

THE FORMATION OF CUSTOMARY  
INTERNATIONAL LAW

by

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## CHAPTER II

THE OBJECTIVE ELEMENT IN CUSTOMARY  
INTERNATIONAL LAW<sup>81</sup>

“Words are also actions, and actions are a kind of words.” (Ralph Waldo Emerson, “The Poet”, *Essays* (1841-1844).)

*Introduction*

In the previous chapter I said that there was the highest authority for the proposition that there are two components of customary international law: the “objective” and the “subjective”. In deference to this view, and despite my own reservations about whether the distinction is always feasible or useful, I propose in this chapter to concentrate on the “objective” element: in other words, State practice<sup>82</sup>. (In the next chapter we shall explore the “subjective” element, that is, consent to the practice becoming law, according to some authorities; and according to others, a belief that the practice is lawful.)

The rules relating to such matters as diplomatic immunity and the freedom of the high seas have evolved as the result of the *conduct* of States which was either parallel and uniform from the outset, or (more commonly) eventually fell into a common pattern. Traditionally, there has been more emphasis on State conduct than on the subjective element; this is understandable because the will or the belief of a State is more difficult to ascertain than its conduct, which is often, by its nature, public and objectively verifiable. With the introduction of more multilateral and more open forms of diplomacy, especially in the United Nations, it is arguable that the situation has changed: we shall examine this further in Chapters IV and V.

81. Since this chapter was written, many of the views contained in it have been adopted by the International Law Association’s International Committee on the Formation of Customary (General) International Law: see ILA, *Report of the 68th Conference* (Taipei, 1998), in press. The Report was based mainly on a draft by the present author.

82. I prefer the term “objective element” to the more common “material element”, because the latter may more easily be confused with the concept of “material source of law” — a topic with which I dealt in the previous chapter (Chap. I, Sec. 6 (*d*)) and which belongs to a different order of ideas.

The questions I shall discuss here are : (1) whose practice counts ? ; (2) what is State practice ? ; (3) the time element ; (4) uniformity of practice ; (5) the extent of practice ; and (6) the persistent objector.

### 1. Whose Practice Counts ?

The first question I want to pose is : whose practice are we talking about ? The objective element is usually described as “State practice”. But in constitutional law, and in other branches of public international law, the “State” comprises at least three elements — the executive, the legislature and the judiciary, not to mention political subdivisions (such the provinces in a federal system), and private persons or other entities acting on behalf of the State<sup>83</sup>. Does the conduct of all of these organs of the State count as State practice ? And what about the practice of intergovernmental organizations ?

Strupp and others, writing in the earlier part of this century, took the view that one should only count the practice of the organs which, according to the internal law of the particular State, had the capacity to bind it to international obligations<sup>84</sup>. Normally, this power would be confined to the head of State or Government, the minister of foreign relations and his staff, including members of the diplomatic service. But this is far too restrictive.

To begin with (and limiting ourselves for the moment to the executive branch of the State), although it is normally the foreign ministry which conducts relations with other States, it is far from being the only department to do so. For example, if aviation is concerned, the department with primary responsibility may well be the ministry of transport or its equivalent. No doubt in many instances the foreign ministry is also involved, but in practice this is not always possible.

Furthermore, international relations comprise more than just diplomatic contacts. An administrative act under internal law, performed by an element of the executive other than the foreign ministry, may affect a foreigner and thereby enter into the domain of international law and relations : for instance, a nationalization decree.

83. Cf. the International Law Commission's draft articles on State responsibility, Part I, Arts. 5-15 : *Yearbook of the ILC*, 1980-II, Part 2, p. 31.

84. K. Strupp, “Les règles générales du droit de la paix”, 47 *Recueil des cours* (1934), p. 257 at pp. 313-315 ; cf. D. Anzilotti, *Cours de droit international* (trans. Gidel), pp. 74-75.



And what about organs of the State other than the executive, notably the judiciary and the legislature? According to Strupp's approach, their conduct should not count, because they are not responsible for the conduct of foreign relations. However, the views of such thinkers were very much influenced by their belief that customary law is essentially a sort of unwritten treaty law, and of course the capacity to enter into treaties is normally vested in the executive. But as I shall suggest in Chapter III, the conception of custom as tacit treaty, though superficially attractive, is open to serious objection; and if it is incorrect, the theoretical obstacle to counting the acts of other organs of States falls away. Indeed, on the level of theory one can very plausibly argue that international law is the law governing relations between States as a whole, not just their executives<sup>85</sup>.

So far as concerns the legislature, the matter is, I think, relatively straightforward. Legislation can affect the rights of foreigners and, thereby, the States of which they are the nationals. For instance, if an act of parliament imposes a restriction on the right of foreigners to fish in a zone which was previously regarded as the high seas, this constitutes an implied claim by the State, through its competent organ, to jurisdiction over those waters<sup>86</sup>. Similar considerations apply, indeed *a fortiori*, to jurisdictional claims made in the actual constitution of the State. Constitutional and legislative practice in

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85. On the other hand, it is submitted that the practice of regional components of federal States (or of other subordinate local authorities) does not count, as such, towards the formation of rules of customary law. Although their activities are capable of giving rise to State responsibility, as a matter of principle the practice of such bodies, though it may impact on international relations (e.g. California's unitary tax system) should not, of itself, be regarded as constituting State practice. The reason is that these entities are not States in the international law sense of the term and they are not (normally) capable of conducting their own international relations. It is, however, otherwise if such entities are constitutionally empowered (albeit in a limited way) to conduct their own foreign relations and other States recognize that capacity (e.g. the Byelorussian and Ukrainian Soviet Socialist Republics before the break-up of the Soviet Union). Similarly if the entity concerned acts with the authority of the (federal) State, or if the latter adopts its acts. A State's failure to prevent the conduct in question can amount, for present purposes, to tacit adoption. For example, if foreign States protest about the Californian unitary taxation system, and the United States of America does nothing to prevent its being put into effect, then this conduct has to be regarded as having been adopted by the United States and therefore as an instance of State practice (whether or not the United States is in a position, under its constitutional law, to change the rules in question).

86. It should also be noted that, in many States, the legislature (or part of it) plays an important role in the making of war and peace, the conclusion of treaties, and so on.

the domain of international relations ought therefore to count as State practice<sup>87</sup>.

This is equally true of domestic courts since they, too, are organs of the State. And certainly international tribunals, including the highest, have not been averse to using national judicial decisions as evidence of State practice on occasion<sup>88</sup>. The question, however, arises: what if the practice of domestic tribunals conflicts with that of the executive, which is quite possible in democratic countries with a doctrine of separation of powers<sup>89</sup>? If, by any chance, there is a contradiction between the positions of the Government and the courts, it seems to me that this goes more to the *weight* of the evidence of State practice than to its *admissibility*, so to speak. In other words, it is not that the latter does not count as State practice, but that it does not normally count as much — does not weigh as heavily — as an act of the Government<sup>90</sup>, which after all is the organ with primary responsibility for the conduct of international relations.

This distinction between the issue of whether a certain practice *counts* at all, on the one hand, and *how heavily it counts*, is an idea to which I shall return, though I do not want to over-formalize it.

Before leaving the question of the decisions of national courts, attention should be drawn to one further point. As well as constituting practice of the State of which they form part, these decisions can constitute persuasive (albeit not binding) precedents on the rules of international law on particular questions, just as do those of international courts and tribunals. There are numerous examples of this. Decisions of national courts thus perform a dual function in relation to customary law: they count as a form of State practice within the meaning of Article 38 (1) (b) of the Statute of the Court, but they are also a “subsidiary means for the determination of rules of law” within the meaning of subparagraph (d) of that Article.

Still on the general question “Whose practice counts?”, it should

87. *Accord*, e.g. Cf. L. Ferrari Bravo, “Méthodes de recherche de la coutume internationale dans la pratique des Etats”, 192 *Recueil des cours* (1985), pp. 237, 259-261.

For an example of judicial acceptance of this proposition, see e.g. *Nottebohm case (Second Phase)*, *ICJ Reports 1955*, p. 4, at p. 22.

88. See e.g. “*Lotus*” case (1927), *PCIJ, Series A., No. 10*, p. 23 at pp. 26 and 28-29; *Nottebohm case (Second Phase)*, *ICJ Reports 1955*, p. 4 at pp. 21-23.

89. Various rules and techniques of domestic law, such as the use of executive certificates, reduce the likelihood of a clash, but by no means make it impossible.

90. Authorized at the appropriate level.

be noted that it is not just the practice of *States* which contributes to the development of customary rules. The practice of international organizations can do so too. To a varying extent, intergovernmental organizations participate in international relations in their own name, and not that of the members who constitute them. As such, they are subjects of international law who play their own part in the law-making process. For example, the United Nations sends military personnel to perform various functions in different parts of the world, and the European Union conducts external commercial relations in its own name. Their practice contributes to the law of war and of economic relations, respectively. Again, in the *Reservations to the Genocide Convention* Advisory Opinion<sup>91</sup>, the ICJ, in determining the customary law regarding reservations to treaties, took into account the practice of the United Nations Secretary-General, as the depositary of numerous multilateral treaties, alongside that of the chancelleries of various States. To the extent that organizations act in this sort of way in their own right, they are capable of contributing to what is conveniently and traditionally called State practice, but which is, more precisely, the practice of subjects of international law<sup>92</sup>.

Although some commentators do indeed refer to the practice of international organizations as an example of the objective element in customary law, they tend not to point to the sort of practice just mentioned, but rather to cite in this connection the resolutions of such organizations, and particularly those of the General Assembly of the United Nations<sup>93</sup>. But it is submitted that the adoption of such instruments is more helpfully understood as a form of action by the *member States* of the organization. In voting for or against a resolution which has something to say about international law — and not all do — States are engaging in a form of State practice and/or are manifesting their subjective attitude (consent or belief) about the rule in question. Precisely what significance is to be attached to

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91. *ICJ Reports 1951*, p. 15.

92. There are also several cases concerned with the interpretation of the constitution of an international organization where the practice of the organization (or organs thereof) and of other organizations or organs has been taken into account. See further O. Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat", 25 *British Year Book of International Law* (1948), p. 91.

93. Examples are R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), Chap. 2; B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", 58 *British Year Book of International Law* (1987), p. 39.

these votes is a question which will be considered in Chapter V ; but the point to stress here is simply that such conduct is better classified as the conduct of the members, rather than the conduct of the organization itself, of which there are fewer genuine examples<sup>94</sup>.

Neither do I regard it as helpful to classify the decisions of *international courts and tribunals* as instances of State practice, even if their competence to act derives from States. In the first place, the purpose of international courts and tribunals is to act *independently* of those appointing them. To treat them as State's agents is therefore misleading as well as — in a sense — demeaning. Furthermore, the real significance of the decisions of international courts and tribunals (apart from their role in settling a particular dispute) lies in their precedential value as determinations of the law. Even if they are, strictly speaking, binding only on the parties and only in the particular case, their persuasive force can be considerable — depending on the status of the tribunal, the quality of its reasoning, the terms of the *compromis* or Statute by which it is set up, and so on. In short, their contribution to the formation of customary international law, though considerable, is not best subsumed under the heading “State practice”<sup>95</sup>.

94. Admittedly, the line is not always easy to draw. For example, the practice of an international organization in relation to the criteria of statehood, for the purpose of admission to, or participation in, might be viewed both as the practice of the organization and as that of the members voting within it: cf. e.g. Higgins, *The Development of International Law through the Political Organs of the United Nations*, Chap. 2; though see M. H. Mendelson, “Diminutive States in the United Nations”, 21 *International and Comparative Law Quarterly* (1972), p. 609. It is also true that international organizations tend to be controlled quite tightly by the Member States. Nevertheless, it is submitted that the distinction between the conduct of an organization and that of the members within it is one which it is both possible and desirable to make, not just in principle but in practice. And in any event, it seems inadmissible both to treat the resolution as the practice (or the *opinio juris*) of the members, and also to count it as a substantial piece of practice of the organization constituted by them — save perhaps in those rare cases (as in the European Union) where there is a substantive shared competence.

95. This is not the place to engage in a lengthy disquisition on the role of international courts and tribunals — still less of national courts — on the formation of customary international law. But it is interesting to note that Article 38 (1) (d) of the ICJ Statute speaks of judicial decisions as “subsidiary means for the *determination* of rules of law”. “Determination” has — usefully and intriguingly — a dual connotation. It can mean “ascertainment”: the decision is a means of ascertaining what the (customary) rule is, it is a piece of evidence. But the word “determine” can also mean “decide”, in the sense of laying down the law: although there is no doctrine of binding precedent in international law, the International Court, in particular, makes decisions on debatable questions of customary law which thereafter, in practice, cease to be debatable — or at any rate become very hard to challenge.

A contribution to the formation of customary international law, in a *broader* sense, is also made by other types of entity, such as non-governmental international organizations (e.g., Amnesty International, the Institute of International Law, or the International Law Association); multinational and national corporations; and even individuals.

Myres McDougal has identified seven phases of the decision-making process<sup>96</sup>, which he labels intelligence (the gathering of information); promotion (lobbying); prescription; invocation (before tribunals, amongst others); application; termination; and appraisal (enquiry into past decision-making in the light of postulated goals). In relation to some of these roles, non-governmental entities certainly have a significant part to play.

For example, interest groups and corporations may be important in inducing a Government or group of Governments to adopt a certain policy with regard to, say, satellite communications or compensation for nationalization (“promotion”); and it is not infrequently the institution of legal proceedings in domestic courts by or against foreign individuals or corporations (“invocation”) which triggers a determination by those courts of the content of customary international law (“application”).

But however important this contribution might be, I would nevertheless maintain that there is a distinction to be drawn between the *indirect* contribution made by non-governmental bodies to the customary law process, and the *direct* role played by governmental bodies (that is, States and — to a lesser extent — international organizations). In the ultimate analysis, it is only the practice of the organs and instrumentalities of States<sup>97</sup> which is taken into account in deciding whether a rule of customary international law has come into being or has been modified by another rule. In this (relatively) formal sense, the practice of non-governmental bodies does not count in the formation of customary international law. This may not sound very “progressive”, and some might consider it undesirable for States to have such a tight monopoly over the law-making process; but in my opinion that it is the present reality.

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96. E.g. M. S. McDougal, “Legal Basis for Securing the Integrity of the Earth-Space Environment”, 184 *Annals of the New York Academy of Sciences* (1971), p. 375.

97. Including for present purposes domestic and international courts, international tribunals and intergovernmental organizations.

## 2. *Forms of Practice*

Having ascertained *whose* practice is to be taken into account, we are now in a better position to identify what forms this practice takes. It comes in many different guises, of which the following is an illustrative, rather than exhaustive, list, and not in order of importance. Diplomatic correspondence, including protests; declarations of government policy (including statements to the legislature); the advice of government legal advisers; press communiqués; official manuals dealing with legal questions, for example manuals of military law; executive practice or decisions; orders to the armed forces, such as rules of engagement; votes in international organizations; the observations of Governments on projects produced by the International Law Commission or similar bodies; national legislation; domestic court decisions; pleadings before international tribunals; and so on<sup>98</sup>. In my opinion, however, this list needs to be qualified by the observation that behaviour does not count as State practice if it not communicated to another State<sup>99</sup>. If we think of the customary process as one of (express or tacit) claim and response, the reason is clear: secret conduct is incapable of constituting either a claim or a response. Thus, the secret “bugging” of an embassy is not a tacit claim to be entitled to do so<sup>100</sup>. Neither is the confidential advice of a legal adviser or secret instructions to armed forces<sup>101</sup>. If, subsequently, the matter becomes publicly known, it is capable of constituting evidence of the State’s subjective attitude towards the rule (its will or its belief, to be discussed further in the next chapter), but it is submitted that it is not, strictly speaking, an instance of the objective element.

### (a) *Statements*

It will be noted that, as well as concrete acts like adjudicating and enforcing domestic law against foreigners, the foregoing list also

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98. Cf. I. Brownlie, *Principles of Public International Law* (4th ed., 1990), p. 5. A valuable extended examination of the nature and significance of some of these items is to be found in L. Ferrari Bravo, 192 *Recueil des cours* (1985), p. 237.

99. It does not need to be communicated to the whole world, but at least to another State interlocutor, for the reason which follows in the main text.

100. If the act is discovered, it probably does not count as State practice unless the State tries to assert that its conduct was legally justified.

101. Advice which the Government publishes to support its case is a different matter.

contains a number of items which fall into the category of statements. But are statements, “verbal acts”, really a form of State practice, or is something more positive, more active, required? The *dictum* in Judge Read’s dissenting opinion in the *Fisheries* case<sup>102</sup> to the effect that claims need to be backed up by arresting ships has been misunderstood. It is clear that he was speaking in the context of claims to historic title over territorial waters and similar zones, and it is well established that, *in that type of case*, mere “paper claims” are insufficient: the intention to exercise sovereignty needs to be accompanied by its actual exercise. But in other contexts, there is no *a priori* reason why statements should not count whilst physical acts, such as arresting ships, should<sup>103</sup>. For voluntarists, this must necessarily be so: both forms of conduct are manifestations of State will. For those who stress the importance of belief, verbal acts are probably more likely to embody the beliefs of the State (or what it says it believes) than physical acts, from which belief needs to be inferred by others. And whichever school one subscribes to — or both or neither — there seems to be no inherent qualitative difference between the two sorts of act. It is just that verbal acts often carry less weight. The statements of some junior diplomat or technician, not a lawyer and quite possibly without any understanding of law or proper instructions, in an obscure committee, clearly should not be accorded much weight. But this lack of weight is not inherent in the nature of verbal acts: a formal statement of position by a head of State or Government, or a formal diplomatic communication at the highest level, plainly must be taken seriously.

So there is no difficulty, in principle, about statements counting as practice.

Corroboration is also to be found in the fact that virtually all the authorities agree that *diplomatic protest* (or its absence) is important in determining whether a customary rule has been created, amended,

102. *ICJ Reports 1951*, p. 116 at p. 191:

“The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiations and international arbitration.”

103. As to whether, for the purposes of the present discussion, it is necessary to decide whether making a statement is best treated as a form of conduct — a “verbal act” — or (by reference to its content) as an expression of the subjective element in customary law, see the text accompanying footnote 108, *infra*.

terminated or strengthened<sup>104</sup>. In his book *The Concept of Custom in International Law*, D'Amato tries to play down the importance of protests<sup>105</sup>: but a brief examination of digests of State practice or decisions of international tribunals would show that they are in fact very important in the international legal, not just the diplomatic, process. His argument that a rejected protest actually strengthens the claim in question is, moreover, premised on an eccentrically mechanistic view of the quantity of acts needed to bring about a customary rule<sup>106</sup>. I shall have more to say about protest when I discuss the subject of the persistent objector<sup>107</sup>.

Verbal acts, then, can constitute a form of practice. But their *content* can be an expression of the subjective element — will or belief. For instance, if a government representative gives a press conference, he or she is both performing an act (of speech) and also, through its substance, communicating his Government's position on a particular legal question. Whether we classify a particular verbal act as an instance of the subjective or of the objective element may depend on circumstances, but it probably does not matter much which category we put it into. What must, however, be avoided is counting the same act as an instance of *both* the subjective and the

104. Cf. the *S.S. "Lotus" case* (1927), *PCIJ, Series A, No. 10*, p. 23 at p. 29; *Anglo-Norwegian Fisheries case*, *ICJ Reports 1951*, p. 116 at pp. 138-139. Cf. also the dissenting opinion of Judge Altamira in the former case, pp. 97-98, 103, and the dissenting opinion of Judge *ad hoc* Negulesco in the *European Commission of the Danube case* (1927), *PCIJ, Series B, No. 14*, p. 105 at p. 114. In the "*Wimbledon*" case (1923), *PCIJ, Series A, No. 1*, pp. 1, 28, the Court, considering the practice concerning the passage of contraband of war through the Suez and Panama canals, noted that no-one had ever considered this passage to be a violation of the neutrality of the riparian State. This is perhaps an indirect reference to the absence of protest.

L. Ferrari Bravo, 192 *Recueil des cours* (1995), pp. 237, 257 and 263 points out that these days protests are not necessarily delivered in the time-honoured bilateral diplomatic form; one State may complain about another's conduct to an international organization in a letter or the like, the object of the complaint responds in like fashion, and a sort of dialogue is established in this way, without the organization necessarily having to take any action. Its function is more like a bulletin board.

105. At pp. 98-102. He rather arbitrarily seeks to exclude territorial claims or "servitudes", where he admits protests can be both common and legally effective. For protests in relation to expropriation, see for instance M. Whiteman, *Digest of International Law*, Vol. 8 (1967), pp. 1020 *et seq.* (including the famous Hull letter); for protests related to extraterritorial jurisdiction, see. e.g. A. V. Lowe (ed.), *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (1983), pp. 147-156, 198-199, and 212. Similar examples could be produced from many other areas of international law.

106. At pp. 87-98. See further *infra*, footnotes 175 and 301.

107. *Infra*, Sec. 6.



objective element. If one adheres to the “mainstream” view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by “real” practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will). In the next chapter I question whether practice *does* always need to be accompanied by the subjective element; but even if that is right, there is another reason why “double-counting” should not be indulged in, which is as follows. As we shall see shortly<sup>108</sup>, there is a quantitative requirement for the formation of customary rules: they must have a certain “density”. If one treats statements as constituting both acts and expressions of the subjective element, there is a danger of misrepresenting the quantity of practice.

(b) *Omissions*

When we speak of the practice of States, we normally think of positive acts<sup>109</sup>. However, in appropriate circumstances omissions can count too<sup>110</sup>. To take a simple example, States’ abstention from prosecuting foreign diplomats suspected or accused of crimes contributed substantially to the creation of rules of diplomatic immunity. But omissions need to be treated with a degree of caution, as the S.S. “*Lotus*” case<sup>111</sup> demonstrates. In that case the issue was, put simply, whether Turkey had the jurisdiction to prosecute the French officer of the watch of the *Lotus* for negligently causing a collision on the high seas in which a Turkish vessel was cut in two and eight Turkish nationals drowned, the *Lotus* having put into Constantinople after the collision. Arguing in favour of a rule restricting jurisdiction to the flag State of the ship on board which the negligent act was committed, France cited (amongst other things) the almost total absence of prosecutions by non-flag States in such circumstances. The Permanent Court of International Justice rejected the argument; but not

108. *Infra*, Secs. 3-5.

109. Including statements.

110. For a fuller discussion see M. H. Mendelson, “State Acts and Omissions as Explicit or Implicit Claims”, in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991), p. 373; slightly modified version in International Law Association, *Report of the 65th Cairo Conference (1992)*, International Committee on the Formation of Customary (General) International Law, Third Report of the Rapporteur, p. 360 at p. 370.

111. (1927), *PCIJ, Series A, No. 10*.

because it considered that omissions are by their very nature incapable of counting as practice. Rather, it was because, *in the circumstances*, the abstention was ambiguous in character. There were a number of possible reasons why States might have refrained from prosecuting. One logical possibility was, indeed, the existence of a customary law obligation not to prosecute. But other possible explanations included: a lack of power under *municipal* law (much criminal law being limited to the State's own territory); lack of interest; and a belief that the flag State is in a better position to investigate and punish the offence. In the circumstances, the only way of demonstrating that the abstentions were referable to a rule of international law would have been to produce accompanying statements to that effect, and France was unable to produce any such evidence<sup>112</sup>. Another similar example can be found in the Court's Advisory Opinion of 8 July 1996 on *Legality of the Threat or Use of Nuclear Weapons*, where it rightly dismissed the argument that, because nuclear weapon States had refrained from their use since 1945, they had accepted an obligation never to use them<sup>113</sup>. I shall return to this question of abstentions in Chapter III, in connection with the subjective element<sup>114</sup>.

But we should not assume that every omission is inherently and necessarily ambiguous. If, for example, State A announces its intention to prosecute a foreign diplomat and then, after receiving a protest from the sending State, abstains from doing so, it seems reasonable (in the absence of other evidence) to assume that A's abstention is referable to a rule of international law: in other words, that the omission *counts* as a piece of State practice. In the "*Lotus*" case itself, the Permanent Court relied on the absence of protest against

112. (1927), *PCIJ, Series A, No. 10*, pp. 27-28. The Court did not spell out its reasoning so fully as I have done; but this seems to have been what it had in mind.

J. Barberis, "Réflexions sur la coutume internationale", 36 *Annuaire français de droit international* (1990), p. 1 at p. 22, says that debate about omissions is misconceived, because any action can be treated as either positive or negative. But his attempt to demonstrate this is unconvincing. He says that in the "*Lotus*" case, instead of relying on abstentions, France could have invoked a constant and uniform practice of flag States to exercise jurisdiction. But that would not, in fact, have been enough. Jurisdiction can be concurrent, and to show that flag States had exercised jurisdiction would not have proved that they had the exclusive right to do so. Accordingly, France had also to show that other States did not also have jurisdiction, and to do that they needed to rely on abstentions plus whatever statements about a duty to abstain could be mustered.

113. *ICJ Reports 1996*, p. 226 at p. 254, para. 67.

114. *Infra*, Chap. III, text accompanying footnotes 325-327.

legislation based on the “objective territoriality” (or possibly the “effects”) doctrine of jurisdiction<sup>115</sup>. In the *Nottebohm* case (*Second Phase*), the ICJ based its decision in part on the fact that some States

“refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country . . .”<sup>116</sup>;

and (more questionably), it relied on the non-ratification of a convention in the *Asylum* case<sup>117</sup>.

Having considered whose conduct we are to consider, and what kinds of act count as practice, we can now move on to consider what other conditions apply to the objective element of customary international law.

### 3. The Time Factor

Let us consider first the *time factor*. For the Romans, customary law was the product of a long usage<sup>118</sup>. And according to the English common law, for a custom to be law it must be immemorial, dating back “to the time whereof man’s memory runneth not to the contrary”<sup>119</sup>. The notion of “time immemorial” is, in fact, something of a fiction in the common law<sup>120</sup>. Nevertheless, for something to become “customary” it must have become “habitual”, and habits normally take at least some time to develop. In the case of international society, many of the rules are indeed of considerable antiquity. In Chapter V, I shall consider whether modern developments have made possible the creation of something which has been described, perhaps ironically, as “instant customary law”. But even if we were to come to the conclusion that, in certain circumstances, it is possible today to create new law instantaneously<sup>121</sup>, it has to be con-

115. (1927), *PCIJ, Series A. No. 10*, p. 23.

116. *ICJ Reports 1955*, p. 4 at p. 22.

117. *ICJ Reports 1950*, p. 266 at pp. 277-278.

118. Cf. *Dig.* 1.3.32.1 (Julianus): *Inveterata consuetudo pro lege non immerito custoditur* . . . Cicero, *De inventione rhetorica*, 2.22.7, defines custom as the law which has been approved by all, having been observed for a long time.

119. Statute of Westminster, 1275.

120. Cf. T. F. T. Pluknett, *A Concise History of the Common Law* (5th ed., 1956), p. 307.

121. Otherwise than by treaty.

ceded that, taken literally, the phrase “instant custom” is a contradiction in terms. Some time does usually elapse before a practice becomes habitual amongst States. It may not take centuries, but it does not happen overnight<sup>122</sup>. Take the example of sovereign rights over the continental shelf, first proclaimed by United States President Truman in 1945. In 1951 the Umpire in the *Abu Dhabi* arbitration held that the doctrine had not yet assumed “the hard lineaments or the definitive status of an established rule of International Law”<sup>123</sup>. True, the 1958 Geneva Convention on the Continental Shelf<sup>124</sup> recognized this entitlement on the part of coastal States, and in 1969 it was acknowledged to be part of customary law by the International Court of Justice in the *North Sea Continental Shelf* cases<sup>125</sup> (to which we shall repeatedly revert); but this is not to say that the Umpire in the *Abu Dhabi* case was wrong in 1951. Some time usually needs to pass.

In the *North Sea Continental Shelf* cases (really one case), Denmark and the Netherlands claimed that Germany was bound to apply the rule set out in Article 6 (2) of the Geneva Convention on the Continental Shelf 1958 whereby, in the absence of agreement or countervailing “special circumstances”, the continental shelf between two adjacent States was to be “determined in accordance with the principle of equidistance”. They sought to circumvent the difficulty that, although Germany had signed the Convention, it had not ratified it, by arguing (amongst other things) that the adoption of the provision in question in 1958 had “crystallized” an “emerging rule of customary law”<sup>126</sup> or, alternatively, that a new rule had emerged since 1958, based partly on the Convention itself and partly on subsequent State practice<sup>127</sup>. In this latter context, the Court drew attention to the relatively short period of time which had elapsed since the Geneva Convention had been concluded, and the even

122. For a fairly recent example of a Government insisting on the lapse of a substantial period of time, see the Message of the Swiss Federal Council to the Federal Assembly of 10 December 1979 concerning a law on civil responsibility in nuclear matters, in L. Caflisch, “La pratique suisse en matière de droit international public”, 37 *Annuaire suisse de droit international* (1981), p. 181 at p. 185.

123. *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, 18 *International Law Reports* (1951), p. 144 at p. 155.

124. 499 *UN Treaty Series*, p. 311.

125. *ICJ Reports 1969*, p. 3.

126. See esp. at p. 38, paras. 61-62.

127. *Ibid.*, p. 41, para. 70.

shorter one (five years) since it had come into force, and observed<sup>128</sup>:

“Although 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 international law on the basis of what was originally a purely conventional rule, 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 . . .”<sup>129</sup>

But even here, the Court recognized that *some* time is normally necessary before something can become a rule of customary law, “short though it might be”. And in the normal process of claim and response, as McDougal has fruitfully described it, some lapse of time is practically inevitable, even in these days when instantaneous communication is possible: Governments need time in which to decide what their response should be<sup>130</sup>. In any case, a certain “density of practice” is required<sup>131</sup>, as is confirmed by the International Court’s reference, in the *Asylum* case, to a “constant and uniform usage”<sup>132</sup>. This takes time to build up.

#### 4. Uniformity of Practice

In the passage from the *North Sea* cases just cited, the Court required that the practice in question be both “extensive and virtually

128. At p. 43, para. 74.

129. See also p. 42, para. 73. The case will be more fully examined in Chapter IV in particular.

130. It has been argued that there are some principles of unwritten international law which are axiomatic and which therefore do not need to be supported by practice over time. Examples might be the principles of sovereign equality, and of non-intervention. To some extent, this point could be met by observing that the notion of customary international law is not necessarily coterminous with that of unwritten law, so that these other forms of unwritten law are not really “customary law”. It could also be pointed out that the present course does not include *jus cogens* or “general principles of law recognized by civilized nations”. But in any case, it could probably be shown that all or most of the “axiomatic” principles in question actually took some time to become generally accepted: one has only to think of the nineteenth-century law on capitulations and on intervention for humanitarian purposes or for the collection of debts, for instance, to see that the principles of sovereign equality and non-intervention have perhaps not always been regarded as axiomatic.

131. The phrase is Waldock’s: “General Course on Public International Law”, 106 *Recueil des cours* (1962), p. 1 at p. 44.

132. *ICJ Reports 1950*, p. 266 at p. 277 (emphasis added).

uniform”<sup>133</sup>. What “uniform” means is that the various instances of practice must be essentially similar and consistent, both internally and collectively. By “internally consistent”, I mean that each State whose conduct is under consideration must have behaved in the same way on virtually all of the occasions on which it engaged in the conduct in question. By “collectively consistent”, I mean that different States must not have engaged in substantially different practice. For instance, in the *Fisheries* case<sup>134</sup>, the ICJ pointed out that, although a ten-mile closing line for bays had

“been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.”

Another much-cited example is the *Asylum* case<sup>135</sup>. Here, Colombia claimed that a regional custom existed which entitled it to demand a safe-conduct from its embassy in Lima, Peru, for a political opponent of the Peruvian Government, Haya de la Torre. In support of its claim, Colombia relied on a number of treaties, to some of which Peru was not a party, and on a large number of particular cases in which “diplomatic asylum”, as it is known<sup>136</sup>, was sought and granted. The International Court observed that

“The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible

133. The French text of the Judgment renders this as “fréquent et pratiquement uniforme”; but “fréquent” seems to be a mistranslation of the authoritative English text. There is no need for frequency, in the sense of a repetition at short intervals. Repetition at quite long intervals would seem to suffice, so long as the practice was sufficiently extensive and uniform.

134. *ICJ Reports 1951*, p. 116 at p. 131.

135. *ICJ Reports 1950*, p. 266 at p. 277.

136. In contradistinction to “territorial (or political) asylum”, where the refugee is already in the territory of the State in which he seeks refuge.

to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.”<sup>137</sup>

Although, in its 1950 Judgment, the Court spoke of “constant and uniform usage”, it seems that *perfect* consistency, internal or external, is not essential. A year later, in the *Fisheries* case, the Court considered whether the Norwegian system of straight base-lines for the delimitation of the territorial sea was valid and opposable to the United Kingdom. In this context, it said<sup>138</sup>:

“The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.”<sup>139</sup>

Similarly, although the various proclamations of an exclusive economic zone (EEZ) are not identical, they are sufficiently similar in important respects for the Court to have been able to hold, in the *Continental Shelf (Tunisia/Libya)* and *(Libya/Malta)* cases that the EEZ had become part of customary international law<sup>140</sup>.

An interesting question concerning this requirement of consistency arose in the *Nicaragua* case (*Merits*).

In considering the customary law relating to the principles of the non-use of force and non-intervention, the Court had to confront the fact that, as we all know, from time to time these principles are violated. It said:

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137. Another case in which the practice was held to be too inconsistent was the *Reservations to the Genocide Convention* case, *ICJ Reports 1951*, p. 15 at p. 25.

138. *ICJ Reports 1951*, p. 116 at p. 138.

139. See also the *Asylum* case, *ICJ Reports 1950*, p. 266 at p. 278, where the Court brushed aside certain inconsistencies in the stated views of the parties.

140. *ICJ Reports 1982*, p. 18 at p. 74, para. 100; *ICJ Reports 1985*, p. 13, at p. 33, para. 34.

Of course, practice which had been inconsistent can — and often does — align after a time, and so from a certain moment can be regarded as consistent: cf. M. Akehurst, “Custom as a Source of International Law”, 47 *British Year Book of International Law* (1974-1975), p. 20, citing the *Paquete Habana* in the United States Supreme Court: (1900) 175 US 677.

“It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”<sup>141</sup>

At first sight, this might seem a surprising relaxation of the requirement of consistency. A cynic might even say that it acquiesces in a kind of double-standard: it is not what States do that counts, but what they *say* about what they do. However, the Court was right. All legal systems know of deviations from the law, but deviations do not of themselves change the law. This is true even of customary law, if the acts in question are not performed under a claim of right, express or tacit. The more so if those performing the acts acknowledge the validity of the existing rule, but seek to benefit from some alleged exception to it.

##### 5. *Extent of Practice*

In the extract from the *North Sea Continental Shelf* cases I cited a little earlier, the Court required the practice in question to be, not only “virtually uniform”, but also “extensive”. This brings us to the question of the *number and identity of States* that need to be involved in a rule of customary law — in other words, its scope *ratione personae*.

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141. *ICJ Reports 1986*, p. 14 at p. 98, para. 186.



(a) *Particular customary law*

To create a rule of *particular* law, only two States are needed. In the *Right of Passage over Indian Territory* case<sup>142</sup>, the ICJ upheld the existence of a purely bilateral custom between India and Portugal — what it called a “local” custom — enabling transit over Indian territory by private persons, officials and goods between Portugal’s coastal territory of Daman and certain enclaves then under its sovereignty. And this notwithstanding that the Statute of the Court refers only to “international custom, as evidence of a *general* practice accepted as law”<sup>143</sup>. Similarly, in the *Asylum* case<sup>144</sup> it was prepared to countenance the possibility of a customary rule applying only in Latin America<sup>145</sup>.

But, in fact, “regional” and “local” customs are but examples of a wider phenomenon — that of *particular* customary law<sup>146</sup>. A “local” custom need not be a *bilateral* one, such as Portugal’s right of passage over Indian territory. It might be “local” in the sense that it relates to particular area of the earth’s surface, but might burden or benefit *all* States other than the one who enjoys the right, or is sub-

142. *ICJ Reports 1960*, p. 6 at p. 39.

143. Emphasis added.

It is also interesting to note that the Court responded to the Applicant’s supplementary invocation of a rule of *general* customary law by observing that it was unnecessary to do so, since “Such a particular practice must prevail over any general rules”: *ICJ Reports 1960*, p. 6 at p. 44.

144. *ICJ Reports 1950*, p. 266.

145. Though, on the facts, the Court went on to hold that Colombia had failed to discharge its burden of establishing the existence of the rule. In the *North Sea Continental Shelf* cases the German Federal Republic disputed that there was a local custom applying to riparians of the North Sea (*Pleadings etc.*, I, p. 60), but as Denmark and the Netherlands did not raise the issue, it was not decided. Cf. the separate opinion of Judge Ammoun (*ICJ Reports 1969*, p. 100 at pp. 130-131). In the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, a Chamber of the Court made a point of holding that *uti possidetis* was a principle of general application, not just one of Spanish American and, later, African regional law (*ICJ Reports 1986*, p. 554 at pp. 564-565, paras. 19-20); but six years later, in the *Land, Island and Maritime Frontier Dispute*, a differently constituted Chamber treated the principle simply as one applying to former Spanish American colonies, and accepted by the contesting parties, without going into the question of its wider applicability (*ICJ Reports 1992*, p. 351 at pp. 380-387, paras. 27-42). In an elegant and stimulating, though somewhat abstract, contribution to our subject, S. Sur states that, unlike treaties, customary rules have a universal vocation, so that it is sometimes only *a posteriori* that one can determine the limits of their field of application: S. Sur, *La coutume internationale*, extract from *Juris-Classeur de droit international* (1990), p. 14.

146. Cf. G. Cohen-Jonathan, “La coutume locale”, 7 *Annuaire français de droit international* (1961), p. 119.

ject to the obligation, in question. For example, a particular body of water within a State's territory — such as a canal — may by custom be subject to the free passage of ships of all nations<sup>147</sup>. Conversely, a particular State may acquire rights in a certain area, which it can uphold against the rest of the world, in derogation from the general law: Sri Lanka's pearl fisheries are a classic example, cited by Vattel<sup>148</sup>.

Similarly, it would be erroneous to assume that a customary rule confined to a limited group of States has to be a regional one. It can also be restricted to a particular ideological group, or a group which shares the same policies on a specific issue, irrespective of their location. For instance, before the 12-mile territorial sea became generally recognized, there was a particular customary rule justifying such claims as against other States who also claimed the same limit, though this would not have been binding between the States who recognized only 3-mile claims<sup>149</sup>. All of these types of restricted, non-general customary law may be termed particular customary law.

In principle, the creation and evidencing of particular customary law is not very different from what applies to general law. However, there may be differences in the burden of proof. Once it is established that a *general* rule of customary law exists, there is, as we shall see, no need to prove that the particular State concerned has done something to make the rule binding on it. By contrast, there is some authority for the proposition that it is necessary to prove that a *particular* custom has become binding on the specific State concerned, in the *Asylum* case and the *Right of Passage* case<sup>150</sup>. Indeed,

147. Cf. the S.S. "Wimbledon" case (1923), *PCIJ, Series A, No. 1*, p. 28.

148. E. Vattel, *Le droit des gens* (1758), I, pp. 23, 287.

The existence of an historic Norwegian claim to apply straight baselines seems to have been a secondary or alternative ground for upholding them in the *Fisheries* case, but the judgment is not clear on the relation between the various strands of reasoning (*ICJ Reports 1951*, p. 116 at pp. 136-139.) There is no need to go here into the question whether "historic rights" or prescriptive rights are in some way different from rights under customary law.

149. It is unnecessary to enter here into the question of what law obtained between the "3-milers" and the "12-milers". For an attempt to reduce practically all customary law to particular law, see A. V. Lowe, "Do General Rules of International Law Exist?", 9 *Rev. of International Studies* (1983), p. 207; H. Suganami, "A.V. Lowe on General Rules of International Law", 10 *Rev. of International Studies* (1984), p. 175; A. V. Lowe, "A Reply", *ibid.*, p. 183.

150. *ICJ Reports 1950*, p. 266 at p. 276, and *ICJ Reports 1960*, p. 6 at p. 39 respectively.

in the case of a bilateral custom or any other kind of “local” custom, it is difficult to see how a custom could, in practice, arise otherwise than with the participation, or at any rate knowing acquiescence, of the State particularly burdened or benefited by it<sup>151</sup>. (Whether this is also true of regional law is less clear<sup>152</sup>.)

(b) *Universal customary law*

At the other extreme from local customary law is universal customary law. There are some rules of international law which are binding on all members of the international community, without exception. The prohibition of the use of force, except in self-defence, is one. Another is that that treaties have (save in specified and very exceptional circumstances) to be observed. The freedom of ships on the high seas from the jurisdiction of States other than that whose

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151. Cf. D’Amato, *The Concept of Custom*, p. 251. Other aspects of his treatment of special custom (pp. 233-263) are unconvincing. For example, his analogy with the need to prove special (as opposed to general) custom in the English common law. First, it is proof of the existence of the custom, not of consent to it, that is required. Secondly, in international law even general custom needs to be proved (in the broad sense) if challenged (*pace* Judge De Castro’s separate opinion in the *Fisheries Jurisdiction (Merits)* case, *ICJ Reports 1974*, pp. 72, 79). And thirdly, as the author himself concedes, the way in which a particular domestic legal system treats custom proves nothing about the position in international law.

152. Suppose that (contrary to what actually occurred), the Court had held, in the *Asylum* case, that there *was* a regional custom binding on all the (other) Latin American States, and that Peru had never manifested its dissent from such a rule — it had simply done nothing. Given that, in like circumstances, a State who failed to dissent from a *general* rule of international law would be bound — something we shall consider shortly — it seems at any rate arguable that the same position should obtain on a regional level. This is the position taken by H. Thirlway, *International Customary Law and Codification* (1972), pp. 135-141, citing other writers, and accepted by Akehurst, 47 *British Year Book of International Law*, p. 30, and M. Bos, *A Methodology of International Law* (1984), p. 247. However, even if this view were accepted it would still have to be subject to a stringent condition — that the State concerned really was an integral member of a distinct regional system of law. Peru is clearly part of a regional sub-system, American international law. (It is not clear that there is in fact very much distinct *customary* law in that sub-system, though Barberis, 36 *Annuaire français de droit international*, p. 9 at p. 24, n. 61, cites as an example the practice of river riparians subjecting the right of passage of other riparians to prior authorization.) On the other hand, even if there were a Middle Eastern customary law sub-system, binding on the Arab States of the region, this could obviously not bind, say, Israel, without its consent, unless it had integrated itself into the regional system. The best argument *against* Peru being bound on the hypothetical facts above is probably that, even if States are subordinate to the *general* law automatically, derogations from it require proof of consent.

flag they fly is (subject to certain exceptions) a third<sup>153</sup>. This is not the occasion to embark on an investigation of whether such norms should be classified as rules or principles, nor whether they are axiomatic to any legal system<sup>154</sup>, logical deductions from the basic premises of international society (e.g. State sovereignty and independence)<sup>155</sup>, rules of *jus cogens*<sup>156</sup>, or simply happen to be universally accepted.

(c) *General customary law*

But universal norms of customary law, in this sense, seem to be relatively few in number<sup>157</sup>. The great majority of norms of customary law are rules of *general law*. What is normally meant by this concept is that there exists a body rules which, being supported by a sufficiently uniform and extensive practice, bind all States (with the exception of “persistent objectors”, to whom I shall return shortly) without its being necessary to show that the particular State allegedly bound by the rule has participated in its formation or application, or has otherwise accepted it. In its *effects*, general custom is similar to universal custom, the difference being that, in the case of general custom, there is always the possibility that a State or States will be able to show that it has opted out by means of persistent objection.

There is considerable support, in State practice, in the case-law, and in the literature, for the existence of this type of rule and, speci-

153. This last is, of course, a rule of *jus dispositivum* — that is to say, States are free to derogate from it by treaty or by particular custom. However, this does not affect the present point, particularly when the derogations happen to be rather limited in scope.

154. See e.g. D. P. O’Connell, *International Law* (2nd ed., 1970), Vol. 1, pp. 12-13; O. Schachter, *International Law in Theory and Practice* (1991), pp. 20-23 and 49-55.

155. L. Henkin, *International Law: Politics and Values* (1995), p. 31, calls this the “constitutional law” of the international community.

156. Cf. Articles 53 and 64 of the Vienna Convention on the Law of Treaties, 1969. In the *Nuclear Weapons* decision, the Court held that principles of international humanitarian law contained in the Hague and Geneva Conventions are “fundamental rules to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible [*sic*] principles of international customary law”, *ICJ Reports 1996*, p. 226, at p. 257, para. 79.

157. See, e.g. G. G. Fitzmaurice, “Some Problems regarding the Formal Sources of International Law”, in *Symbolae Verzijl* (1958), p. 153 at pp. 161-168.

fically, for the proposition that, if a practice has achieved a sufficient level of generality, it is binding on *all* States<sup>158</sup>.

For a customary rule to be general, and not just particular, the practice has to be “extensive”. This is the word used in the passage from the *North Sea Continental Shelf* cases which I have already cited; in the same sentence, the Court also indicated that the practice concerned should include that of “States whose interests are specially affected”<sup>159</sup>. Mere numbers are not enough; the practice must be representative, must include those whose interests are specially affected. The specific context was a discussion of whether the conclusion of the Geneva Convention on the Continental Shelf 1958 had of itself contributed to the creation of a new rule of customary law about delimitation of the shelf between opposite or (as here) adjacent States. In the immediately preceding paragraph, the Court noted that

“even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient.”

In Chapter IV, I shall have to return in considerable detail to this case, and specifically in relation to the question why the Court thought that the conclusion of a treaty might, of itself, contribute to the creation of a new rule of customary law. But the reason why I am

158. Leaving aside, once again, persistent objectors, to whom I shall return. In the “*Wimbledon*” case (1923), *PCIJ, Series A, No. 1* (see *supra* footnote 104) the Permanent Court of International Justice did not rely on any German participation in the State practice concerned; nor did it look for specifically French or Turkish participation when considering, in the “*Lotus*” case, the claim that only the flag State had jurisdiction in the case of collisions on the high seas: (1927), *PCIJ, Series A, No. 10*. In the *Nottebohm* case (*Second Phase*), the ICJ did not seem concerned to discover whether the parties to the dispute, Liechtenstein and Guatemala, had recognized the rule requiring a “genuine link” of nationality before a diplomatic claim could be brought: it was content to examine the practice of States generally: *ICJ Reports 1955*, p. 4. In the *North Sea Continental Shelf* cases, the Court seems to have been prepared to hold the German Federal Republic bound by a rule of general customary law though, on the facts, it ultimately held that no such rule existed. Similarly, in the pleadings in the *Fisheries* case, it was agreed between the parties that the conduct of third parties was sufficient to found a rule of general law: *ICJ Pleadings, Fisheries*, I, p. 381, para. 255 (Norwegian Counter-Memorial); *ibid.*, II, p. 427, para. 161 (UK reply). Cf. R. Jennings and A. Watts (eds.), I, *Oppenheim’s International Law* (9th ed., 1992), p. 29.

159. *ICJ Reports 1969*, p. 3 at p. 43, para. 74.

examining this passage at the moment is for clues as to what the majority thought was sufficiently extensive participation.

At the date of the judgment, the Convention had received 39 ratifications or accessions<sup>160</sup>. Given that the number of States eligible to ratify at that time exceeded 130, this was, indeed, not a particularly impressive proportion, even if one deducts the 26 land-locked States<sup>161</sup>. So far as concerns the representativeness of those ratifying, the Court gave no specific indication. Of the permanent members of the Security Council, only China had failed to ratify. But so had the Arab States, many Latin American, African and Asian States, and a few important European countries, such as the Federal Republic of Germany itself, Italy, and Belgium. Many of these would have been States whose interests were “specially affected”, and the Court was therefore probably right in holding that participation in the Convention was insufficiently extensive or representative<sup>162</sup>.

The same case offers us one more clue as to what extent of participation in a practice is likely to be regarded as sufficient (or, to be more precise, insufficient). Denmark and the Netherlands also relied on 15 instances of continental shelf delimitation carried out, after the conclusion of the Geneva Convention, on the basis of equidistance. Most of these were in the form of bilateral treaties, but some were unilateral acts. (Some, indeed, were still pending.) The two States claimed that these instances demonstrated that the equidistance principle enshrined in the Convention had become a new rule of customary law. The Court rejected this argument, stating that

<sup>160</sup>. *ICJ Reports 1969*, at p. 25, para. 27.

<sup>161</sup>. The figure comes from Judge Lachs, *ibid.*, p. 218 at p. 227.

Land-locked States certainly had an interest in the subject of the continental shelf as a whole, for the more limited the rights of the coastal State, the greater would be theirs, given that they had the right to register ships under their flag and that their companies might be interested in exploiting the resources of the seabed. They would therefore have an interest in *negotiating* treaty provisions on the continental shelf, as experience at the Third United Nations Conference on the Law of the Sea later showed. On the other hand, once the treaty had been concluded, their interest in actually *ratifying* it might be much less or perhaps even, as the Court said, non-existent. Plainly they would have had no interest in Article 6, which essentially applied only to States sharing the same shelf.

<sup>162</sup>. *Pace*, in particular, the dissenting opinion of Judge Lachs at p. 218 at pp. 225-229. The Court's impression was, it turns out, probably correct: only another 15 States ever ratified this Convention, even though the size of the international community increased considerably in the period following the judgment.

“even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context”<sup>163</sup>.

The Court went on to give several reasons why even these instances did not count. I shall return to them in the next two chapters, but the interesting point here is that the ICJ seemed to doubt that the number of precedents was anyway a sufficient percentage of the many potential delimitations (currently several hundred) waiting to be carried out<sup>164</sup>.

On the other hand, in the *Nicaragua* case (*Merits*)<sup>165</sup>, the Court apparently regarded the almost universal participation of States in the United Nations Charter and certain United Nations resolutions as sufficiently extensive. I shall have more to say in due course about the employment by the Court of these particular types of instrument; but on the question of numbers its view must be unexceptionable.

Further guidance, albeit not in explicit form, is also given by two of the Court’s pronouncements on the status of the exclusive economic zone in customary law. When the judgment in the *Continental Shelf (Tunisia/Libya)* case was pronounced, the Law of the Sea Convention 1982 had not yet been finalized, and the number of States claiming EEZs, though certainly significant and apparently growing, was still limited. Moreover, a number of significant maritime States, in particular the United States and USSR, had not yet proclaimed such a zone. Accordingly, the Court was quite cautious, noting simply that “the *concept* of the exclusive economic zone . . . may be regarded as part of modern international law”<sup>166</sup>. But by the time it gave judgment in the *Libya/Malta* case in 1985, the situation had changed significantly. The Law of the Sea Convention had now

163. *ICJ Reports 1969*, p. 43, para. 75 (emphasis added).

164. Akehurst, however, argues with some plausibility that in this case Denmark and the Netherlands were seeking to establish a new rule in derogation from an existing one (that delimitation should take place in accordance with equitable principles): therefore, the threshold should be higher than if a rule is being created *in vacuo*: 47 *British Year Book of International Law*, p. 13.

165. *ICJ Reports 1986*, p. 14.

166. *ICJ Reports 1982*, p. 18 at p. 74, para. 100 (emphasis added).

been concluded (although it was not yet in force) and the number of EEZ claims had increased<sup>167</sup>. Perhaps most significantly, the Soviet Union and United States had by now proclaimed their own EEZs, so that there was little likelihood of significant opposition to the adoption of this régime. Accordingly, the Court was able to use more positive language, observing that “the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States *to have become part of international law*”<sup>168</sup>.

In neither of these cases had a *majority* of eligible States made such a claim, though it is also true that there was a significant absence of protest on the part of those who had not. Further evidence that a numerical majority is not required is to be found in the *Frontier Dispute (Burkina Faso/Mali)* case where, as previously indicated<sup>169</sup>, a Chamber of the ICJ held that the principle of *uti possidetis* was one of general customary law, even though it cited only the practice of Spanish American and African States, who do not constitute a majority of the international community. Similarly, in the *North Sea Continental Shelf* cases, the Court concluded that customary law required a delimitation agreement between those concerned based on equitable principles<sup>170</sup>, even though the examples of the recognition of this principle in State practice were, at the time, rather few<sup>171</sup>.

Obviously, the amount of practice required to overturn an old rule will be greater than in cases where the matter has not previously

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167. There were now about 56, not counting claims to fishing zones in excess of 12 miles. Cf. 2 *Law of the Sea Bulletin* (March 1985), v; D. Attard, *The Exclusive Economic Zone in International Law* (1987). The total number of coastal States at that time was computed to be 141, but these included some whose geographic position did not offer any or much scope for an EEZ, and others who refrained from claiming one in order not to provoke boundary disputes with their neighbours. Having said all of this, it is still noticeable that the percentage of States making such claims was hardly more impressive than that of the States who had ratified the Geneva Convention on the Continental Shelf, yet the reaction of the Court in the *North Sea Continental Shelf* cases was very different. One distinction between the two situations may have been a belief on the part of the Court that, unlike the Continental Shelf Convention, where the number of ratifications had not seemed likely to increase significantly, more and more States were likely to claim, or at any rate accept claims to, the EEZ. If such assessments were indeed made, they turned out to be well founded.

168. *ICJ Reports 1985*, p. 13 at p. 33, para. 34 (emphasis added).

169. *Supra*, footnote 145.

170. *ICJ Reports 1969*, p. 3 at p. 46, para. 85.

171. *Pleadings*, I, pp. 30-31, para. 31.



been the subject of specific regulation in international law; but even in the latter instance, it must be sufficiently general<sup>172</sup>.

Here we have, then, some guidance as to what the International Court considers to be sufficiently extensive practice. But it is not very precise, and one will not find greater accuracy by perusing arbitral or national judicial decisions or State practice. We lawyers may find this lack of precision troubling. After all, we know exactly how many votes are needed to adopt legislation, how many to adopt a

<sup>172</sup> Cf. footnote 164 *supra*.

At first sight the decision of the PCIJ in the “Wimbledon” case seems questionable on this question of the extent of participation required, apparently relying on only two precedents: (1923), *PCIJ, Series A, No. 1*. The issue was whether Germany was entitled to prohibit the passage through the Kiel Canal of a British merchant ship carrying armaments bound for Poland, which at that time was at war with Russia. Germany claimed that, as a neutral, it was entitled, and even bound, to prohibit that passage and that, moreover, it was inconsistent with its sovereignty for it not to be able to control the passage of the vessels of belligerents or those carrying contraband of war. Much turned on the construction of Articles 380 to 386 of the Treaty of Versailles, but during the course of that exercise the PCIJ made a comparison with the régimes of the Suez and Panama Canals. After examining them, it went on (at p. 28):

“The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany’s neutrality would have necessarily been imperilled if her authorities had allowed the passage of the ‘Wimbledon’ through the Kiel Canal, because that vessel was carrying contraband of war consigned to a State then engaged in an armed conflict. Moreover they are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.”

One’s first impression (like that of a number of authors) might be that the Court was relying on just two precedents in order to establish a general rule of customary law. But the matter is not in fact so simple. Although in each instance there was only one canal, and one riparian State, the beneficiaries of these régimes were all the maritime States of the world; and many had in fact exercised their rights. To borrow the useful analytical tools of Hohfeld (“Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, I: 23 *Yale Law Jl.* (1913), p. 16; II: 26 *ibid.* (1917), p. 710; both reprinted in W. Hohfeld, *Fundamental Legal Conceptions*, ed. W. Cook (1919)), these were “multital” duties (duties towards all States), creating a multitude of bilateral links and thus a relatively large quantity of practice. For an attempt to apply this analysis to some of the questions under examination here, see my “State Acts and Omissions as Explicit or Implicit Claims”, *supra*, footnote 110. Cf. C. H. M. Waldock, “General Course on Public International Law”, 106 *Recueil des cours* (1962), p. 1 at p. 44, who observes that “on a question concerning international canals, of which there are very few in the world, the quantum of practice must necessarily be small”. The Court was probably also reasoning that the Panama and Suez régimes showed that there was nothing *inherently* contrary to sovereignty or neutrality in allowing such passage.

multilateral treaty, and how many ratifications to bring it into force. More fundamentally, lawyers like certainty. But, as was pointed out in Chapter I, we must remember that customary law is not really like that. One of its distinguishing features is its *informality*, not to say formlessness. In this respect, customary law is like other informal social rule systems, such as those of fashion. To followers of fashion, numbers are significant, but there is no magic number, the achievement of which means that a fashion has been created or changed. Similarly, in any sort of customary law society (not just the international one), there is no special number that has to be achieved before something becomes a general rule. It is more a matter of feel, of judgment, which is difficult to verbalize or formalize, and which cannot easily be communicated to outsiders. In such a context, authoritative third-party decision-makers can play an important role in “declaring” what has become law and what has not<sup>173</sup>. But in the society of States, where much of the law is “auto-interpretative” in the sense that it is not subject to compulsory third-party arbitration or adjudication<sup>174</sup>, each Government must make its own judgment, no doubt at least partly influenced by its policies, and in the knowledge that its *prise de position* may influence the way the rule develops (or fails to develop)<sup>175</sup>.

Which brings us to the next point. In informal rule systems, it is often not simply a question of counting heads: it also matters *whose* heads they are. The highly attuned antennae of members of the world of fashion know that there are some leaders and some follow-

173. To revert to my comparison of the formation of custom to the building of a house, it is not possible to determine the exact moment when the assembly of bricks and other materials has become a “house”. Is it when the roof goes on, when the windows are put in, or only when all the utilities have been installed and it has been painted? Or, to change the metaphor, what the consumer wants to know is whether the fruit is ripe when he bites into it, not the exact moment at which it “ripened” (even if there were a way of determining this). See *supra*, Chapter I, text accompanying footnotes 17-19.

174. Cf. L. Gross, “States as Organs of International Law, and the Problem of Auto-Interpretation”, in Lipsky (ed.), *Law and Politics in the World Community: Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law* (1953), p. 59.

175. D’Amato, *The Concept of Custom*, pp. 87-98, although denying that there is a “magic number”, in fact has quite a mechanistic view of what he calls the “quantitative element” in custom. For him, a single State act will be persuasive, though two are preferable, three are better still, etc.; and two precedents going one way will counteract one going another. This approach is too crude. For the complement to his “quantitative element”, the “qualitative”, see *infra*, footnote 301; and for his views on the role of protest, see *supra*, text accompanying footnotes 105-106.

ers, although the boundaries are to some extent fluid and so it is not really possible to formalize — or perhaps even articulate — this hierarchy. Similarly, in customary law societies, the practice of some is more influential than that of others. International society is no exception: some States wield a greater influence than others. To resort to yet another metaphor, De Visscher, who likened the formation of custom to the gradual wearing of a path, said “Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight . . . or because their interests bring them more frequently this way.”<sup>176</sup>

In the past, the consensus of “civilized States”, and particularly the leading States, was often considered sufficient<sup>177</sup>. And even today, when the doctrine of the sovereign equality of States has replaced the class distinctions of the previous century, the practice of the most important States in the particular area of activity may be accorded particular weight<sup>178</sup>. There are a number of ways in which this can come about. First of all, States which are particularly active in a given area may be more concerned about it than others and devote more resources to thinking about and planning the development of the law. Thus, it was no accident that the United States and the United Kingdom were pioneers of the régime of the continental shelf, since their nationals were actively engaged in offshore oil exploration and exploitation and were acutely interested in the seabed beyond the territorial sea. Secondly, the more influential States are in a better position to encourage others to follow their lead, or deter others from obstructing the development they favour. States with worldwide interests also have more opportunities to develop practice: major powers, for example, send and receive more diplomatic legations than others, and have thus had more occasion to influence the development of the customary law on diplomatic relations. Accessibility of the State’s practice is another factor: for example, developed countries have been able to influence percep-

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176. C. de Visscher, *Theory and Reality in Public International Law* (trans. P. E. Corbett, rev. ed., 1968), p. 155.

177. Cf. e.g. *The “Paquete Habana”*, 175 US, p. 677 at p. 686 (US Supreme Court 1900); J. Westlake, *International Law. Part 1: Peace* (1904), p. 16.

178. See e.g. *The “Paquete Habana”* (*supra*, footnote 177) where the United States Supreme Court was particularly influenced by the practice of the leading maritime States; and *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529, *per* Lord Denning MR at pp. 552-560, where the English Court of Appeal placed great weight on the practice of major commercial States.

tions of what State practice is considerably, and perhaps even disproportionately, due to the fact that they are the ones who tend to publish their practice in the form of readily accessible digests and so on<sup>179</sup>. The extent and quality of publication by the scholars of the various nations plays a part, too; and the fact that publications from a particular country are in a language widely understood in the international community (such as English) will also help.

But it would be erroneous to conclude from this that it is always the major powers, and they alone, who “make the running”. The creation of a special status for archipelagic waters, for instance, was at the initiative of archipelagic States, none of whom was a major power<sup>180</sup>. Similarly, the EEZ was not initiated — and was indeed originally opposed — by major maritime powers. So a State can be a significant actor in a particular field without being a major power generally.

Significant actors can also exercise an important negative influence. If they do not participate in, or — worse still — reject, a developing practice, it cannot become customary law<sup>181</sup>. This follows from the rule, already discussed, that the practice has to be not only extensive, but representative, including therefore all major participants or groups of participants in the activity in question<sup>182</sup>.

It might be objected that the system I have described is not very democratic. That may well be so. But first of all, we must ask ourselves what “democratic” means, in the specific context of international relations. Is “one State, one vote” democratic? Is it, then,

179. The best example is the various digests of international law published or sponsored by the United States Department of State. The Department is also responsible for other influential publications, such as its *Limits in the Seas*.

180. The price for the latter’s acquiescence in these claims, in particular the recognition of a right of “archipelagic sea lanes passage”, is to be found in the compromise embodied in Part IV of the Law of the Sea Convention 1982.

181. Or at any rate *general* customary law. It may still be *particular* law between those engaged in the practice.

182. This is sometimes regarded as a “strong” variant of the persistent objector rule (as to which, see *infra*, Section 6): persistent objection by a sufficiently important State or group of States can not only exempt that State or States from the scope of the emerging rule, but prevent it becoming a rule (or at least a general rule) at all. But it is not so much a question here of opting out of a rule, more one of preventing a general rule ever coming into being. An example of the phenomenon is the refusal of the United Kingdom, at the relevant time the major maritime power, to accept the doctrine of neutral convoy: although the doctrine was accepted by practically all the Continental powers, British opposition was sufficient to prevent its becoming a rule of general law: cf. T. Gihl, “The Legal Character and Sources of International Law”, 1 *Scandinavian Studies in Law* (1957), p. 51 at p. 82.

democratic for San Marino, say, to carry the same weight as China? And should we take into account whether this State or that is itself internally democratic? Furthermore, the fact is that both domestic and international societies are rarely completely egalitarian in reality. The most important groups and individuals often have a preponderant influence in the development, if not the application, of the law — and never more so than in customary law societies. In the context of international society, the importance attached to “specially affected States” does at least mean that customary rules will reflect the realities of power and so have a reasonable prospect of being effective. On the other hand, the broad meaning of the concept “specially affected States” and the requirement of representativeness prevent the formation of customary international rules being the sole preserve of the mighty. Whether the balance is correctly struck is a highly controversial, but ultimately political, question.

#### *6. The Persistent Objector*

Finally, there is a safeguard for the State which does not participate or acquiesce in the usage in question, but is indeed positively opposed to it. It can rely on the so-called “persistent objector rule”<sup>183</sup>. According to this, a State which manifests its opposition to a practice before it has developed into a rule of general international law can, by virtue of that objection, exclude itself from the operation of the new rule. As already mentioned, this situation should be distinguished from one where the opposition of a sufficiently important State or group of States prevents a general rule coming into being at all; the latter is simply an aspect of the rule that, for a practice to become a general customary rule, it needs to be sufficiently representative.

In the literature, there is a widespread acceptance of the existence of a persistent objector rule; indeed, it has been treated by many as practically axiomatic<sup>184</sup>. The doctrine has, however, met with some

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<sup>183</sup>. Sometimes known as the “persistent dissenter rule”. This topic could equally logically be dealt with in connection with the subjective element; but as a matter of exegesis it follows conveniently from our discussion of the extent of practice.

<sup>184</sup>. See e.g. R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, I: *Peace*, p. 29; C. Rousseau, *Droit international public* (1970), I, p. 326; J. H. W. Verzijl, *International Law in Historical Perspective*, I (1968), p. 37; I. Brownlie, *Principles of Public International Law* (4th ed., 1990), p. 10;

opposition in the past, notably on the part of D'Amato<sup>185</sup>; and recently it has been questioned by Stein<sup>186</sup> and, with less hesitancy, Charney<sup>187</sup>. The attack is mainly on the grounds (1) that the judgments usually cited in support of the principle in fact offer it no support; and (2) that practically no State practice has been shown to support it either. I propose to deal with each of these points in turn before going on to consider (3), the justification of the rule as a matter of theory and policy.

(1) *The alleged lack of judicial authority.* Two passages from judgments of the ICJ appear to support the persistent objector rule. The first is from the *Asylum* case. It will be recalled that, in that case, the Court held that there was not a sufficient uniformity of practice regarding diplomatic asylum to warrant the conclusion that there was a rule of Latin American customary law that the country in whose embassy a fugitive had taken refuge could demand a safe-conduct out for him<sup>188</sup>. The judgment could have stopped there, but it added:

“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.”<sup>189</sup>

D'Amato is certainly right in classifying this as a case concerning special (i.e. particular) custom, and he may also be right in saying that in special custom, unlike general custom, proof of consent is

G. I. Tunkin, *Theory of International Law* (trans. W. E. Butler, 1974), p. 130; H. Thirlway, *International Customary Law and Codification* (1972), pp. 109-110; M. Villiger, *Customary International Law and Treaties* (1985), pp. 15-17; K. Wolfke, *Custom in Present International Law* (2nd ed., 1993), pp. 66-67; G. Danilenko, *Law-Making in the International Community* (1993), pp. 109-113. An early example is C. van Bynkershoek, *De Foro Legatorum* (1744, trans. G. J. Laing, 1946), Chap. XIX *in fine* (p. 539).

185. D'Amato, *The Concept of Custom*, pp. 233-263.

186. T. L. Stein, “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law”, 26 *Harvard IL J.* (1985), p. 457.

187. J. Charney, “The Persistent Objector Rule and the Development of Customary International Law”, 56 *British Year Book of International Law* (1985), p. 1.

188. *Supra*, text accompanying footnote 137.

189. *ICJ Reports 1950*, p. 266 at pp. 277-278.

necessary<sup>190</sup>. But it does *not* logically follow that, as he maintains, there is no persistent objector rule in relation to *general* customary law. Indeed, the passage is perfectly consistent with there being such a rule in general international law, even though, given the context, the Court's statement is inconclusive on this point.

The other passage which has been much relied upon by supporters of the persistent objector rule comes from the *Fisheries* case. The context was the Court's examination of the United Kingdom's invocation of an alleged general rule of international law limiting closing lines in bays to a length of 10 miles. As has already been seen in the context of the requirement of consistency<sup>191</sup>, the ICJ held that "the ten-mile rule has not acquired the authority of a general rule of international law". In the following sentence, it added that "In any event the ten-mile rule would appear to be inapplicable to Norway, inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."<sup>192</sup> D'Amato suggests that this observation was about a *special* customary rule. Now, it is certainly true that the various strands of the Court's judgment in this case are in some respects difficult to disentangle, and it is also true that *other* parts of the judgment do deal with special custom, at least in a very broad sense of that term<sup>193</sup>. But in the context in which the passage at present under examination appears, and bearing in mind the pleadings, it is simply implausible to suggest that the Court was not alluding to *general* custom<sup>194</sup>.

It has also been contended, with more plausibility, that the pronouncements in question were mere secondary grounds, or even *obiter dicta*. So far as concerns the Court's animadversions in the *Fisheries* case, Fitzmaurice has argued that they were, strictly, *obiter*, since the United Kingdom had expressly conceded Norway's right to draw a closing-line across all her fjords and sunds "which fall within the conception of a bay as defined in international law . . . whether the proper closing line of the indentation is more or less than 10 sea miles

190. Though see *supra*, footnotes 151 and 152.

191. *Supra*, Sec. 4.

192. *ICJ Reports 1951*, p. 116 at p. 131.

193. See, in particular, the treatment accorded to the United Kingdom's failure to protest against the Norwegian straight base-line system, at pp. 138-139.

194. *Pleadings*, I, pp. 381-384; II, pp. 428-429; IV, pp. 98-99. Cf. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), pp. 154-156; *id.*, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 *Recueil des cours* (1957), p. 2 at pp. 99-100; Akehurst, 47 *British Year Book of International Law*, p. 1 at pp. 24-25.

*long*”<sup>195</sup>. The Court needed only to proceed on the basis of this concession, and so its observations about the general law and Norway’s persistent objection to it were, strictly, unnecessary to its decision, he argues. But, I would submit, this depends on the logical structure which the *Court* (not a commentator) chose for its judgment. The British concession was made only as a matter of historic title in derogation from the general law ; but the Court went out of its way to point out, first, that the 10-mile rule was *not* a rule of general law, and, secondly, that it was in any case not opposable against Norway, who had always objected to it. It therefore did not reach the British concession.

Similarly, it is not clear that the Court’s observation about Norway’s persistent objection to the alleged rule was logically secondary, as Charney maintains<sup>196</sup>. It is true that the part of the case concerning bays could have been concluded without discussing Norway’s persistent objection : the Court could simply have held that the 10-mile rule was not one of general law. But, equally, if the persistent objector rule is recognized by international law, a finding that Norway was such an objector could have obviated the need to examine whether a general customary rule existed. Likewise, Charney is, admittedly, right that, in the *Asylum* case, the finding that the alleged regional customary rule did not exist would have sufficed without the added observation that, even if such a rule *had* existed, it would not have bound Peru, because of its opposition to it ; but equally, I suggest, the logical order of these propositions can be reversed. In short, whether the *dicta* were *obiter* depends on the logical priority between different parts of the judgment, and Charney’s view of this is not self-evidently correct. Moreover, it is not clear that international adjudication, which knows no doctrine of binding precedent, is a proper place for the making of over-subtle distinctions between *ratio decidendi* and *obiter dictum*<sup>197</sup>, the more so when, even in the

195. *Law and Procedure (supra)*, pp. 241-242.

196. 56 *British Year Book of International Law*, p. 9. Similarly Stein, 26 *Harvard IL JI*, p. 460: “the Court’s endorsement of the principle in each case was pure dictum [*sic*]”.

197. R. Y. Jennings, “The Judiciary, International and National, and the Development of International Law”, 102 *Int. Law Rep.* (1996), ix, suggests that there is room for seeking to determine the *ratio decidendi* in international adjudication, though he admits that there is weighty authority against this view. It is not my purpose to take sides in this controversy here ; what I am suggesting is that, even if there is room for such distinctions, in international adjudication it is not necessarily or always appropriate to treat alternative grounds of decision as *obiter*.



English common law, the criteria for making these distinctions have proved in some respects rather controversial<sup>198</sup>. Furthermore, whether wisely or not, the Court frequently accumulates reasons for its decisions<sup>199</sup>.

So far as concerns the *Fisheries Jurisdiction* case (*Merits*)<sup>200</sup>, Charney makes too much of the fact that the majority judgment is silent on the persistent objector rule<sup>201</sup>. The issue was the extension of Icelandic fisheries jurisdiction to 50 miles from the base-lines, allegedly in contravention of agreements with the United Kingdom and Germany. The Court did not rule directly on the question whether the Icelandic claim was valid under general international law, simply holding that the Icelandic claim was not opposable to the applicants, and that the parties were obliged to negotiate in good faith an equitable solution to their dispute. The judgment does not make it clear whether the non-opposability was due to the treaties, to the United Kingdom and Germany's persistent opposition to any extension of jurisdiction beyond 12 miles, or to their historic fishing rights in Icelandic waters and dependency thereon (to be counter-balanced against Iceland's "preferential rights" in adjacent waters). Although Charney treats the Court's failure to take the opportunity to reiterate the persistent objector rule as somewhat significant, in the circumstances it probably was not. There were sufficient grounds for reaching its conclusion without entering into this topic. Moreover, scrutiny of the declarations and separate and dissenting opinions reveals that even the majority was deeply divided on its reasons. Some members of the Court thought that general international law had developed so as to endorse the concept of preferential rights for coastal States, but subject to taking into account the legitimate interests of other States; whilst others thought that any extension beyond 12 miles was illegitimate. Non-opposability was an obvious compromise solution, but going too deeply into the reasons for non-opposability could have destroyed this compromise. It is also the

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198. Cf. e.g. A. W. B. Simpson, "The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent", in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (1961), p. 148; R. W. M. Dias, *Jurisprudence* (5th ed., 1985), pp. 136-144.

199. For further examples, see the discussion of the *North Sea Continental Shelf* cases, *infra* Chap. 4, Secs. 1-3.

200. *United Kingdom v. Iceland*, *ICJ Reports 1974*, p. 3. The judgment in the proceedings instituted by Germany is in all material respects identical.

201. *Op. cit.* at pp. 10-11.

case (as Charney concedes) that Judge Sir Humphrey Waldock's separate opinion came close to relying on the United Kingdom's persistent objection to extensions beyond 12 miles under general international law<sup>202</sup>; and that, conversely, Judge de Castro asserted that Iceland could not be bound by a 12-mile fishery limit, since it had persistently objected to it<sup>203</sup>. There are also a number of separate or dissenting opinions in other cases which expressly or impliedly support the persistent objector principle, though admittedly these cannot carry as much weight as a majority judgment<sup>204</sup>. There also seems to be no case in which the International Court has applied a rule of customary law against a State which has persistently opposed it<sup>205</sup>.

There is also some arbitral support for the persistent objector rule: in the *Fischbach and Friedricy* case in the Germany-Venezuela Mixed Claims Commission, the umpire (Duffield) held that "Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations."<sup>206</sup> There is also a measure of support in the Inter-American Commission on Human Rights Opinion in the case of *Roach and Pinkerton v. United States*<sup>207</sup>. Prominent municipal tribunals, too, have supported the doctrine<sup>208</sup>. In *The "Antelope"* in 1825<sup>209</sup>, the issue was the lawfulness of the arrest by American authorities of a vessel engaged in the slave trade. The United States Supreme Court

202. *ICJ Reports 1974*, p. 105 at p. 120; cf. the dissenting opinion of Judge Gros at pp. 147-419.

203. *Ibid.*, pp. 72, 92.

204. See the dissenting opinion of Judge Azevedo in the *Asylum* case, *ICJ Reports 1950*, p. 332 at pp. 336-337; the separate opinion of Judge *ad hoc* Van Wyk in the *South West Africa* case (*Second Phase*), *ICJ Reports 1966*, p. 67 at pp. 169-170 (though see the dissenting opinions of Judges Tanaka and Padilla Nervo at pp. 250, 293 *et seq.* and pp. 443, 470 respectively); the separate opinion of Judge Ammoun in the *North Sea Continental Shelf* cases, *ICJ Reports 1969*, p. 100 at pp. 130-131; the dissenting opinions of Judges Lachs and Sørensen in the same case, *ibid.*, p. 218 at pp. 238 and 241, 247-248, respectively; and the separate opinion of Judge Gros in the *Nuclear Tests (Australia v. France)* case, *ICJ Reports 1974*, p. 276 at pp. 286-289.

205. Danilenko, *Law Making in the International Community*, pp. 112-113.

206. (1903), 10 *RIAA*, p. 388 at p. 397.

207. Organization of American States, Inter-American Commission on Human Rights, *Annual Report, 1986-1987*, p. 147, p. 168 (para. 54). (I am grateful to Ms S. C. Hulton for this reference.)

208. See S. C. Hulton, "The Persistent Dissenter Rule in Customary International Law: A Survey of the Case-Law and the Literature", paper circulated by me, on behalf of a working group of the British Branch of the International Law Association, to the International Law Association Conference, 1992 (Cairo). See further, footnote 222 *infra*.

209. 10 Wheaton, p. 66 at p. 122.

(*per* Marshall, CJ) held the arrest wrongful: although the trade had now been prohibited by most States, it had previously been legal, and States who had refused to change their position were entitled to do so. Eight years earlier, the celebrated English Admiralty judge, Sir William Scott (Lord Stowell) had come to the same conclusion in *Le Louis, Forest*<sup>210</sup>. As against this, the Supreme Court of Chile appears at first sight to have reached a different conclusion in *Lauritzen et al. v. Government of Chile*<sup>211</sup>. The issue was whether one neutral had a right of angary against another. Denmark, the flag State of the ship requisitioned by the Chilean Government, had always opposed the right of angary. The Court dealt summarily with this fact, as follows:

“Respectable as this opinion [of the Danish Government] is, it should be pointed out that the Danish Government is not a party to this litigation and that its right to express an opinion in the matter has no more weight than that of tradition, when one bears in mind the fact that Denmark has never accepted angary. The oldest treaty containing a clause in opposition to the exercise of angary is that concluded between France and Denmark in 1645.”<sup>212</sup>

This seems to constitute authority against the persistent objector doctrine. However, the following points should be noted. First, although the judgment as a whole is very thoroughly reasoned on other points, with copious citation of the literature and the State practice, the persistent objector issue seems not even to have been argued before, or considered as such by, the Court. Secondly, the Chilean Government had argued that the taking did not constitute angary, and that it was entitled to pay less than the full compensation angary admittedly required. In holding that the act did constitute angary, and that full compensation was due for angary, including (if appropriate on the facts) lost profits, the Court seems to have considered that it made no difference whether the taking was lawful or unlawful; if so, the persistent objection of Denmark would have been irrelevant. Consequently, the Court’s decision is not in fact strong authority against the persistent objector rule.

210. (1817) 2 Dods, p. 210.

211. (1956), 23 *International Law Rep.*, p. 708.

212. *Ibid.*, at p. 729.

(2) *The alleged lack of support in State practice.* Both Stein and Charney, in support of their questioning of the persistent objector rule, make much of the scarcity of examples of State practice<sup>213</sup>. But neither has searched very far. For the most part, they have confined themselves to the absence of examples in the works of writers on international law in general and on sources in particular, as they admit; though they also have gone on to examine a handful of instances, mainly from the law of the sea, where they would have expected to find the persistent objector rule invoked, but did not<sup>214</sup>.

I shall suggest shortly that examples of State practice are by no means lacking. However, we should not be surprised that they are not very common. States do not issue protests at the drop of a hat: they require very careful consideration, because what is formally asserted may rebound on the maker on some future occasion, and also because the recipient of a protest is not likely to regard its delivery as a friendly or constructive act, to put it mildly. Moreover, because protests are acts of diplomacy, it is quite frequent for the protest not to be publicized either by the sender or the recipient, so that our knowledge of their full extent is necessarily limited. Furthermore, from a rhetorical standpoint, so to speak, reliance on the persistent objector rule is not likely to be the preferred mode of argumentation<sup>215</sup>. It is much more attractive for a State to be able to say: “No general rule has emerged, (*inter alia*) because my opposition (and that of like-minded States) has prevented its doing so”, than to say “I concede that a general rule has emerged, but I am not bound by it because of my persistent objection”. Legally, the latter argument could shift the “burden of proof” from the State asserting that a general rule exists to the one seeking to escape the application of the alleged rule; and, diplomatically, the persistent objector argument admits that the State making it is the “odd man out”. True, we

213. D’Amato, *Concept of Custom in International Law*, pp. 98-102, seems to share this view, especially in view of his disparagement of the role of protest in the formation of general customary law. But we have already seen (*supra*, text accompanying footnotes 105-106) that his remarks on (*inter alia*) the latter point are questionable.

214. Stein, 26 *Harvard IL JI*, p. 459; Charney, 56 *British Year Book of International Law*, p. 11.

215. Cf. P.-M. Dupuy, “A propos de l’opposabilité de la coutume générale: enquête brève sur l’objecteur persistant”, in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991), pp. 257, 263-266.

lawyers have the luxury, denied to other mortals, of being able to argue in the alternative, as follows: "There is no general rule; or, if there is, we are not bound by it because of our persistent objection"; and States will argue thus if they must. But any practitioner knows that, forensically if not logically, the alternative argument can weaken the force of the principal one. Thus, for example, in the controversy over the convoy of neutral vessels by warships flying the same flag, the United Kingdom's preferred argumentative position was that, in the face of its opposition (being at that time the major maritime power) no new general rule could come into being.

One instance of State practice was referred to by the two authors themselves, but in their discussion of the judicial precedents; and Charney, at least, does not seem to have taken it into account as an instance of State practice (which it undoubtedly is). In their pleadings in the *Fisheries* case, both the United Kingdom and Norway agreed on the existence of the persistent objector rule<sup>216</sup>.

Both authors make much of the fact that the persistent objector rule was not applied, or even invoked, on several occasions when one would have expected it. Stein makes the point that, although the Soviet Union always opposed the erosion of the doctrine of absolute State immunity, the foreign courts which decided cases in which Soviet agencies or instrumentalities were involved have never accorded them any special treatment<sup>217</sup>. However, he has to concede that, so far as appears from the judgments reviewed by him, the Soviet Union has not invoked the persistent objector rule before these tribunals. Unless the point is put to the court, it is hardly surprising if it does not take it into account. There are all sorts of possible reasons why the USSR might have thought it not worth its while to raise the point: it seems useless to speculate.

Both Stein and Charney also point out that, although South Africa persistently maintained that it was entitled to practice *apartheid*, others have taken no notice of this objection<sup>218</sup>. To this it might be responded that it is widely considered that *apartheid* is prohibited by

216. *Pleadings*, Vol. I, Contre-Mémoire de la Norvège, pp. 381-383, paras. 256-260; Vol. II, Reply of the United Kingdom, pp. 428-489, paras. 162-164; Vol. III, Duplique de la Norvège, pp. 291-296, paras. 346-353. See also *North Sea Continental Shelf* cases, *ICJ Pleadings*, Vol. I, pp. 60 and 400 (Federal Republic of Germany) and p. 509 (Denmark and Netherlands).

217. 56 *British Year Book of International Law*, pp. 460 *et seq.*

218. Stein, 26 *Harvard ILJl*, p. 463; Charney, 56 *British Year Book of International Law*, p. 15. The latter adds Rhodesia.

*jus cogens*, and many believe that the persistent objector rule does not apply to norms in that category. Charney also concedes that there might be treaty norms relevant to this discussion, some at least of which were binding on South Africa.

Stein seeks to illustrate his thesis further by pointing to the fact that the United States and others opposed the view of the Group of 77 that the deep seabed could be mined only in accordance with the régime to be established by Part XI of the Law of the Sea Convention 1982, but did not invoke the persistent objector rule. However, any such failure is explicable on the grounds I have already indicated, namely, that the more attractive argument for the United States and its allies would have been simply to assert that the customary law position had not been changed by a treaty which they had refused to accept.

Both authors also cite the refusal of the United States — subsequently abandoned — to accept other States' extension of their territorial seas from three to twelve miles. The American stance seems, in fact, to have been a combination of the “no change in the general law” and the persistent objector positions, albeit that the latter may not have been articulated in so many words. There is some force in the authors' point that various countries arrested American fishing boats for violating their new limits, without any weight apparently being given to the United States legal position on these claims. That the United States did not insist, however, may be due purely to diplomatic reasons, rather than legal ones. For instance, some of the main claimants were its neighbours and allies. The United States authorities may also have realized that the 3-mile limit, if ever it had been mandatory, could not hold<sup>219</sup>.

Charney also refers to the fact that whilst, in the 1960s, Japan strenuously opposed the claims of some of its neighbours to 12-mile exclusive fishing zones, they insisted on them. But the fact that Japan did strenuously oppose them, and even threatened to take New Zealand to the International Court of Justice, surely shows that it regarded itself as entitled not to accept what others regarded as a change in the general law. In the end the disputes were settled; and

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219. Both authors also refer to the fact that some States enforced their jurisdiction over tuna in their exclusive economic zones, despite the fact that the United States did not recognize such jurisdiction beyond a 12-mile territorial sea limit. However, Charney admits both that the law was unsettled, and that the United States took countermeasures.

he admits that these settlements are inconclusive as to the existence or not of the persistent objector rule.

Charney also makes the more general point that persistent dissent does not seem to pay: Japan had to accept 12-mile fishing zones at the end of the day, and the United States had to accept even wider claims to exclusive fishery and exclusive economic zones, up to the 200-mile limit<sup>220</sup>. One might add that, thankfully, South Africa had to drop *apartheid* in the end. But this tells us nothing about whether a persistent objector rule exists, but only about its (allegedly limited) *usefulness*. International law operates within the wider *milieu* of international relations, and the world does not stand still. Even if one has undisputed rights, it does not always pay to stand on them. There is a diplomatic cost of being the “odd man out”, and sometimes the price is deemed not worth paying, even for superpowers. This applies, however, even in cases where there is no question of being the persistent objector<sup>221</sup>.

Moreover, it is not the case that persistent dissent never pays. Charney cites the prolonged resistance of the United States and other capital-exporting countries to the erosion of the “prompt, adequate and effective” standard of compensation in cases of lawful expropriation, and suggests that even the (then sixth draft of) the American Law Institute’s *Restatement of the Foreign Relations Law of the United States* had to accept a lower standard of “just compensation”. But it seems clear from the final version of this text<sup>222</sup> and from the

220. By contrast, Stein sees an increasing role for the persistent objector in the future: 26 *Harvard IL JI*, pp. 463–475.

221. For instance, the United States had the indisputable right to administer the Trust Territory of the Pacific Islands; but in the face of growing pressure against colonialism and its analogues, it gave it up.

Moreover, the abandonment of a previous position may be due to changes of perception of self-interest rather than, or as well as, the difficulties of swimming against the tide. For instance, the United States, with its long coastline and extensive continental margin, may benefit more from the EEZ than it (or the then dominant groups within its governmental structure) previously thought. Also, in the case of maritime zone claims, the State which persists in trying to uphold narrow limits will find that it is having to allow foreign fishing boats into its near offshore, whilst its own boats are excluded from the corresponding waters of foreign States. This results in pressure to conform with expanding limits.

222. *Restatement, Third* (1987), Sec. 712, including Comments and Reporters’ Notes.

The *Restatement*, Sec. 21, Comments (b) and (d), accepts the persistent objector rule; but Reporters’ Note 2 says that “Refusal of States to adopt or acquiesce in a practice has often prevented its development into a principle of customary law, but instances of dissent and exemption from practice that developed into

case-law<sup>223</sup> that this was not so; and subsequent developments have revealed the capital-exporting States to have been remarkably successful in maintaining their position. Similarly, the resistance of the United States and others to many of the rules contained in Part XI of the Law of the Sea Convention 1982 (both as a matter of customary and of conventional law) seems to have been very effective, resulting in the substantial modification of those provisions by the euphemistically named Agreement on the Implementation of Part XI of the Law of the Sea Convention<sup>224</sup>.

Stein and Charney are right, however, in saying that the writers generally do not cite State practice in support of their endorsement of the persistent objector rule. This is partly due to the fact that, as I shall explain in Chapter III, for quite a few of them the existence of the rule is simply a corollary of their view that the binding force of customary rules depends on consent. Another probable reason why writers do not generally cite State practice in support of their views is that digests of State practice are usually based on substantive topics, rather than sources questions like the present one, so that it is a very laborious task to find the data.

However, research under my supervision by Ms Susan Hulton of University College London is nearing completion, and will show quite a wealth of State practice in support of the persistent objector rule. So it may be that the sceptics about this rule just not have looked hard enough.

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principles of general customary law have been few." In fact, the two instances that it does cite are equivocal or inapt. As Hulton, *op. cit.*, p. 20, n. 70, puts it:

"The first [example cited] is the successful maintenance by the Scandinavian countries of a 4-mile territorial sea 'although a 3-mile zone was generally accepted'. This may, however, be an expression of the fact that there never was a general (3 mile) rule (see, e.g., D. P. O'Connell, *The International Law of the Sea* (1982), Vol. I, p. 165). Alternatively, it may be an instance of opposition to a general rule being acquiesced in by other countries (see, e.g., Akehurst, 47 *British Year Book of International Law*, p. 24, footnote 3). The second example is Norway's successful maintenance of 'a different system of delimitation of its territorial zone'. This is presumably a reference to Norway's use of the straight base-lines method of delimiting its territorial sea. As we have seen, however, this system was treated by the Court as an application of the customary rules to an exceptional situation, not as an exception to those rules."

223. See e.g. M. H. Mendelson, "What Price Expropriation? Compensation for Expropriation: The Case Law", 79 *American Journal of International Law* (1985), pp. 414 and 1041; *contra*, O. Schachter, *ibid.*, p. 420.

224. GA res. 48/263 (28 July 1994), 33 *International Legal Materials* (1994), p. 1309.



(3) *Considerations of theory and policy.* If one believes that States are bound by customary rules because (and to the extent that) they individually consent to them, then it is obvious why a persistent objector is not obliged. Indeed, the question might be posed why the objection needs to be *persistent*: one refusal should be enough. I shall, however, suggest in Chapter III that the voluntarist thesis is not completely satisfactory as a basis of customary law obligation. If that is correct, then the question whether the persistent objector rule exists is not a matter of deduction from the first premise, but of *induction*<sup>225</sup> from State practice and, to a subsidiary degree, from judicial and arbitral decisions. I have sought to show that there is sufficient support for it from those quarters. The question remains, however: is it desirable, as a matter of policy, that such a rule *should* exist?

Akehurst defended the rule on the following grounds:

“If the dissent of a single State could prevent the creation of a new rule [as, I might add, it was sometimes argued in the nineteenth century, at least if the single State was a ‘first-class’ power], then new [customary] rules would hardly ever be created. If a dissenting State could be bound against its will, customary law would in effect be created by a system of majority voting; but it would be impossible to reach agreement about the size of the majority required, and whether (and, if so, how) the ‘votes’ of different States should be weighed. Moreover, States which were confident of being in a majority would adopt an uncompromising attitude towards the minority.”<sup>226</sup>

Charney challenges this on a variety of grounds: but the fact is that, whether rightly or wrongly, States as a whole are not yet ready to accept a system in which the majority can not only change the law, but bind the minority thereby. They may — not unreasonably — hold that States who did not object when they could have done so are bound, and that those who come along later have to take the rules as they find them: but that is as far as they are prepared to go. This observation seems to apply generally, not just of those States who, although powerful, often find themselves in a numerical minority. All Governments are very jealous of their sovereignty, and there does not seem to be much enthusiasm for a system where this could be

<sup>225</sup> Cf. G. Schwarzenberger, *The Inductive Approach to International Law* (1965).

<sup>226</sup> 47 *British Year Book of International Law*, p. 26.

overridden by mere weight of numbers. (I report this as a fact of life, rather than a policy preference<sup>227</sup>.) Consequently, the rule seems to perform a useful function as a safety valve. As Weil put it:

“The classic theory of custom depends on a delicate, indeed precarious, equilibrium between two opposite concerns: on the one hand, to permit customary rules to emerge without demanding the individual consent of every State; on the other hand, to permit individual States to escape being bound by any rule they do not recognize as such.”<sup>228</sup>

It may be that, in many (though not all) instances, the invocation of the persistent objector rule is merely a short-term measure to enable dissenting States to adjust themselves to the new régime. But if that is a way of reducing friction and unnecessary quarrels about rights, that is no bad thing; and if it means that the convoy can move forward without having to wait for the slowest member, this is all to the good. I submit, therefore, that the existence of the persistent objector rule is well established in State practice, case-law and the literature, and justifiable as a matter of policy.

I am conscious of having devoted a considerable amount of space to a discussion of just one aspect of our subject — the persistent objector rule. However, it was necessary to do so, I think, for two main reasons: first, because it is heavily relied on by supporters of the voluntarist theory, as we shall see in the next chapter: and secondly, because its existence has been put in doubt, as we have seen, by the recent attacks on it.

Before leaving the subject, something should be said about the circumstances in which the rule can be invoked though, for reasons of space, this will be done only briefly.

First of all, obviously the objection must be expressed: it is no

<sup>227</sup> Charney's further point that international law does not require a single invariable rule anyway, and that the law may itself provide for exceptions, or they can be achieved through prescription and acquiescence, does not seem to advance his argument greatly. If it were not for the possibility of the persistent objector rule being invoked, the majority might (to take Akehurt's observation further) be unwilling to accommodate the minority by allowing for exceptions and variations. And for a State to have to rely on prescription and acquiescence means that, as Charney notes, prior to the vesting of the prescriptive right the deviating State would be a violator of the law: at least the persistent objector rule means that a State can preserve its rights without having to add to the already excessive tally of violations of international law.

<sup>228</sup> P. Weil, "Towards Relative Normativity in International Law?", 77 *American Journal of International Law* (1983), p. 413 at pp. 433-434.

use government officials and ministers voicing doubts amongst themselves, but not communicating them to the outside world. If a State which is directly affected by a practice does not object, it can in many instances reasonably be taken to have acquiesced or to be otherwise precluded from objecting to the rule.

Secondly, the protests must be maintained<sup>229</sup>. This is indeed implied in the word “persistent”. The reason for the requirement is similar to the one just given in support of the need for express objection: if the State, having once objected, fails to reiterate that objection, it may be appropriate (depending on the circumstances) to presume that it has abandoned it<sup>230</sup>.

Thirdly, merely verbal objection, unaccompanied by physical actions to back up that objection, seems to be sufficient. Indeed, it would be subversive of world peace were it to be otherwise, as well as disadvantaging States lacking the military resources or the appropriate technical personnel to take such action<sup>231</sup>.

Fourthly, the British pleadings in the *Fisheries* case conceded the right of persistent objection only where it could be shown that at one time international law had given States a greater freedom of action than they would now enjoy under a new general rule<sup>232</sup>. According to Stein<sup>233</sup>, “On this understanding, persistent objection would not exempt a State from a rule concerning a subject previously ungoverned by international law”. But this is perhaps questionable: if a

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229. In the *Fisheries* case, it will be recalled, the Court stated that Norway had “always” opposed the 10-mile rule for bays. On the other hand, in the *Asylum* case it seemed to be sufficient that Peru had refrained from ratifying two Montevideo Conventions which had included the alleged rule to which it objected.

230. Stein, 26 *Harvard IL JI*, pp. 478-479, raises the question whether an objector also needs to be consistent, in the sense that its reasons for objecting should be consistent with its other positions. For example, he suggests that it is inconsistent for the United States to object to coastal States exercising jurisdiction over tuna fishing beyond the territorial sea, whilst itself exercising jurisdiction over other highly migratory species within 200 miles of its baselines. He sees both advantages and disadvantages in a requirement of consistency: but two major disadvantages he identifies are that it would open the door for inconclusive disagreement as to consistency of positions, and would diminish the “safety valve” function of the rule if opportunities were reduced for “losers” in the global process to invoke the rule when (but only when) their political sensitivities so required.

231. Cf. Colson, “How Persistent Must the Persistent Objector Be?”, 61 *Washington Law Rev.* (1986), p. 957.

232. *ICJ Pleadings, Fisheries*, Vol. IV, pp. 98-99; cf. Fitzmaurice, 92 *Recueil des cours* (1957), pp. 99-101.

233. 26 *Harvard IL JI*, pp. 477-478.

subject is unregulated by international law, according to the principle enunciated in the “*Lotus*” case there is a presumption in favour of freedom of action<sup>234</sup>. Accordingly, the British limitation of the persistent objector rule does not seem to go very far. But in any case, this is not a restriction Norway accepted, and there is no evidence that the Court was prepared to adopt it either<sup>235</sup>.

Fifthly, the British pleadings also suggested that a State could not exclude itself from the operation of a “fundamental principle” of international law<sup>236</sup>. But the point was not pursued in oral argument nor dealt with by the Court. There is no other case-law supporting it. Thirlway, who approves such a limitation, says that it means that the persistent objector rule does not apply to concepts (as opposed to rules) which are so fundamental to the system that they are non-derogable: concepts like “State”, “international wrong”, and “the territorial sea”<sup>237</sup>. But even if this is so, it is for the most part trivial, because States are not normally going to try to derogate from basic concepts, but rather from rules. Moreover, in one sense these concepts are bracket terms for sets of rules which define when they may be properly employed, and so the problem is not avoided. For example, does the concept “territorial sea” include the rules as to how the base-lines are to be drawn<sup>238</sup>? And, most important of all, whether something is a *fundamental concept* can be acutely controversial, once one gets beyond those simply axiomatic to a system of international law, such as sovereignty and independence. For example, is the “common heritage of mankind” a fundamental concept or not? Certainly, it cannot be said to be axiomatic: international law did without it for several centuries.

<sup>234</sup>. (1927), *PCIJ, Series A, No. 10*, p. 18. Even though the Court may have overstated the degree of freedom of States (or States and writers may have exaggerated it), there is little doubt that some such presumption exists.

<sup>235</sup>. Having said that, if what is being restricted is not just a general liberty, but a specific right, the case for the application of the rule clearly becomes stronger.

<sup>236</sup>. See *ICJ Pleadings*, Vol. II, pp. 428-429.

<sup>237</sup>. *International Customary Law and Codification*, pp. 28-29 and 110; cf. Hulton, *op. cit.*, p. 26, n. 94.

<sup>238</sup>. Thirlway tries to deal with this by saying that, in the *Fisheries* case, “the Court, by upholding the Norwegian claim, in effect recognized that its method of drawing baselines could not be said to be a denial of the concept of the territorial sea”; but this assumes what he is trying to prove, viz., the existence of this limiting factor. Furthermore, whether something is called a “concept” or a “rule” tends to be arbitrary. Indeed, in some circumstances the former term may denote something *weaker* than a rule: cf. the reference to the EEZ as a “concept” in the *Tunisia/Libya* case, *supra*, text accompanying footnote 166.

Schachter, whilst conceding that the British limitation is not authoritatively established, thinks it not unreasonable<sup>239</sup>. He seeks to deal with the problem just posed by saying:

“In the light of contemporary issues, the question might be raised by a claim of a State that it had dissented from recognizing the right of navigation through the exclusive economic zone or had dissented from the principle of an international authority for the common heritage of the sea-bed. If these principles are regarded as fundamental and of major importance to the generality of States with respect to an area beyond any State’s jurisdiction, a good case can be made for denying the dissenting State the right to avoid the obligations that all other States incur as a consequence of the acceptance of the new principles. The issue cannot reasonably be decided solely by reference to voluntarist theory. It would be germane to consider a variety of factors including the circumstances of adoption of the new principle, the reasons for its importance to the generality of States, the grounds for dissent, and the relevant position of the dissenting States. The degree to which new customary rules may be imposed on recalcitrant States will depend, and should depend, on the whole set of relevant circumstances. It would be unwise, as well as futile, to prescribe a categorical rule for so complex and delicate an issue.”

Three comments may be made about this passage: (a) Schachter apparently introduces a criterion for deciding whether a principle is “fundamental and of major importance”: the attitude of “the generality of States”. But it is precisely when the “generality of States” desires a new rule that the persistent objector rule comes into its own. If the rule is not to be invoked when the generality of States says so, the dangers that Weil and others voiced their alarm about in the context of *jus cogens* will be present to an even greater extent. Whether or not this approach is regarded as progressive, it is in any event unlikely to prove acceptable to powerful States (and others) who find themselves in the minority. (b) Schachter draws attention to the fact that other States are accepting reciprocal obligations, and implies that the dissenting State would otherwise be a “free rider”. But a State’s opinion that it has more to lose from a new rule than it

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239. *International Law in Theory and Practice* (1991), pp. 13-14.

gains thereby might be a reasonable one: reference to reciprocity and “free riders” assumes a community of interest which may not exist. And it is not impossible to envisage circumstances where the objector would not be a “free rider”: Peru, for instance, would not have been one in relation to diplomatic asylum, except in the unlikely event of its seeking to invoke the right to accord diplomatic asylum without recognizing such claims against it<sup>240</sup>. (c) It might well be thought that to say that “The degree to which new customary rules may be imposed on recalcitrant States will depend, and should depend, on the whole set of relevant circumstances” is, in this particular context, too vague even by the standards of international law, particularly when it is borne in mind that there is no tribunal with the compulsory jurisdiction to determine these questions.

Thirlway’s and Schachter’s concept of “fundamental principles” includes at least some which are *jus dispositivum*. Whether or in what circumstances the persistent objector rule applies to rules of *jus cogens* is beyond the scope of these lectures.

In short, then, the argument that the persistent objector rule should not apply in the case of “fundamental principles” seems questionable, at least if the principles concerned are not those of *jus cogens*.

Before leaving the persistent objector rule I should reiterate that it applies only to those who make their objection at the time the general rule is emerging: there is no “subsequent objector” rule. This is the case whether the subsequent objector existed at the time but said nothing, or said nothing because it did not exist at the time<sup>241</sup>. Why this should be is something to be considered in the next chapter.

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So much for the objective element in customary international law. In the next chapter, we shall consider the subjective element.

240. It may depend on whether the obligations are (in reality as well as in form) “normative” or “synallagmatic”: cf. my “Disentangling Treaty and Customary International Law”, 1987 *Proceedings of the American Society of International Law*, p. 160.

241. Waldock, 106 *Recueil des cours* (1962), pp. 52-53, points out that in the cases in which they participated in the PCIJ and ICJ, respectively, neither Poland nor India sought to rely on the fact that they were new States, and that it seems to have been assumed that they would be bound by existing rules: see *German Settlers in Poland* case (1923), *PCIJ, Series B, No. 6*, p. 36; *Certain German Interests in Polish Upper Silesia* case (1926), *PCIJ, Series A, No. 7*, at pp. 22 and 42; *Right of Passage* case, *ICJ Reports 1960*, p. 6.