are now beginning to be crystallized by international conferences which codify certain not inconsiderable areas of international law⁴⁰."

Travaux préparatoires and Customary Law

Another aspect of the increasing interaction between conventional and customary law is that, once it is recognized that an international convention, or a proposal in a conference, may either declare a pre-existing rule, cause an emerging one to crystallize or be the focal point of a State practice hardening into customary law, the *travaux préparatoires* of the conventional rule acquire a very significant value. They assist in determining whether the rule was proposed *de lege lata*, whether it is a rule *in statu nascendi*, or is advanced *de lege ferenda*.

Thus, one of the traditional methods of treaty interpretation has equally become a useful tool in the delicate and difficult task of determining the existence of a customary rule.

For instance, in the Judgment of the Court in the *North Sea Continental Shelf* cases decisive evidence as to whether the rule of equidistance was or was not declaratory or pre-existing law was afforded by the discussions in the International Law Commission leading to the incorporation of that rule.

After reviewing the work of the International Law Commission, and remarking that "the status of the rule in the Convention therefore depends mainly on the processes that led the Commission to propose it", the Court added:

"These processes . . . show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention should be said to have reflected or crystallized such a rule⁴¹."

And in its Advisory Opinion on *Namibia*, when accepting that the provision of the Vienna Convention on the Law of Treaties on breach was declaratory of customary law, the Court took into account, as being an important factor, some indications contained in the *travaux préparatoires* of that Convention. The Advisory Opinion makes explicit reference to the fact that the provision in question had been adopted at the Conference without a dissenting vote.

Consent of the Defendant State or General Consensus of States

One of the consequences of the development of customary law which has taken place in the last decade is that the consensualist doctrine of customary law—which appeared to have been accepted by the Permanent Court in the *Lotus* case—now seems to have been abandoned by the International Court of Justice.

The Judgment in the *North Sea Continental Shelf* cases contains an implied but conclusive rejection of the doctrine that customary law constitutes a tacit agreement, requiring the assent of the State against which a customary rule is being invoked.

In that case the Federal Republic of Germany had not ratified the Convention and the Court expressly rejected the contention of Denmark and the Netherlands that the Federal Republic of Germany “had accepted the régime of Article 6 in a manner binding upon itself⁴²”. Despite this finding the Court examined whether the principle of equidistance in Article 6 constituted a rule of customary law, either as declaratory of a pre-existing norm, or as the crystallization of an emerging one or as the basis for a new rule. The whole Court’s reasoning—including in this respect that of the dissenters as well—is based on the assumption that if in any of these ways the principle of equidistance had become “a part of the *corpus* of general international law”, then such a rule “like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter⁴³”. It is true that in these words the Court is describing the contentions of Denmark and the Netherlands, but no reservation was made by the Court and the whole object of its analysis was to find out whether or not there had been an acceptance of the rule by the generality of States, regardless of the lack of assent by the defendant State which it had already noted.

Consequently Rousseau⁴⁴ is right in asserting that this Judgment is a definitive departure from the consensualist doctrine of customary law, a doctrine still advocated by certain writers such as Tunkin⁴⁵.

It is true that an *obiter dictum* of the Court in the subsequent *Barcelona Traction* Judgment has raised some doubts, having been interpreted by certain commentators as reintroducing the theory of custom based on tacit agreement or consent.

In this case the Court had to deal with the question of the diplomatic protection of shareholders and in so doing it examined the subject against the background of the origin, purpose and function of the cus-

tomary law of diplomatic and judicial protection of foreign economic interests. In the course of considering this the Court referred to the fact that the customary law of State responsibility on the subject is a historical product which has been the result of conflicts or controversies between States having opposed interests. The Court then remarked that “a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject⁴⁶”.

This passage has been criticized as tending to suggest “that no rule of customary law can ever evolve without the specific consent of those concerned⁴⁷”, thus reintroducing the doctrine of the tacit agreement.

It is clear from the context, however, that the Court was referring, not to the consent of the defendant State in a given dispute, but to the relations between States interested in exercising diplomatic protection and States in whose territories such protection is sought to be exercised. When referring to the consent of “those concerned” the Court alluded to both groups of States, that is to say, it did not require the assent of any individual State, such as the defendant, but referred to aggregate consent, to the consensus of both groups of States.

In the *Namibia* Advisory Opinion the Court had to pronounce on a South African objection to the validity of the resolution requesting the opinion, which had been adopted by the Security Council with the voluntary abstention of two permanent members. It recognized the validity of the Security Council resolution, remarking that the practice of voluntary abstention was “generally accepted by Members of the United Nations and evidences a general practice of that Organization⁴⁸”. By thus using the terms of Article 38 of the Statute of the Court regarding custom it seems to have admitted that there is a practice of international organizations, similar to the practice of States, constituting a source of rules of customary international law, although it may not, strictly speaking, be contained in the terms of Article 38.

The Court was not deterred from making this finding by the fact that the legitimacy of the practice had been challenged occasionally by certain member States when they strongly opposed a particular resolution adopted by the Security Council by the procedure described. Such an occasional opposition could not detract from the generality of the practice.

All these findings and pronouncements of the Court, especially when taken together, imply a complete abandonment of the doctrine of the tacit agreement; customary rules are the product of general consensus, not of individual State consent, express or implied.

This places in their true perspective earlier "dicta" in the *Asylum and Rights of Nationals of the United States of America in Morocco* cases where reference was made to the assent of the defendant State⁴⁹. As various writers have pointed out⁵⁰ those "dicta" refer to regional or local custom. The State invoking a custom of this type must furnish evidence of the existence of the custom, and of the assent of the State specifically affected. General custom is however a part of international law which the Court is presumed to know and in respect of which no burden of evidence lies upon the party relying on that general custom. Evidence of the specific assent of the defendant is unnecessary: all that the Court must determine is, in the words of Article 38 of the Statute, whether a certain practice is "generally accepted as law".

This does not mean, however, that the attitude which has been taken by the defendant State is in all cases completely irrelevant. The Court is not normally concerned to search for the specific consent from the defendant State but concentrates instead on the generality of a practice, on the general consensus of States: on the other hand, a totally different situation arises when a customary rule, despite its generality, has been unambiguously and persistently rejected by a certain State from the outset. The situation of the recalcitrant State arose in the *Nuclear Tests* cases where the Applicants contended that the prohibition of atmospheric tests had become a rule of customary law, invoking in support the Moscow Test Ban Treaty of 1963, to which 106 States became parties, and various resolutions of the General Assembly. France, the respondent, had, like China, persistently opposed the alleged rule and had declined to become a party to the Moscow Treaty. The Court did not pronounce on this question, since it did not reach consideration of the merits of the case⁵¹.

Resolutions of the General Assembly and Customary Law

Contemporary writers have asserted that resolutions of the General Assembly constitute a new and autonomous source of international law which should be taken into account as such by the International Court of Justice.

Such a general proposition is not in harmony either with the Charter of the United Nations or with the Statute of the Court. According to the Charter, resolutions of the General Assembly addressed to States are in the nature of recommendations. These resolutions are not among the sources of law indicated in Article 38 of the Statute.

Yet the General Assembly is not only a principal organ of the United

Nations, but one composed of representatives of all States Members, as Article 9 of the Charter provides. This means that the General Assembly is a forum where—with the increasing universality of the United Nations—almost all States meet and where these States may, after deliberation, express their views and their collective will with respect to principles and rules of law for the conduct of States. It has been said long ago that "whenever it appears that all nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law⁵²".

Resolutions of the General Assembly aimed at formulating principles and rules of law for the conduct of States normally appear under the title of Declarations. It has been stressed that "in United Nations practice, a declaration is a formal and solemn instrument, suitable for rare occasions when principles of general and lasting importance are being enumerated⁵³". These Declarations may constitute a source of rules of international law in a way similar to the formation of a consensus in conferences for the codification and progressive development of international law.

As with such conferences, it is possible to find also in respect of certain General Assembly Declarations the three effects in respect of customary law already described.

Thus in a General Assembly declaration rules of customary law may be recognized as pre-existing norms and declared to be so; an emerging rule of customary law *in status nascendi* may crystallize thanks to a unanimously adopted General Assembly declaration; a resolution by the General Assembly which is clearly *de lege ferendae* may however provide the basis for a subsequent and concordant practice of States which will transform the resolution into a rule of customary international law.

Naturally, it is not possible to say that all Resolutions adopted under the title of Declarations have one of those effects. The determination of when this occurs is a matter requiring careful analysis in each case and with respect to each provision or paragraph of a given resolution, taking into account, *inter alia*, the drafting of the text; the voting strength it obtained; the statements made by members during the process of deliberation and the subsequent conduct of States (and of the United Nations itself) in respect of each resolution. As has been pointed out, "these Assembly resolutions do not create law, but they may authoritatively prove its existence⁵⁴".

For instance, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Resolution 2625 (XXV) of the General Assembly) may be considered as declaratory of existing rules of international law.

This Resolution was elaborated over a period of seven years by a Special Committee representing all the groups and tendencies within the United Nations, working on the basis of consensus. The Declaration was adopted on 24 October 1970 by acclamation and without a dissenting vote. Its text declares "that the principles of the Charter which are embodied in this Declaration constitute basic principles of international law".

This Resolution does not purport to amend the Charter, but to clarify the basic legal principles contained in Article 2.

Adopted in these terms and without a dissenting vote, it constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognizing what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members⁵⁵.

An example of a resolution of the General Assembly crystallizing emerging rules of international law is the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, unanimously adopted by the General Assembly on 13 December 1963⁵⁶. The object and purpose of this Resolution, as indicated in its title, was to constitute a declaration of legal principles which "reflected international law as accepted by Members of the United Nations⁵⁷" and thus crystallized the general consensus which had manifested itself in the previous years in respect of the freedom of outer space activities.

A similar effect may be attributed to the Declaration of the General Assembly on the Principles Governing the Sea-Bed (Resolution 2749 (XXV) of 17 December 1970) which proclaims that the resources of the seabed are "the common heritage of mankind" and provides that :

"No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible

with the international régime to be established and the principles of this Declaration."

The general consensus of the States voting for the Declaration and accepting the principle of "common heritage of mankind" is that all States are entitled to share in the resources of the area of the seabed beyond the limits of national jurisdiction.

Consequently, a national claim for exclusive mining rights over seabed resources while the international régime is being negotiated would be contrary to the principles of the Declaration and not in accordance with the existing customary international law on the subject⁵⁸.

Finally, an example of a General Assembly resolution which has had a constitutive or generating effect is Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples. This resolution on the subject of decolonization was described in the *Namibia* Advisory Opinion as an important part of customary law. Speaking of the development of international law in regard to non-self-governing territories the Court described Resolution 1514 (XV) as "a further important stage in this development" and went on to state :

"...the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law through the Charter of the United Nations and by way of *customary law*⁵⁹".

It is clear from the context of the Opinion that this reference to customary law is meant to include Resolution 1514 (XV) of the General Assembly.

Furthermore, in the *Western Sahara* Advisory Opinion the Court had occasion to express more detailed views as to the method through which Resolution 1514 (XV) had become part of general customary law. It results from the Court's pronouncement in this respect that the resolution became a rule of positive customary law through the subsequent action of States, particularly within the United Nations.

The Court mentioned the fact that "General Assembly Resolution 1514 (XV) provided the basis for the process of development which has resulted since 1960 in the creation of many States which are today Members of the United Nations⁶⁰".

The Court thus seems to have taken particularly into account the fact that since its adoption Resolution 1514 (XV) had been the basis for a

development which caused or assisted—particularly through the action of the Committee on Decolonization and the General Assembly itself—the independence of many new States which, once they became independent, were accepted as Members of the Organization. Thus, around the nucleus of a General Assembly resolution, the practice of States and of the international organization itself had created a rule of customary international law.

To conclude, in the exercise of its powers under the Charter the General Assembly may not legislate for the world, nor do its decisions constitute an independent source of law. But, as the “town meeting of the world” it is a centre where States may express their consensus on an existing or emerging rule of international law or provide the basis and the starting point for a progressive development of that law through the uniform conduct of States.

CHAPTER II

THE LAW OF TREATIES

The Definition of a Treaty

Although the definition of an international treaty seems at first sight to be a purely academic question, judicial experience shows that the determination of whether a certain instrument constitutes a treaty has important practical consequences.

For instance, in two cases before the International Court of Justice the question whether an instrument was a treaty had decisive significance for the establishment of the Court’s jurisdiction with respect to the dispute.

In the *Anglo-Iranian Oil Co.* case the jurisdiction of the Court was invoked on the basis of Iran’s acceptance of the optional clause, dating from 1932, which referred to disputes “relating to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration”.

The United Kingdom invoked as a treaty subsequent to 1932 a concession contract of 1933, signed between the Government of Iran and the Anglo-Persian Oil Company, contending that this agreement had:

“a double character, the character of being at once a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments ⁶¹.”

The Court could not, however,

“accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom ⁶².”

From this pronouncement of the Court it results that an agreement between a State and a private company, even a multinational one, even