INTERNATIONAL LAW

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to the flag state, the French government was unable to prove that states had acted in this manner from a sense of legal obligation.

Similarly, in the *North Sea Continental Shelf* cases,[1] the attempt was made to show that the Continental Shelf Convention in general, and Article 6 dealing with the median line delimitation of adjoining areas of continental shelf in particular, had become part of customary international law. The International Court took the view that the practice of states in this respect had not been sufficiently uniform, but even if it had been, there was an absence of the psychological element required for the creation of a new rule:[2]

> "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 duty."

Having referred to the *Lotus* case, the Court continued:[3]

> "the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so".

In order for a customary rule to develop, it must at some stage be possible to imply from the conduct of a group of states that between them it is regarded as a matter of legal duty that they should act in a certain way. Such a rule will only attain the position of a general rule of international law if a sufficient number of states accept it as binding on them, and if the rest of the international community fail to register an effective protest to the extension of the rule to the conduct of relations in which they are involved. It is because of this emphasis on the acceptance of, or acquiescence in, a developing rule that international law retains its theoretically consensual foundation. As Fitzmaurice has commented:[4]

> "Where a general rule of customary international law is built up by the common practice of states, although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often the uncoordinated, independent, if similar, action of states), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice as constituting a binding rule of law."

1. I.C.J. Rep. 1969, p. 3. 2. At p. 44. 3. At pp. 44–45.
4. *The Law and Procedure of the International Court of Justice, 1951–4: General Principles and Sources of Law* (1953), 30 B.Y.B.I.L., at p. 68.

But how far is the proposition that international law is based on the consent of states a useful guide to understanding the nature of international law and the way in which its rules develop? It must be realised, of course, that the consensual theory should not be taken to its ultimate logical conclusion. For example, the fact that the practice relied upon to prove the existence of a customary rule is limited to a group of states does not necessarily prevent the development of a rule of universal application. The actions of the chief maritime powers could clearly create a universal principle of the law of the sea, and it would not be open to a state, hitherto without a coast, if it acquired access to the sea and built up a shipping fleet, to refuse to recognise the principle because it had developed without that state's consent. In such a situation, it would be difficult to imply the acceptance of the rule by the inland state, and equally difficult to establish acquiescence on its part. The rule is part of universal international law because it would be totally destructive of any principle of obligation to allow a state to decide that it was not bound by an existing rule of international law.

As long as this limitation on its scope is kept in mind, the consensual theory does provide an explanation of the fact that, in certain circumstances, rules of international law can exist which are not binding on all states, either because the practice on which they are based is limited to a small group of states, or because a fairly uniform practice has been expressly dissented from by a particular state. In the *Asylum* case, the International Court recognised that Colombia could succeed in its claim by showing that a particular rule relating to diplomatic asylum was binding on Peru, even though such a rule was nowhere recognised outside Latin-America. In the words of the Court:[1]

> "The Colombian Government has finally invoked 'American international law in general' . . . it has relied on an alleged regional or local custom peculiar to Latin-American states. The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'."

Then, having commented on the uncertainties and contradictions in the practice of the states concerned, the judgment continued:[2]

> "The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum."

1. I.C.J. Rep. 1950, at pp. 276–277. 2. *Ibid.*, at pp. 277–278.