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KAROL WOLFKE

CUSTOM IN PRESENT INTERNATIONAL LAW

WROCŁAW 1964

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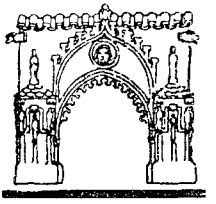

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INTRODUCTION

Object and Scope of the Study

The problems of custom in international law, as in law in general, include some of the oldest and most difficult Their difficulty lies in the intangibleness of custom, in the numerous factors coming into play, in the great number of various views, spread over the centuries, and in the resulting ambiguity of the terms involved. Consequent on this is the fact that international custom and customary law raise the greatest number of doubts and controversies [1] Hudson, the late eminent expert in the problems of the International Court of Justice, stated that even the authors of Article 38 of the Statute of the International Court of Justice and of Article 24 of the Statute of the United Nations International Law Commission "had no very clear idea as to what constituted international custom "[2]

In the municipal law of many countries, as modern legislation is being developed, customary law is entirely loosing its significance It is otherwise in international law Notwithstanding the rapid development of that law

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[1] One might mention here the well known statement by Professor Basdevant, which has in no way lost its validity Les idees des juristes sur les caracteres de la coutume n'ont atteint ni a l'unite ni a la clarte " Jules Basdevant, ' Regles generales du droit de la paix ', *Recueil des Cours de l'Academie de droit international* (further cited as *RCADI*), v 58 (1936-IV), p 508 Professor Charles de Visscher wrote in 1955 'En fait, le phenomene coutumier en droit international est encore peut explore, ses criteres divisent les auteurs, ses applications, en bien des domaines, suscitent des controverses entre gouvernements Charles de Visscher, 'Coutume et traite en droit international public , *Revue generale de droit international public*, 1955, No 3, p 355

[2] *Yearbook of the International Law Commission* (further cited as *YILC*), 1950, v I, p 6

by way of treaties, there are still numerous branches of international life regulated by customary law and, still more important, new rules of that law are arising.

Premature it seems is the recently expressed opinion that, as a result of the accelerated tempo and growing complexity of international life, customary law is rapidly loosing its importance.[3] Customary law being most elastic and best adaptable to new conditions and needs is evolving with the evolution of all international life. The enormous growth of contacts between States, especially as a result of the multiplication of international organizations, creates a new demand for customary rules, mainly in those fields, where, for various reasons, the conclusion of treaties is difficult.[4] Problems of international customary law are, therefore, still highly topical, deserving analysis, especially in the light of the essential changes which have taken place in the political structure of the world in the last few decades.[5]

The object of the present study is to ascertain what conception of international custom might be recognized as generally accepted in the judicial life of our present international society, taking into account the fact that that society is composed of more than a hundred and ten States many of them differing fundamentally from others as to their social and economic systems, cultural heritage, and conditions of development.

As the field of research have been chosen the universally accepted rules of international law (above all the provisions of the United Nations Charter), the most representative practice, to which the jurisprudence

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[3] See for instance Charles de VISSCHER, "Cours général de principes de droit international public", *RCADI*, v. 86 (1954-II), p. 475.

[4] "Among the virtues of customary law should be included its elasticity. Being the direct outcome of needs, without strict definition, it is very malleable and adapts itself easily to new circumstances". Stanisław HUBERT, *Prawo narodów*, Wrocław 1949, v. I, p. 208.

[5] Rightly, then, Professor TUNKIN stated in 1958: "There may hardly be any doubt that the problem of customary international law is one of the most important and also one of the most difficult of all problems of international law." Grigory I. TUNKIN, "Co-existence and International Law", *RCADI*, v. 95 (1958-III), p. 9. See also the pronouncement by Professor BARTOS (Yugoslavia) in the International Law Commission, *YILC* 1961, v. I, pp. 275-278.

of the International Court, old and new, may be reckoned, and the most representative opinions of contemporary doctrine, principally as expressed in the works of the United Nations International Law Commission

On the other hand, we have eschewed here an historic survey of the practice and doctrine Instead the already existing elaborations may be indicated For instance, those by KOSTERS, GIANNI, and especially by MATEESCO, who confronted opinions on international customary law from most distant ages From among more recent studies, the lectures on the history of the sources of the law of nations by Professor GUGGENHEIM in the Academy of International Law deserve special attention.[6]

Also ommitted are detailed descriptions of the views, already many times discussed, of representatives of main currents in the doctrine of international law Finally, the almost classical decisions referring to international custom given by international tribunals and national courts in the last century have been passed over. This is the more justified, since their authority as precedents might be questioned in the present community of States

TERMINOLOGY

Before attempting any discussion of the problems of international custom, it is essential to define at least the most important terms involved For, there is in this respect a glaring arbitrariness and even inconsistency, not only in the doctrine, but also in jurisprudence

It seems, for instance, reasonable to give up the term "source of international law" altogether, since it is equivocal to such a degree as leads to serious misunderstandings, especially in the theory of customary law [7]

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[6] See Bibliography

[7] Cf Max SØRENSEN, *Les sources du droit international*, Copenhague 1946, p 13, Hans KELSEN, "Theorie du droit international coutumier," *Revue internationale de la theorie du droit*, v I, 1939, n 4, p 263, G GIANNI, *La coutume en droit international*, Paris 1931, p 115, Josef L KUNZ, "The Nature of Customary International Law *American Journal of International Law* (further cited as *AIJL*), v 47 (1953), p 663, Torsten GIHL, *The Legal Character and Sources of International Law*, Stockholm 1957 (Acta Universitatis Stockholmiensis, Studia juridica Stockholmiensia, no 1), pp 71-73 K R R SASTRY, *Studies in International Law*, Calcutta 1952, p 22

The term "international custom" is sometimes used, even by one and the same author and in the same publication, in various meanings—for instance, in that of international practice or customary rule On the other hand, the notion of international custom is often described by the term "international practice" or "usage" [8]

Professor KELSEN has forthrightly declared that the term "custom" is equivocal, since it denotes, first a certain factual situation creating rules, next, a rule created by that factual situation, hence a customary rule [9]

There is also a serious ambiguity as to the meaning of the term "custom" in the wording of Subparagraph 1(b) of Article 38 of the Statute of the Court,[10] which, as being inserted in the United Nations Charter, constitutes in a sense a most authoritative definition of the rule of international customary law Many authors, including some members of the Advisory Committee of Jurists of 1920, considered this article as an enumeration of, what are called, the sources of international law, and the custom referred to in this subparagraph, as source of customary law Recently Sir Gerald FITZMAURICE, now a Judge of the Court, argued that "the drafting of head (b) in Article 38 is notoriously defective, but the source it mentions—international custom—is an undoubted formal source of international law "[11] On the other hand, from the very wording of the

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[8] As illustration of the reckless use of terms, we may quote a statement referring to Subparagraph 1(b) of Article 38 of the Statute of the Court in a well known article by KOSTERS " une coutume internationale ne prouve une pratique de quelque nature qu'elle soit, la pratique est la coutume même et etant de droit, elle est droit coutumier J KOSTERS, "Les fondements du droit des Gens', *Bibliotheca Visseriana*, La Haye v IV, (1925), pp 240-241

[9] KELSEN, *Theorie*, p 262, see also Paul FAUCHILLE, *Traite de droit international public*, 8th, ed , v I, part I, Paris 1922, p 42, Alf ROSS, *A textbook of International Law General Part*, London, 1947 p 87, Paul GUGGENHEIM, *Traite de droit international public* Geneve 1953, v I, p 46

[10] The term 'Court' will be used to denote both the Permanent Court of International Justice and the International Court of Justice

[11] Gerald FITZMAURICE, "Some Problems Regarding the Formal Sources of International Law," *Symbolae Verzijl*, La Haye 1958, p 173 Following Professor SCHWARZENBERGER, who abandoned the term "source of law", Subparagraph 1(a) to 1(c) refer to "law-creating processes " Georg SCHWARZENBERGER, *International Law*, v I, London 1957, p 26

whole Article 38 it clearly follows that Subparagraphs 1(a-c) refer to kinds of rules of international law, since it is indisputable that the Court applies rules for giving decisions, and not "sources" The confirmation of this may be found in the Report of the Advisory Committee of Jurists of 1920, where it is clearly indicated that Article 38 "lays down an order in which the rules of law are to be applied "[12]

As an example of inconsistency in applying terms by the Court, we might cite the replacement of the term "practice" by that of "usage" in the Columbian-Peruvian *Asylum* Case of 1950 [13]

These few instances—and numerous others could be cited—clearly show the necessity of preliminary determination of terminology

Practice —The term "practice" (in French "*pratique*", in German "*Ubung*," in Polish "*praktyka*," in Russian "*praktika*") is one of the most fundamental and, at the same time, most general and vague terms used in connection with international custom It is sometimes used also in the meaning of the term "usage" or even "custom".[14] Especially as regards the practice of courts, in this case—of international courts, the term "practice" has the meaning of an unwritten rule of procedure [15]

Very frequently, however, this term means simply a sequence of facts of conduct, although it is impossible to determine whose practice, hence whose action, what kind of action, and in reference to whom All these—

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[12] Permanent Court of International Justice, Advisory Committee of *Jurists, Proces-verbaux of the Proceedings of the Committee, June* 16th *-July* 24th 1920 *with annexes*, The Hague 1920 (further cited as *Committee*), p 729 The enumeration in Article 38 is decisively referred to by Professor HUBERT as enumeration of kinds of rules HUBERT, *Prawo*, v II, p 17 See also Ludwik EHRLICH, *Prawo międzynarodowe*, 4th ed , Warszawa 1958, p 23, GIHL, p 73

[13] "The Colombian Government must prove that the rule invoked by it is in accordance with a *constant and uniform usage practiced by the States in question* This follows from Article 38 which refers to international custom 'as evidence of general practice accepted as law' " *International Court of Justice, Reports of Judgments, Advisory Opinions and Orders* (further cited as *ICJ Reports*), 1950, p 276 Italics added

[14] See *infra*, p 16—18

[15] 'La pratique de la C I J est la maniere habituelle selon laquelle la Cour procede sur des points non regles par le Statut ou le Reglement, par exemple pour la preparation de ses arrêts ou avis " *Dictionnaire de la terminologie du droit international*, Paris 1960 (further cited as *Dictionnaire*)

sometimes essential—features of conduct denoted as "practice" have to be deduced from the context in which the term has been used.

To the term "practice" adjectives are often added indicating at least one of the qualities of the conduct in question. Those adjectives are, however, as a rule too vague. For instance, the generally encountered term "State practice" indicates that reference is made to conduct ascribed to States. There are, however, still some doubts, as to whether it embraces conduct of all State organs or only of some of them; whether only relations with other States are concerned, etc. Still more difficulties are encountered in the attempt to determine the meaning of such terms as "general practice" or "long practice."

In order to avoid misunderstandings, it seems, then, advisable to apply the term "practice" only in its broadest sense—that is, as the conduct of all organs, even of private persons, which might have a bearing on international law.[16] This term, however, will not embrace the activity of writers on international law, which under the name "teachings of publicists," "opinions of writers" or "the doctrine" has always, by tradition, been considered as something distinct.

Precedent.—The term "precedent" (in French: "*précédent*," in German: "*Präzedent*," in Polish: "*precedens*," in Russian: "*precedent*") is another important term closely linked with international custom and practice. The range of meanings in which this term is used is indeed considerable.[17]

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[16] "Pratique. — Terme qui, dans les expressions: pratique des Etats, des organisations internationales, d'un organe international, désigne une manière habituelle d'agir, de procéder, de décider qui ne constitue pas une règle coutumière mais peut contribuer à la création de celle-ci. "*Ibid.*, p. 465. The above quoted definition, though general, is still too narrow, for it suggests a certain uniformity and hence does not include conduct not fulfilling the conditions of custom—that is, when inconsistent and sporadic actions are referred to. As an example of conceiving "practice" in a broad sense, the opinions given by WALDKIRCH and Professor ROSS may be cited. "(Die Staatenpraxis)... wird nicht durch einen einheitlichen Inbegriff von Handlungen gebildet, sondern besteht aus allen möglichen Äusserungen des zwischenstaatlichen Lebens." E. WALDKIRCH, *Das Völkerrecht in seinen Grundzügen dargestellt*, Basel 1926, p. 37. "A State's international attitude may reveal itself in all acts of State that are connected in some way or other with International Law." ROSS, *A Textbook*, pp. 87-88.

[17] "Précédent. — Décision, acte, disposition, ou manière d'agir invoquée dans la

Many writers under the influence of the Anglo-American judicial system, which have had a strong bearing on international courts and tribunals, by "precedent" understand primarily a judicial decision in which a rule has been ascertainded or applied. Such a decision acquires the authority of a precedent for the judges and other organs settling similar cases in the future.

A narrow meaning of the term "precedent" has been given for instance by Professor HUBERT, who wrote: "The ascertainment of a legal principle in a judicial decision by virtue of a custom existing in the practice—that is, applied by States—constitutes a precedent and is undoubtedly binding."[18]

A somewhat broader meaning of the term "precedent" is given by Professor ROSS: "Precedent may be defined as earlier judicial decisions in which a body of rules is more or less plainly objectified."[19] Professor EHRLICH embraces in this term also acts by other organs of international subjects, but only as applied to a concrete case of a more general principle previously applied to cases of the appropriate kind.[20] Professor REUTER, on the other hand, requires only that precedents should be derived from organs whose function is the application of rules of law.[21] A very broad definition of precedent is given by Professor BASDEVANT, who writes: "Precedents are often furnished by actions and not by abstract formulas enunciating the rule itself. The jurist should by an intellectual effort extract the principle which is envolved in a concrete fact constituting a precedent."[22]

In the broad meaning, as examples of practice, the term has also sometimes been used by the Court. In the *S. S. Wimbledon* case of 1923 "the precedents" of the Suez and Panama canals were cited, which included both valid treaties and the facts of passage of warships through those

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suite ou susceptible de l'être pour déterminer la conduite à suivre dans une situation semblable." *Dictionnaire*, p. 466.

[18] HUBERT, *Prawo*, v. II, p. 6.

[19] ROSS, *A Textbook*, p. 86.

[20] EHRLICH, *Prawo*, p. 14.

[21] Paul REUTER, *Droit international public*, Paris 1958, p. 35.

[22] "Les précédents sont souvent fournis par les actions et non par des formules abstraites énonçant la règle elle-même. Le juriste doit, par un effort intellectuel, dégager le principe qu'implique le fait concret constituant le précédent." BASDEVANT, *Règles*, p. 511.

canals.[23] In the *Asylum* case, the Court applied this term to facts of granting asylum, which the Columbian Government cited as evidence of an alleged regional custom.[24] In the Advisory Opinion on *Effect of Award of Compensation Made by the United Nations Administration Tribunal*, the action of the Council of the League of Nations was defined as precedent.[25]

Similarly as with the term "practice," ambiguity can be avoided, at least in part, by adding adjectives. Thus, to distinguish precedents furnished by courts and tribunals the term "judicial precedents" is most frequently used.

Further in the present study, the term "precedent," without additional description, will be applied only in its broadest sense, denoting every act, single manner of acting of any organ (or even of private person) which can have any significance for the creation or application of international law in the future.[26] In other words, precedent will simply mean element of practice. Obviously enough, every such fact becomes precedent not by itself but only *ex post* for those who search the past for guidance in settling a concrete legal dispute or problem.

International usage.—The very old term, originating in Roman law, "usage" (in French: "*usage*," in German: "*Gebrauch*," in Russian: "*obyknovienie*"[27]) is also very often used alternatively for practice, custom, or customary rule.[28] Most frequently, however, by "usage" a practice of a certain uniformity and constancy is meant, such that it is possible

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[23] *Permanent Court of International Justice* (further cited as *PCIJ*), *Series* A 1, p. 28.

[24] *ICJ Reports* 1950, p. 286.

[25] *Ibid.* 1954, p. 62.

[26] *E. g.*, *PCIJ Series* B 16, p. 15. On division of precedents, see Jean HAEMMERLÉ, *La coutume en droit des gens d'après la jurisprudence de la C. P. J. I.*, Paris 1936, pp. 148-165.

[27] This term has been applied by LUKIN. (P. I. LUKIN, *Istočniki meždunarodnogo prawa*, Moskva 1960, p. 80) It has not as yet been generally accepted in Soviet literature. Grigori I. TUNKIN, *Voprosy teorii meždunarodnogo prawa*, Moskva 1962, p. 89.

[28] *Cf.* Nicolas MATEESCO, *La coutume dans les cycles juridiques internationaux*, Paris 1947, p. 223. The terms "usage" and "custom" are used interchangeably especially in English literature and jurisprudence. L. OPPENHEIM, *International Law, A treaties*, 7th ed. by H. Lauterpacht, London 1948, v. I, p. 25.

to presume a duty to act accordingly, although, this duty is not of a legal character, but a moral one, or of courtesy Sometimes "usage" (*usus*) also simply denotes a habit of conduct in a certain way in similar circumstances [29] Among typical usages may be included the maritime honours, certain privileges granted to diplomatic envoys *ex gratia*, or even the form of diplomatic correspondence

Assuming that usage is a kind of uniform practice, we should not confuse it with corresponding rules of international morality or comity [30]

International custom and *Customary rule of international law* — The ambiguous use of the term "international custom" is frequent not only in the doctrine but even, as we have seen, in such an important instrument as the Statute of the International Court of Justice [31] In particular, neither international jurisprudence nor the doctrine attach importance to the distinction between international custom and international customary rules The distinction is essential, however, if not so much for judicial practice, as for research purposes

In the present study, the term "international custom" (in French "*la coutume internationale*," in German "*internationale Gewohnheit*," in Polish "*zwyczaj międzynarodowy*," in Russian "*meždunarodnyi obyčai*") will be used only in the meaning of a kind of qualified practice distinguished from others (for example, from usage) by the existence of a corresponding obligation to act according to this practice, hence, by the existence of a corresponding customary rule of international law This does not imply, however, that custom and customary rule are conceived here as two in-

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[29] "(Usage) —Pratique generalement suivie par les Etats, qu'elle soit transformee ou non en regle coutumiere, l'usage etant parfois invoquee sans pretendre par la a l'existence d'une coutume " *Dictionnaire*, p 663, see also HAEMMERLE, p 178, OPPENHEIM, *International Law*, v I, p 25, GIHL, p 77, TUNKIN, *Co-existence*, p 10

[30] See *infra*, International Custom and Customary Rule of International Law

[31] This has been noted by Professor KELSEN and after him by Professor LUKIN Professor KELSEN wrote, *inter alia* "It is not possible to apply 'international custom' since custom is a habitual or usual course of action and the course of action cannot be applied to a case What is applicable to a dispute is a legal norm " Hans KELSEN, *The Law of the United Nations*, with Supplement, London 1951, p 533 See also LUKIN, p 79

dependent entities. On the contrary, both are *ex definitione* interdependent and complementary. They create rather two aspects or a single ontologically complex entity, custom representing the "is" aspect and the customary rule—the "ought" aspect. It is precisely this close interdependence which is the reason why in most instances the terms "custom" and "customary rule" can be used interchangeably. Nearly everything which will be said in the following chapters on conditions, formation, division, ascertainment, etc., refer both to customs and to customary rules. There are, however, some exceptions. It would be incorrect, for instance, to speak of a "binding" custom or of its "application." Custom as a kind of practice, hence actual qualified conduct, can exist, develop, become extinct, etc. But only the corresponding right and obligation, hence a rule of law, which at any time may be expressed in words, can bind and be applied.[32] Thus, such frequent expressions as "binding custom," "obligatory practice," or "general practice accepted as law" in Subparagraph 1(b) of Article 38 of the Statute of the Court are, in fact, no more than misleading abbreviations, actually meaning, in sequence: a binding customary rule, an obligation to follow a practice, and general practice accepted, though not "as law" (since practice cannot be law), but at most—as a manifestation or expression of law.

In connection with customary rules of international law, it should further be noted that such rules may be expressed either as rights or as obligations.[33] Without going into detailed analysis of this fact, it is assumed here that both, a customary right and the corresponding duty, constitute only two different formulations of the same customary rule, based on the same custom.

International customary law.—Finally, the term "international customary law" (in French: "*droit international coutumier*," in German: "*völkerrechtliches Gewohnheitsrecht*," in Polish: "*zwyczajowe prawo między-*

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[32] *Ibid.*

[33] Great importance has been lately attached to this distinction by Professor MacGIBBON, when he discussed the role of acquiescence in international customary law. See I. C. MacGIBBON, "Customary International Law and Acquiescence," *British Yearbook of International Law* (further cited as *BYIL*), 1957, p. 116.

narodowe," in Russian: "*meždunarodnoe obyčnoe pravo*") or simply "customary law," without additional qualifications, will also be used only in its broadest meaning, embracing all customary rules of international law, both those universally binding and those binding several or even only two States.

CHAPTER ONE

THE ELEMENTS OF INTERNATIONAL CUSTOM

THE GENESIS OF SUBPARAGRAPH 1(B) OF ARTICLE 38 OF THE STATUTE OF THE COURT

The problem of what are called elements of international custom—that is, the conditions of its existence, and hence of the binding force of the corresponding customary rule, is among the most important and controversial in the theory of international customary law.[1]

In attempting to ascertain what are the requirements imposed on custom by contemporary international law, we must pause at Article 38 of the Statute of the Court, as the enumeration of categories of rules of international law accepted, practically speaking, by all States. This article reads as follows:

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

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[1] Among modern writers, this problem has been discussed most pertinently by KOSTERS, BASDEVANT, HAEMMERLÉ, GIANNI, SÉFÉRIADES, KOPELMANAS, GOUET, LAUTERPACHT, STRUPP and KELSEN. Since the Second World War, in particular by ROUSSEAU, SØRENSEN, GUGGENHEIM, MacGIBBON, Charles de VISSCHER, TUNKIN and LUKIN. See Bibliography.

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

In particular, the genesis and interpretation of Subparagraph 1(b) of that article constitute a natural starting point for every discussion on international customary law today. Behind this definition of "international custom" stands a prolonged evolution of opinions on custom in general since Roman times.[3] The first enumeration of kinds of rules of international law in a convention, where customary rules under the name "usage" were mentioned, may be found only in 1899 in the Hague Convention on Law and Customs of War on Land. It is stipulated there that in cases not regulated by that convention the population and the belligerent parties remain under the protection of principles of the law of nations resulting from "usages existing among civilized nations, from law of humanity and the postulates of public conscience."[4]

Next, in famous Article 7 of the Convention of 1907, relative to the creation of an international Prize Court, customary law was not even mentioned, but only admittedly embodied in the term "rules of international law."[5] For the first time customary law as a separate category of law was enumerated in Article 38 referred to above of the Statute of the Permanent Court of International Justice.

The Advisory Committee of Jurists, appointed by the Council of the League of Nations for the purpose of preparing plans for the establishment of the Permanent Court of International Justice, referred to the work of both Hague conferences and even explicitly based the draft of the present Article 38 on the aforementioned Article 7 of the convention con-

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[2] Italics added. See C. Wilfred JENKS, *The Common Law of Mankind*, London 1958, p. 91; SCHWARZENBERGER, *International Law*, p. 38; *YILC* 1952, v. II, p. 63.

[3] In recent literature on this subject see, in particular, Paul GUGGENHEIM, "Contribution à l'histoire des sources du droit des Gens," *RCADI*, v. 94 (1958-II), passim.

[4] *Conférence Internationale de la Paix, La Haye 18 Mai — 29 Juillet 1899*, Nouv. Ed., La Haye 1907, Annexes, p. 18.

[5] "Si la question de droit à resoudre est prévue par une Convention en vigueur .. la Cour se conforme aux stipulation de ladite Convention.

A défaut de telles stipulations, la Cour applique les règles du droit international. Si des règles généralement reconnues n'existent pas, la Cour statue d'après les principes généraux de la justice et de l'équité." *Deuxième conférence internationale de la Paix, Actes et documents*, La Haye 1908, v. I, p. 670.

cerning the Prize Court [6] Also considered were draft-schemes prepared by individual States and groups of States [7]

Baron Descamps, Chairman of the Committee, initiated discussion on the subject as to what rules were to be applied by the future court. He presented a proposal which read.

The following rules are to be applied by the judge in the solution of international disputes, they will be considered by him in the undermentioned order:

1 conventional international law, whether general or special, being rules expressly adopted by the States,

2 *international custom, being practice between nations accepted by them as law*,

3 the rules of international law as recognized by the legal conscience of civilized nations,

4 international jurisprudence as a means for the application and development of law [8]

A valuable comment to this draft may be found in Descamps' "Speach on the Rules of Law to be Applied" delivered at the 14th Meeting of the Committee

Both, the draft and the comment show that Descamps, though far from being a voluntarist—since he based customary law on "constant expression of the legal conviction and the needs of nations,"[9] nevertheless

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[6] *Committee*, pp 323, 324, 729

[7] *Ibid*, pp 23-27, 41, 43, 729 Among the draft-schemes submitted by States, only the German explicitly mentioned customary law Article 35 of that project reads as follows "The decision of the tribunal is based according to international agreements, international customary law, and according to general principles of law and equity" *Ibid*, p 91 In the common draft-scheme of five neutral States, and in the Swiss draft, not only treaties but also "recognized rules of international law" and "principles of law of nations" were mentioned, which evidently embraced also customary law No draft--scheme, however, defined what was to be understood by customary international law

[8] *Ibid*, p 306 Italics added

[9] "It was equally evident that, when a clearly defined custom exists or a rule established by the continual and general usage of nations, which has consequently obtained the force of law, it is also the duty of a judge to apply it Custom has always played an important part in, and been especially applicable to the law of nations It is a very natural and extremely reliable method of development since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse Not to recognize international custom as a principle which must be followed by the judge in the absence of expressed conventional law, would be misconstrue the true character and whole history of the law of nations" *Ibid*, p 322

explicitly required two other elements as conditions of existence of custom State practice and acceptance of this practice by those States—hence an element of will. That the element of will of States was meant, follows not only from paragraph 2 of the proposed article, but also from Descamps' opposing conventions and "custom" to "objective justice "[10] It is also quite clear that Descamps under "custom" understood customary law and that, although he defined it as "proof of general practice" (*attestation d'une pratique commune*), in fact thought that practice creates customary law, and, hence it is evidence of custom and not *vice versa* [11]

The comparison of the draft with Descamps' speach and the official translation of those texts in the records of the Committe constitute further evidence of, how little importance had been attributed to consistent terminology in drafting of the rubric referring to customary law While in the draft the term "pratique commune" was used, in the English translation it was simply "practice," in his speach, Descamps spoke of "règle etablie par la pratique constante, générale," which in turn was translated into "a rule established by continual and general usage "[12]

In the discussion at the meetings of the Advisory Committee of Jurists in 1920, the great Power jurists supported limitation of the rules to be applied by the future court [13] Root (U. S A) even doubted whether States would agree to accept customary law [14] Lord Phillimore (United

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[10] "The only question is whether after having recorded as law conventions and custom, objective justice should be added It would be a great mistake to imagine that nations can be bound only by engagements which they have entered into by mutual consent " *Ibid*, pp 322-323

[11] See *supra*, note 9

[12] *Committee*, pp 306, 322-323, see also, Appendix

[13] In spite of the fact that the members of the Advisory Committee were formally independent experts in international law, the supremacy of the great Powers could be distinctly felt in the preparatory work, and in the final wording of the Statute of the Court See Karol WOLFKE, "The Privileged Position of the Great Powers in the International Court of Justice," *Die Friedenswarte*, v 56, no 2(1961), pp 156-167

[14] "Mr Root [as in the proces-verbal of the Committee] The States would not accept a Court which had the right to settle disputes in accordance with rules established by the Court itself and by the interpretation of more or less vague principles Nations will submit to positive law, but will not submit to such principles as have not been developed into positive rules supported by an accord between all States " *Committee*,

Kingdom) was in favour of the first part of the scheme drafted by the five neutral States—that is, for settling disputes primarily on the basis of treaties, and, in their absence—upon "recognized rules of international law." Certainly, he was opposed to overstepping the limits of accepted law.[15] Ricci-Busatti (Italy), on the other hand, insisted upon stressing in the paragraph on customary law that practice should be that of the parties and "accepted by them as law."[16] His motivation was that "custom, like any convention applicable to a State, must be in force between the parties of the dispute."[17]

The final draft of the provision corresponding to the present Subparagraph 1(b) of Article 38 did not differ essentially from the original proposal by Descamps. Striking only is the dropping of the requirement that practice should be accepted by the nations taking part in it (*acceptée par elles comme loi*), as had been originally proposed. They removed also the existing inconsistency as between the English translation and the French original, in spite of the fact, that, as already noted, that translation was more logical.[18]

There are no details in the records from the meetings of the Committee concerning the amendments introduced into the original text of the paragraph on customary law. The comment in the final Report of the Committee

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pp. 286-287. Further the proces-verbal reads: "Mr. Root at a first reading found nothing in clauses 1 and 2 of the President's project which required amendment, but even if, personally, he would accept the clause relative to international custom, he was not certain that 50 States would agree on the subject." *Ibid.*, p. 293.

[15] "Whenever the point of law to be decided by the Court is provided for directly by any Treaty in operation between the contesting parties, such Treaty shall form the basis of the judgment. In the absence of such Treaty provisions the Court shall apply the recognized rules of international law." *Ibid.*, pp. 89 and 295. Cf. KELSEN, *The Law*, p. 532.

[16] "2. international custom as evidence of common practice among said States, accepted by them as law." *Committee*, p. 351.

[17] *Ibid.*, p. 584; see *ibid.*, pp. 351 and 597.

[18] French text: "... la coutume internationale, comme attestation d'une pratique commune des nations, acceptée par elle comme loi." The original English translation read: "international custom, being practice between nations accepted by them as law." On amendment: "international custom, as evidence of a general practice, which is accepted as law." *Ibid.*, pp. 306 and 636. See also, Appendix.

throws no light on this point On the contrary, by introducing still other terms, it raises new doubts [19]

From the wording of Paragraph 2, it is evident that by "international custom" the drafters meant only generally accepted rules It also seems justified to assume that the requirement "accepted as law" was understood by the majority of the members of the Committee literally—that is, as an expression of the consent of States, hence their will, and not of their feeling or conviction [20]

It should be borne in mind that the final wording of the draft-statute was based on schemes by Phillimore and Root—that is, members of the Committee who were most decisively in favour of limitation of the law to be applied by the Court exclusively to rules accepted by States [21]

All the foregoing are, however, only more or less justified assumptions Generally speaking, Paragraph 2 of Article 35 of the draft finally accepted by the Committee, which corresponds to the present Subparagraph 1(b) of Article 38 of the Statute of the new Court, is very confusing and even unintelligible [22] In addition to lack of detail as to how the two requirements of the practice creating the custom are to be understood, there remains the enigma as to what is meant by the clause "international custom as evidence of general practice accepted as law" Existing doubts in this respect can be removed only by investigating the interpretation given to that subparagraph by modern doctrine of international law,

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[19] " the Court is to apply in the absence of general or special conventions, international custom in so far as its continuity proves a common usage *Ibid*, p 729

[20] See *infra*, p 54—58

[21] *Ibid*, p 281 Phillimore and Root accepted the wording proposed by Descamps for the project of the article referring to rules to be applied by the future court Here the opinion by Fernandes (Brazil), a member of the Committee, merits quotation

a great Power could never agree to a system which had not been approved by it or what will be more serious, of a rule whose legality it had systematically contested at all time ' *Ibid*, p 345

[22] The League of Nations Council proposed to amend the English wording of the paragraph to read "international custom, recognition of a common practice accepted as law" Finally, however, the text accepted by the Committee was left untouched League of Nations, Permanent Court of International Justice, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court*, pp 44, 68, 145

and above all, as to how customary law has been applied by the Court itself and by such an important organ as, for instance, the United Nations International Law Commission

Criticism of Subparagraph 1(b) of Article 38 of the Statute of the Court

In general, the writers on international law have accepted the wording of Subparagraph 1(b) of Article 38 only with serious reservations. Anzilotti, for instance, wrote unequivocally:

> Curious, if nothing more, is the wording of Paragraph 2 of Article 38 of the Statute of the Permanent Court which speaks of customary law as of evidence of general practice accepted as law, whereas it is precisely the generally accepted practice which constitutes customary law! [23]

Similarly Makowski in Poland criticized the definition in the Statute In his opinion "it is wrongly drafted, because it is not custom which constitutes evidence of certain practice, but universal practice constitutes evidence of custom "[24] The same objection was raised by Hudson in 1950 in the International Law Commission [25] Lately Professor Schwarzenberger also has warned against the faulty wording of Subparagraph 1(b).[26]

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[23] "Singolare, a dir poco, e la formulazione del n 2 dell' art 38 dello Statuto della Corte permanente di giustizia internazionale , che parla della consuetudine come 'prova di una pratica generale accettata come diritto che constituisce la consuetudine'!" Dionisio Anzilotti, *Corso di diritto internazionale*, Volume primo, *Introduzione—Teorie generali*, 3rd ed , Roma 1928, p 99 In Borchard's opinion "the wording of the paragraph is most ambigous It would have been better to stop with the words 'international custom', without endeavouring to explain its nature or source " Edwin M Borchard, The Theory and Sources of International Law", *Recueil d'etudes sur les sources du droit en l'Honneur de François Geny*, v III, p 347, see also Fitzmaurice, *Some Problems*, p 173

[24] Julian Makowski, *Podręcznik prawa międzynarodowego*, Warszawa 1948, p 12, see also Sørensen, *Les sources*, p 84, Charles Rousseau, *Principes generaux du droit international public*, Paris 1944, p 825

[25] "Subheading (b) of Article 38 was not very happily worded It would be better to say 'international practice, as evidence of a general practice, etc' " *YILC* 1950, v I, p 4

[26] "It is essential not to be misled by the faulty draftsmanship which is responsible for the somewhat unhappy formulation of this clause In the first place, international

The seeming absence of criticism on the part of certain authors cannot always be taken to mean that they accept the subparagraph in its literal wording. For example, Professor TUNKIN, although he distinctly based himself upon this subparagraph, at the same time states that accepted general practice created a customary norm,[27]—hence practice is evidence of customary law. Similarily, Professor EHRLICH. Though he accepted the wording in the Statute without objections, at the same time he cited as illustration cases in which practice had clearly served as evidence of customary rule.[28]

Professor Charles de VISSCHER even tried to defend the wording of Subparagraph 1(b) so strongly criticized by others. In his opinion, it is indeed defective, because, from the sociological and historical point of view the opposite corresponds to reality. Formally, however, the customary rule once ascertained implies the existence of practice, which serves as a basis of that rule, and, consequently, confirms the practice.[29]

One might even fall in with this argument. Certainly, an already fixed customary rule not only confirms the actual practice, but also legalizes the future one. Such argumentation, however, still does not justify the

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custom, as used in this sub-paragraph, means international customary law. Secondly, the Court does not apply international custom in this sense because it is evidence of a general practice accepted as law. The position is reverse. A general practice accepted as law is the test, by which it must be ascertained whether, in any particular case, an alleged rule qualifies as an actual rule of international customary law..." SCHWARZENBERGER, *International Law*, p. 39; see also GIHL, p. 76; L. GOULD, *An Introduction to International Law*, New York 1957, p. 137; MacGIBBON, *Customary International Law*, p. 125.

[27] "In our opinion Article 38 ... defines a customary norm of international law first of all as evidence of a general practice. But this general practice is not sufficient to create a customary norm. The general practice, or rather a rule of conduct which is a product of this practice, becomes a customary norm... if it has been accepted..." TUNKIN, *Co-existence*, pp. 12-13.

[28] "Immediately after conventional rules are enumerated the rules of customary law. Their definition in item (b) is entirely apt." EHRLICH, *Prawo*, pp. 23-24; see *ICJ Reports* 1950, pp. 276-277.

[29] "... sociologiquement et historiquement, c'est l'inverse qui est vrais, car ... c'est la pratique qui apporte la démonstration de la coutume. Mais, formellement, la coutume une fois constituée, présuppose et, par conséquent, atteste la pratique qui lui sert de base." Ch. de VISSCHER, *Cours*, p. 475.

wording of Subparagraph 1(b), which is wrong because of the very fact that it raises so many doubts. Moreover, whatever we may think of the role of practice—as a cause of law, hence also evidence, or only as a consequence of an already existing law—the function of this provision is certainly not to show what constitutes evidence of practice, but what constitutes evidence of customary rule.

The rather unhappy wording of Subparagraph 1(b) does not, of course, result from negligence on the part of the drafters, but rather of rival trends in the Advisory Committee of Jurists in 1920. Some writers see in it, above all, the influence of the theory of objective law.[30]

The principal question however still remains unanswered, what is meant by: "general practice accepted as law," and whether and to what degree these requirements have found application in the decisions of the Court and in recent opinions of writers on international law? Doubts in this respect are the more justified considering that the drafters of the Statute themselves had no clear idea as to what custom was.[31] For instance, Professor SØRENSEN stated that the Permanent Court of International Justice did not attach any decisive importance to the provision of Subparagraph 1(b) of Article 38.[32]

THE ELEMENTS OF INTERNATIONAL CUSTOM IN THE DECISIONS AND OPINIONS OF THE COURT

Neither custom nor customary law have been often mentioned *expressis verbis* in the decisions of the Court.[33] In its fourty years' activity the Court has only twice explicitly quoted Subparagraph 1(b) of Article 38

[30] KELSEN, *Théorie*, pp. 259-260; GUGGENHEIM, *Traité*, v. I, p. 45; referring to Subparagraph 1(b), Lauterpacht states unequivocally: "La coutume ne crée pas le droit. La coutume est la pratique actuelle qui se conforme ou obéit à ce qui est déjà le droit." H. LAUTERPACHT, "Règles générales du droit de la paix", *RCADI*, v. 62 (1937-IV), p. 158. See also Max SØRENSEN, "Principes de droit international," *RCADI*, v. 101 (1960-III), p. 35. It seems, however, that the naturalistic influence refers rather to Subparagraph 1(c) of Art. 38.

[31] *YILC* 1950, v. I, p. 6; *cf.* Introduction.

[32] "La Cour n'a jamais dans sa pratique attaché une importance décisive aux termes de la stipulation." SØRENSEN, *Les sources*, p. 84.

[33] The Judgments and Opinions of the Permanent and the new Courts are treated here together as one entity.

of its Statute. Very often, however, it has applied various "principles," "rules," "practices," "precedents," "traditions," etc., which in the majority of cases, if not in all, precisely constituted customary rules of international law.[34]

In the practice of the Court, it is desirable to distinguish those cases in which it itself investigated whether the conditions of customary law had been fulfilled and those, much more frequent, where it applied or cited already ascertained rules of this kind. True, to draw a distinction between those two kinds of cases is sometimes difficult, because the Court applying already fixed rules always takes into consideration additional circumstances in favour of or opposed to the validity of such a rule.

(a) *The Elements of International Custom in the Process of Ascertaining Customary Rules*

Among the cases in which the Court itself ascertained the existence of an international customary rule, most authoritative for the interpretation of elements enumerated in Article 38 should be, it seems, those in which the Court expressly called upon Subparagraph 1(b) of that Article. In fact, however, precisely in those cases the Court based itself on regional and local rules, not at all forseen in Article 38,1(b).

This happened for the first time in the Columbian-Peruvian *Asylum* case. In the part of the Judgment concerning evidence of "regional custom," the Court spoke of "constant and uniform" practice and, instead of practice "accepted as law," it required that practice should be an "expression of right and corresponding duty." The Court also added that this requirement "follows from Article 38 of the Statute of the Court, which refers to international custom as evidence of general practice accepted as law."[35]

In fact, the Court applied neither the elements mentioned in this Judgment nor forseen in Subparagraph 1(b) consistently. For example, in

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[34] See Chapter Four.

[35] "The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right as partaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'." *ICJ Reports* 1950, pp. 276-277.

the same Judgment, the Court, rejecting the arguments of one of the parties as to the existence of an alleged "regional custom," returned to the wording of Subparagraph 1(b).[36] Undoubtedly, the application of particular customary rules is at variance with that subparagraph, where only "general" practice is mentioned.

The Court repeated the above mentioned interpretation with express reference to Subparagraph 1(b) in the case concerning the *Rights of Nationals of the United States in Morocco*,[37] where also the existence of a particular customary rule was at stake. This is significant, considering the outstanding importance attached by the Court to its own decisions.[38] It lends force to the conclusion that the Court aims at express recognition of particular customary law by disregarding the requirement of "general" practice in Article 38. A final confirmation of this conclusion may be found in the Portuguese-Indian *Free Passage* case of 1960, where the Court no longer considered it appropriate to take as a basis its previous precedents, nor Article 38, but simply stated the existence of a local custom.[39]

Outside those exceptional cases in which Subparagraph 1(b) of Article 38 has been expressly mentioned, it seems as if the Court avoided the term "custom" and "customary law" altogether. The reason for this, probably, lies in the controversial character of international customary law.

Cases in which the Court ascertained customary rules without referring to its Statute and even without using the term "custom" are numerous. Among such, the Franco-Turkish S.S. *Lotus* case is of special interest. In this case, the Court unequivocally declared itself in favour of the voluntarist conception of international law, giving its own famous definition of that law, hence also of customary law:

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36 "... it is not possible to discern in all this any constant and uniform usage, accepted as law." *Ibid.*, p. 277.

37 *ICJ Reports* 1952, p. 200.

38 See *infra*, Chapter Five.

39 "The Court ... concludes that ... there existed ... a constant and uniform practice allowing free passage between Daman and the enclaves ... The Court is, in view of all circumstances of the case, satisfied that that practice was accepted as law by the parties and has given rise to a right and a correlative obligation." *Ibid.*, 1960, p. 40.

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims.[40]

This time, then, instead of "general practice accepted as law" the Court spoke of "usages generally accepted as expressing principles of law." It is impossible to state whether this is a conscious departure from the wording of Subparagraph 1(b) (at that time—Paragraph 2) of Article 38. Perhaps it is just further evidence of the little importance attached by the Court to terminology in general. Numerous examples in the whole practice of the Court would indicate rather the latter explanation. Clearly, what is here of the greatest importance, is that both elements envisaged in the Statute are, though only roughly, preserved—that is, the existence of a practice and of its acceptance as an expression of law.

In another point of the same Judgment, the Court mentioned the elements of custom in still other terms. Instead of "practice accepted as law" it speaks of "being conscious of having a duty" to act in certain way. Rejecting the argument that it would be possible to infer from the rarity of judicial decisions that States considered themselves obliged to abstain from instituting criminal proceedings, the Court declared: "only if such abstention were based on ... being conscious of having a duty to abstain would it be possible to speak of an international custom."[41]

This is the only instance in which the Court stressed the requirement that States should be conscious of having a duty. That requirement was, however, only verbal. In fact, the Court based its decision simply upon the facts of tacit consent of the States.[42]

The element of the will of States (and not of any consciousness of duty). in the form of acceptance or consent to practice, has been emphasized also in dissenting and individual opinions concerning that Judgment.[43]

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[40] *PCIJ Series* A 10, p. 18.

[41] "Only if such abstention were based on... being conscious of having a duty to abstain would it be possible to speak of an international custom." *Ibid.*, p. 28.

[42] *Ibid.*, p. 29; GUGGENHEIM, *Traité*, v. I, p. 47; see also *infra*, Chapter Five.

[43] Sometimes, it seems, excessive importance is attached by writers to dissenting and individual opinions, which are quoted *al-pari* with the Judgments or in abstraction

Judge Loder stated in his dissenting opinion that the principle which maintains that the criminal law of a State is not binding outside the territory of that State can be abrogated only by convention or a "certain exception generally and even tacitly accepted by international law."[44] Judge Weiss, in a dissenting opinion, advanced as the requirement for acceptance of a customary rule *consensus omnium*.[45]

Above all, however, the opinion by Judge Nyholm on elements of custom deserves quotation. Following various definitions, "whose aim is to ascertain the indispensable elements for the arising of international custom," he argued:

> These different theories give a general idea of the necessary conditions for the existence of an international law and they show the necessity of some action (acts, will, agreement) on the part of the States, without which a rule of international law cannot be based on custom.[46]

Nyholm even required that the consent of States should be express and not merely tacit.[47]

The Advisory Opinion of 1927 concerning *Jurisdiction of the European Commission of the Danube between Galatz and Braila* constitutes a further

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from the decisions to which they refer, whereas in fact the role of such opinions is mainly secondary. In particular, when an opinion, especially of a judge of the unsuccessful party confirms a certain view of the Court, it constitutes a serious fortification to that view. On the other hand, if such opinion contains a view different from that of the majority, it proves only that the Court's conclusion has been reached in spite of the dissenting opinions of certain judges. In the latter case, then, we cannot speak of a fortification of the position taken by the Court, but rather of removal of doubts as to the arguments which have been rejected.

To attach too great importance to opinions of this kind in abstraction from the concrete case—that is, treating them as opinions of publicists, often seems unjustified also because they are given in view of a concrete circumstance, by which the Judge might be, even involuntarily, biased. This remark applies, of course, even to a much greater degree to the opinions of representatives and advisers of the parties, and therefore, having regard to the main object of this study, such opinions will be quoted only exceptionally.

[44] *PCIJ Series* A 10, p. 35.

[45] *Ibid.*, pp. 43-44.

[46] *Ibid.*, p. 60.

[47] *Ibid.*

important decision from the point of view of ascertaining customary rules In this opinion are enumerated as principal conditions of custom (without mention of the term "custom"[48]) also consistent practice and tacit consent The particular custom existing between the members of the European Commission and Rumania, was based, as the Court described it, on situation *de facto*—that is, on practice consistently applied by all States concerned This practice consisted in jurisdiction exercized by the Commission on the section of the Danube in question with the "tacit but formal acquiescence of the Rumanian Delegate "[49]

The objections raised against this opinion by the Judge *ad hoc*, Negulesco, also, though indirectly, confirm that the Court based itself on tacit acceptance of practice by Rumania Moreover, the Court did not share this Judge's opinion that essential to the existence of custom is a practice from time immemorial and mutual conviction of the legality of the practice exercized [50]

The "practice" ascertained in the Advisory Opinion on the *Free City of Danzig and the International Labour Organization* can be also reckoned among customs From the decisions of the High Commissioner of that City and understandings arrived at between Danzig and Poland, the Court stated the existence of a "well understood [hence accepted] practice" regulating relations between Poland and Danzig [51]

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[48] Only Judge Negulesco in his dissenting opinion refers to custom *Ibid*, B 14, pp 104-115

[49] " the powers of the Commission are to be exercised from Galatz to above Braila, under the same *de facto* conditions as before the war These conditions are determined by usage having juridical force simply because it has grown up and been consistently applied with the unanimous consent of all States concerned Now, in view of the Committee, the prewar usage in the Galatz-Braila sector was that jurisdictional powers were exercised there by the European Commission In this usage the Rumanian delegate tacitly but formally acquiesced, in the sense that a *modus vivendi* was observed on both sides according to which the sphere of action of the Commission in fact extended in all respects as far as above Braila " *Ibid*, p 17

[50] *Ibid*, p 114

[51] " many differences of opinion as to foreign affairs arose between Poland and the Free City, but a practice which seems now to be well understood by both Parties, has gradually emerged from the decisions of the High Commissioner and from the subsequent understandings and agreements arrived at between the Parties under the aus-

A lot more material concerning elements of custom may be found in the Judgments and Opinions of the new Court This can be already seen even in the instances referring to the definition of customary rules in the Statute and the trend towards definite recognition of particular customs [52]

As example of refusal to recognize the existence of a customary rule because of non-fulfilment of the elements, the Advisory Opinion of 1951 on the *Reservations to the Genocide convention* should be mentioned After analysis of the practice of making reservations to multilateral conventions by certain signatories and taking into account the position adopted by other States towards these reservations, in other words, as regards "practice accepted as law," the Court did not recognize the existence of what is called principle of absolute integrity of the convention [53]

In particular, the Judgment of 1951 in the British-Norwegian *Fisheries* case throws considerable light on the problem of elements of custom, though also without mentioning the term "custom" or "customary law."

In this case the Court did not, for instance, recognize the binding force of what was called the ten-mile rule for bays, because the respective State practice had been inconsistent and because the defendant party, Norway, opposed application of this rule to her coast [54] The Court thus distinctly applied the criteria envisaged in Subparagraph 1(b) of Article 38 of the Statute of the Court

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pices of the League " *Ibid*, B 18, pp 12-13 Of course, the objection might be raised here that the relations between Poland and Danzig were not of an international character, and hence no customary rule of international law *sensu stricto* could arise

[52] See *supra*, p 29—30

[53] In that Opinion, the Court declared " neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusions that consent to one or other of these practices had been given " *ICJ Reports* 1951, pp 25-26

[54] ' although the ten mile-rule has been adopted by certain 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

In any event the ten-mile rule would appear inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast *Ibid*, 1951, p 131

The main point of the dispute was, however, the existence (respectively non-existence) of a legal exception in favour of Norway from the general principles of delimitation of territorial sea.[55] On this occasion, the Court expressly set aside the requirement that practice should be consistent.[56] It mentioned instead other conditions; constancy and sufficiently long duration.[57] The fulfilment of the element "accepted as law" was recognized by virtue of the absence of protest on the part of the interested States.[58]

That the Court has attached special importance to the absence of protest by the parties may be seen also in the *Interhandel* case of 1959. The Court there described the rule that local remedies must be exhausted before international proceedings may be instituted as a "well established rule of international law." It added further that this rule "has been generally observed" and that "the Swiss government does not challange the rule."[59]

The practice of the organs of international organizations has also already given occasions for ascertaining customary rules—strictly speaking, of rules which belong to a sort of internal law of international organizations.[60]

In the Advisory Opinion of 1956, concerning *Judgments of the Administrative Tribunal of the I. L. O. upon Complaints made against the Unesco* the Court concludes from the practice of treating the members of the staff of Unesco, holders of fixed term contracts, as entitled to be considered for continued employment, that sometimes non-renewal of a fixed-term contract provides ground for complaint.[61] In other words,

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[55] See *infra*, pp. 127—128.

[56] "The Court considers that too much importance need not be attached to the uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice." *ICJ Reports* 1951, p. 138.

[57] "Constant and sufficiently long practice." *Ibid.*, p. 139.

[58] *Ibid.*, pp. 136, 138.

[59] *Ibid.*, 1959, p. 27.

[60] Concerning the relation of such customs to international customs *sensu stricto*, see Chapter Four.

[61] "The fact is that there has developed in this matter a body of practice to the effect that holders of fixed-term contracts, although not assimilated to holders of permanent ... contracts, have often been treated as entitled to be considered for continued employment, consistently with the requirements and the general good of organization, in a man-

it might be said that there is a rising custom based on practice tacitly acquiesced in as binding by a common organ of States

Similarly in the Advisory Opinion on *Certain Expenses of the United Nations (Article 17 par 2 of the Charter)* the Court stated

> It is consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security These resolutions were adopted without dissenting vote in every year from 1947 through 1959 except 1952, 1953 and 1954 [62]

This is also a sort of developing custom based upon practice and attitude to it by the member-States

Summing up, we may say that those decisions of the Court, in cases in which it has ascertained the existence of customary rules of international law, confirm the fact that little regard has been paid to the wording of the definition in the Statute of the Court Even in cases in which the Court expressly cited it, the Court has considered the conditions of custom there provided—1) general practice and 2) accepted as law—only very vaguely One thing seems certain however—that it always considered both those elements Even so, there are no grounds for stating that the Court has consistently required any sort of qualified practice On the contrary, even the sole requirement mentioned in Subparagraph 1(b) of Article 30—"general practice"—has been disregarded by express recognition of particular customary rules

The way in which the Court has applied the element of acceptance as an expression of law entirely confirms the supposition that this element has been considered as an element of the will of States, strictly speaking—of presumed acquiescence in practice, above all, on the part of those States against which the rule was to be applied

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ner transcending the strict wording of the contract The practice as here surveyed is a relevant factor in the interpretation of the contracts in question It lends force to the view that there may be circumstances in which the non renewal of a fixed-term contract provides a legitimate ground for complaint " *ICJ Reports* 1956, p 91 Cf LUKIN, pp 112, 122, R J DUPUY, "Le droit des relations entre les organisations internationales,' *RCADI*, v 100 (1960-II), p 521

[62] *ICJ Reports* 1962, pp 160, 161 This Opinion met with serious objections by some Judges precisely because there were, they maintained no grounds for presumption that the practice in question had been accepted See *infra*, pp 106

A certain explanation is still needed in connection with the sporadic facts of the Court's calling upon arguments other than practice and acquiescence, when ascertaining customary rules of international law. For example, in the Advisory Opinion of 1927 on *Jurisdiction of the European Commission of the Danube between Galatz and Braila* the Commission argued for its jurisdiction in relation to Braila on the basis of the fact that, since the Commission's task is to keep free navigation on the maritime Danube, "it would be inconceivable that the territorial jurisdiction of the European Commission should be interrupted by part sectors subject only to territorial authorities [of Rumania]."[63]

In the *Fisheries* case of 1951 the Court based the legitimacy of the Norwegian claim for a special delimitation of the territorial sea also on economic considerations and on the configuration of the Norwegian coast.[64]

Instances of this kind do not involve, however, the application of Subparagraph 1(b) of Article 38 of the Statute, nor the problem of elements of international custom in general, since those arguments played only a supplementary role, independent of the elements of practice and the acceptance of practice as a manifestation of law. Those examples prove only the, practically speaking, unlimited freedom enjoyed by the Court in considering all circumstances and arguments which might support or oppose the existence of a certain customary rule of international law.[65]

(b) *Elements of International Custom in the Practice of Applying Rules Already Ascertained*

Cases of the application of customary rules already fixed whose binding force the Court did not verify, are numerous. Among them priority of

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[63] *PCIJ Series* B 14, p. 62.

[64] *ICJ Reports* 1951, p. 133; see also MacGIBBON, *Customary International Law*, p. 136.

[65] " ... State interest may be the reason or motive for the building up by prescriptive means of a historic title or special rights not normally accorded by law. But ... it is the usage or custom, acquiesced in by other States, that constitutes the legal foundation of source of the right." Sir Gerald FITZMAURICE, "The Law and Procedures of the International Court of Justice 1951-1954: General Principles and Sources of Law," *BYIL* 1953, p. 69.

mention goes to those cases in which there are no indications at all as to on what the Court based the binding force of the rule. Such practice does not raise objections, when rules at stake are so well known and accepted as the principle of freedom of the sea.[66] In other cases, the absence of any justification of the validity of a certain rule seems less well grounded. For example in the *Lotus* case the Court declared: "It is certainly true that... vessels on the high seas are subject to no authority except of the State whose flag they fly."[67] Similarly, in the Judgment of 1933 in the Danish--Norwegian case on the *Legal status of Eastern Greenland*: "The Court considered it beyond all dispute that a reply of this nature given by the minister of Foreign Affairs on behalf of his Government ... is binding."[68]

In both cases it must be presumed that there came into play, if not directly customary rules, then at any rate certain logical consequences of such generally accepted rules: in the *Lotus* case—a rule of customary maritime law; and in the *Eastern Greenland* case—of implied competence of State organs. At the same time, no conclusions may be drawn as to the elements of custom which the Court took as a basis. What is more, it is not at all certain that those principles were so well established and obvious that it sufficed to quote them without any statement of justification. For instance, it follows from Judge Anzilotti's dissenting opinion in the *Eastern Greenland* case that "no arbitral or judicial decisions relating to international competence of a Minister for Foreing Affairs has been brought exhaustively treated by legal authorities". Only in this Judge's opinion "it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs... with authority to make statements on current affairs to foreign representatives" and that "declarations of this kind are binding upon the State."[69]

It is true that sometimes we may find expressions additional to the rules cited by the Court. These descriptions express nothing, however,

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[66] In precisely this way the Court referred to it in the *Lotus* case: "In virtue of the principle of the freedom of the seas ... " *PCIJ Series* A 10, p. 25; see also *ibid.*, A 17, p. 29.

[67] *Ibid.*

[68] *Ibid.*, A/B 53, p. 71.

[69] *Ibid.*, p. 91.

about the criteria on which the Court has based itself. In the Advisory Opinion of 1923 on *Delimitation of the Polish-Czechoslovakian Frontier (question of Jaworzina)* the Court declared that a certain interpretation "must be respected by all, in accordance with the general principle: *ejus est interpretare legem cujus condere.*"[70] In the Advisory Opinion of 1925 on the *Exchange of Greek and Turkish populations* the Court took as basis "a principle which is self evident ..."[71] The "fundamental principle of the maintenance of contracts and agreements duly entered" was cited in the Judgment of 1926 in the *Mavrommatis Jerusalem Concessions* case.[72] The principle that no one can be judge in his own suit was mentioned as a "well-known rule" in the Advisory Opinion of 1925 on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (frontier between Turkey and Iraq).*[73] A "familiar principle," that "where a contract is ambiguous, resort may be had to the manner of performance in order to ascertain the intention of the Parties" is mentioned in the Judgment of 1929 in the case concerning the *Payment in Gold of the Brazilian Federal Loans issued in France.*[74] In the Judgment of 1924 in the *Mavrommatis Palestine Concessions* case, the Court cited the "elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels."[75]

These examples seem to indicate that the Court did not consider it appropriate to add any justification in cases in which universally accepted customary rules were applied. Moreover, it also seems as if the Court preferred to avoid classification of the rules ascertained. Especially it would be difficult, in view of the very controversial character of

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[70] *Ibid.*, B 8, p. 37.

[71] "a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligation undertaken." *Ibid.*, B 10, p. 20; see also *ICJ Reports* 1951, p. 21.

[72] *PCIJ Series* A 5, p. 48.

[73] *Ibid.*, B 12, p. 32.

[74] *Ibid.*, A 20-21, p. 119.

[75] *Ibid.*, A 2, p. 12.

Subparagraph 1(c), to decide whether a given rule belongs to customary rules *sensu stricto* or to general principles mentioned in that Subparagraph.[76]

From the point of view of the problems here studied, certainly the most interesting are those cases of application of already fixed rules in which there are already some distinct hints to the elements of custom.

The element of practice, for instance, has been mentioned in the case of 1926 concerning *Certain German Interests in Polish Upper Silesia* (merits) where we read of "derogations from the rules generally applied in regard to the treatment of foreigners and the principle for vested rights."[77] Similarly, in the *Factory at Chorzów* case of 1928 (claim for indemnity—merits):

> The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunal — is that reparation must... wipe out all the consequences of the illegal act..."[78]

In the *Corfu Channel* case of 1949 the Court also applied a principle based above all on international practice. It declared:

> It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give explanation.[79]

The element of acquiescence was certainly implied where the Court used such expressions as "generally accepted in international law," "accepted principle of law" or "generally accepted principle."[80] For example in the *Corfu Channel* case just cited, the Court described as "generally recognized" the following "general and well recognized principles: elementary considerations of humanity ... the principle of freedom of maritime communication, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[81]

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[76] See *infra*, Chapter Four.

[77] *PCIJ Series* A 7, p. 22.

[78] *Ibid.*, A 17, p. 47.

[79] *ICJ Reports* 1949, p. 18.

[80] *PCIJ Series* A 7, p. 22; *ibid.*, B 16, p. 25; *ibid.*, A/B 44, p. 24.

[81] *ICJ Reports* 1949, p. 22.

In a few instances, the Court hinted also at both elements of custom. using only different expressions. In the *S.S. Wimbledon* case of 1923, constituting an intermediate instance of application of a fixed rule and of its ascertainment, the Court quoted precedents and, as an element of recognition—general opinion. The Court stated:

> The precedents... afforded by the Suez and Panama Canals... 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.[82]

Similarly, in the Advisory Opinion of 1956 on *Judgments of the Administrative Tribunal of the I. L. O. upon Complaints made against Unesco* the Court described directly as "generally accepted practice" the principle that "legal remedies against a judgment are equally open to either party."[83]

Another example may be found in the *Nottebohm* case (preliminary objection) where the Court declared:

> Paragraph 6 of Article 36 [of the Statute of the Court] merely adopted... a rule consistently accepted by general international law in the matter of arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents...[84]

Both elements of custom were also distinctly mentioned in the Advisory Opinion of 1954 on the *Effect of Award of Compensation made by the United Nations Administrative Tribunal*:

> According to a well-established and generally recognized principle of law, a judgement rendered by such a judicial body is *res judicata*, and has binding force between the parties of the dispute.[85]

The instances quoted above of application of already established rules, except those where there is absolutely no information as to what

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[82] *PCIJ Series* A 1, p. 28.

[83] *ICJ Reports* 1956, p. 85.

[84] *Ibid.*, 1953, pp. 119-120.

[85] *Ibid.*, 1954, p. 53. See also *PCIJ Series* B 6, p. 36; *ibid.*, B 12, p. 30; *ICJ Reports* 1950, p. 281; *ibid.*, 1951, p. 21.

kind of rule the Court took as a basis, confirm what has been said so far concerning elements of international custom In all those cases, in a very general way and using different terms, the two elements (practice and its acceptance) have been considered Those examples are at the same time evidence of the wide range of discretion claimed by the Court in applying law in general

There is yet another category of instances, a numerous one, as regards which the Court has applied rules ascertained by it or other tribunals in own previous decisions and opinions Such cases will be discussed in Chapter Five devoted to the ascertainment of customary rules

The Elements of International Custom in the Discussions of the United Nations International Law Commission

The Reports of the International Law Commission are of primary importance for the discussions on customary law, in view of the function and structure of that organ of the United Nations General Assembly [86] In particular, the debates at the 1949 and 1950 sessions, devoted to, among other problems, that of "ways and means of making the evidence of customary international law more readily available" contribute enormously to elucidation and better comprehension of the existing divergences as regards international custom and its elements [87]

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[86] In Polish literature the outstanding importance of the work of the United Nations International Law Commission has been emphasized by Professor Klafkowski (*The Potsdam Agreement*, Warszawa 1963, pp 2-4, 38-50)

[87] This problem was dealt by the Commission primarily according to the provisions of Article 24 of its Statute which reads as follows "The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter " *Ways and Means of Making the Evidence of Customary International Law More Readily Available, Preparatory work within the purview of article 24 of the Statute of the International Law Commission* (*Memorandum submitted by the Secretary-General*) (A/CN 4/6), New York 1949, pp 4-5 The members of the Commission who were nationals of the Soviet Union and Czechoslovakia temporarily withdrew from the discussions Later on, however, from their resumed participation it follows that they accepted the results of the Commis-

A working paper on this subject was prepared for this Commission by Manley HUDSON. In the part of it dealing with requirements which must be fulfilled for a customary rule of international law to exist, Hudson wrote:

> Seeking with Brierly (p. 62) "a general recognition among States of a certain practice as obligatory", the emergence of a principle or rule of customary international law would seem to require presence of the following elements:
>
> a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
>
> b) continuation or repetition of the practice over a considerable period of time;
>
> c) conception that the practice is required by, or consistent with, prevailing international law; and
>
> d) general acquiescence in the practice by other States.
>
> Of course the presence of each of these elements is to be established as a fact by a competent international authority.[88]

Hudson further added:

> If this outline of the necessary elements is somewhat lacking in precision, it may serve nevertheless as a guide for determining the character of the evidence of customary international law which should be made more readily available.[89]

A single glance will show that the requirements enumerated are very rigorous, exceeding those envisaged in Subparagraph 1(b) of Article 38 of the Statute of the Court. Hudson also certainly asserted too readily that "nearly all treaties on the subject were in agreement to accept the four elements enunciated in Subheads (a), (b), (c), and (d)."[90]

The debate on elements of custom started from the last Subheading (d), which, roughly speaking, corresponded with the requirement of acceptance as law in the Statute of the Court.[91]

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sion's deliberations in their entirety. See, for instance, Krilov's proposal referring to publication of the documents of the Commission, *YILC* 1955, v. I, p. 238. See also *ibid.*, 1956, v. I, p. 1; *ibid.*, 1958, v. I, p. 184.

[88] *YILC* 1950, v. II, p. 26.

[89] *Ibid.*

[90] *Ibid.*, v. I, p. 4.

[91] For the sake of clarity, the opinions on each sub-heading of Hudson's draft, which were scattered, have been collected.

Scelle, Chairman of the session, speaking first said that practice was not enough. By contrast with the opinions of certain authors, he believed that the idea of international custom implied general acquiescence, and that *opinio juris sive necessitatis* was essential.[92]

In reply to Scelles's question as to whether the two "sources" mentioned in Subheads (c) and (d) in Hudson's enumeration corresponded to *opinio juris sive necessitatis*, Hudson replied in the affirmative, and explained that this *opinio* "must be shared by the States establishing the practice." He pointed out that sub-heading (d) was not well translated into French. It should be "*d'être généralement admis sans protestation de la part d'autres Etats.*"[93]

Next, Scelle pointed out "the great danger involved in confusing practice and custom." He mentioned as example the opinion expressed by Professor Guggenheim.[94] In Scelle's opinion "a practice must have received general acquiescence, as was stated in the English text." In reply to one of the members of the Commission he added, however, that "regional custom was not excluded," and in this case, too, "acquiescence was necessary ... by the regional community."[95]

When Professor François (Holland) called the attention of the Commission to a certain difference of opinion, "since the Chairman [Scelle] had spoken of acquiescence, whereas Mr. Hudson had merely mentioned absence of protest," Scelle explained that "as acquiescence could be tacit. absence of protest was sufficient for acquiescence."[96]

Cordova (Mexico) was of the opinion that "acquiescence by all States was necessary, not merely tacit assent." Scelle, however, thought that "implicit general acceptance was sufficient," that is, not universal.[97]

El-Khoury (Syria) agreed that "absence of objection might amount to acquiescence." He asked however, whether "if the new practice had

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[92] *YILC* 1950, v. I, p. 4.

[93] *Ibid.*, p. 5.

[94] *Ibid.* See Paul GUGGENHEIM, "Les deux éléments de la coutume en droit international," *La technique et les principes du droit public, Etudes en l'Honneur de Georges Scelle*, Paris 1950, p. 166; cf. Karol WOLFKE, "L'élément subjectif dans la coutume internationale," *Zeszyty Naukowe Uniwersytetu Wroclawskiego, Seria* A Nr 27, *Prawo* VII, 1960, p. 166.

[95] *YILC* 1950, v. I, p. 5. [96] *Ibid.* [97] *Ibid.*

not been applied to particular States, could the absence of protest on their part be considered as implying acquiescence" In reply, Hudson stressed that he "preferred the wording in English acquiescence generally by other States in the practice," to the French text "dans la pratique d'autres Etats," which was incorrect In Hudson's opinion "what was involved was consensus of opinion proved by acquiescence"[98]

In answer to a request of Mr El-Khoury, Hudson gave as example of concordant practice which had received the acquiescence of a number of countries the continental shelf In reply to Mr El-Khoury's question as to, "when a principle could be regarded as receiving general acquiescence," Hudson repeated once more, what is very essential here, that "absence of protest was the criterion" Mr El-Khoury could not agree with this opinion He could not see "why any particular State should protest against agreements, which did not concern it," and he thought "Subheading (d) of Hudson's enumeration was unnecessary"[99]

Thus ended the exchange of opinions on Subheading (d) Clearly, the divergences and doubts, especially at the beginning of the discussion were numerous Finally, however, the majority, it seems, fell into agreement with Hudson For the existence of a customary rule of international law it suffices, then, that practice should be tacitly recognized, absence of protest being sufficient evidence of such recognition It was agreed, also, that acquiescence, to be sure, must be general, but there may exist also customary regional rules

Note the use alternatively of such terms as "acquiescence," "assent,' '*opinio juris sive necessitatis*," and "absence of protest" From the discussion in the Commission, it follows that those expressions have been ultimately recognized as equivalent They correspond, in general, with the requirement of "accepted as law' in Subparagraph 1(b) of Article 38

The other elements of custom enumerated by Hudson in his paper encountered even more definite objections

Subheading (a)—that is, "concordant practice by a number of States with reference to a type of situation within the domain of international relations," provoked Cordova's question as to whether the expression "a number of States" meant the most powerful States or those faced with

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[98] *Ibid* [99] *Ibid*

particular situation." He himself was of the opinion that "international law was established by States with more frequent international relations, and hence primarily by the great Powers." Hudson answered in an evasive way that "he tried to avoid introducing the idea of power, but that he did not think that practice by a single State was sufficient to establish custom."[100] From this explanation of the special rapporteur himself, it would follow that the requirement "a number of States" means only: more than one. In other words, referring to the Subheading (d) already discussed, practice of a few States suffices, provided that such practice is recognized by other States.

Referring to the element described in Subheading (b) (continuation or repetition of the practice over a considerable period of time), Mr. Amado (Brazil) mentioned the novel opinion of "a contemporary French author" to the effect that "*diuturnitas* was not as important as has been thought hitherto, and that a single precedent could be sufficient to create a custom."[101] Hudson agreed that "it was difficult to define what was meant by 'over a considerable period of time'." He was, however, against deletion of that provision, since he felt that "the repetition was necessary." Speaking on continental shelf, Hudson stressed that there had been a concordant practice by a number of States since 1942 and that one must wait another 25 years since "a nascent rule of international law was in the making."[102] Such a determination of the period required for the ripening of a custom has, however, no foundation either in international practice or in doctrine.

Brierly (Great Britain) was not altogether convinced that Subheading (b) was necessary. According to him, essential was *opinio juris sive necessitatis*—that is, the element corresponding to the requirement "accepted as law," which sometimes, in Brierly's opinion, can rise "at a moment's notice." For example, the principle of sovereignty in the air, which had been a matter of opinion up to the 1914 war, was then settled at once. Generally speaking, *opinio juris sive necessitatis* did not, Brierly thought. arise for a considerable time, but there were exceptions to the rule. This view was also shared by Mr. El-Khoury who, in turn, cited the example of the Nürnberg principles.[103]

100 *Ibid.* 101 *Ibid.* See also *infra*, Chapter Two. 102 *YILC* 1950, v. I. p. 5.
103 *Ibid.*

Mr. Sanström (Sweden) argued that *opinio juris sive necessitatis* was relative, and that particular circumstance—for example, positive recognition by States—could shorten the period required for the establishment of a customary rule.[104] In the second part of the discussion on the draft report of the International Law Commission, Mr. Alfaro added that "customary law was constantly developing, at a rate which today seemed to be getting faster and faster." As example he quoted the law in relation to air navigation.[105]

In the end, requirement of long duration of the practice did not hold good either. On the contrary, the majority of members of the Commission agreed that international custom may nowadays arise very quickly.

Subheading (c) of Hudson's draft, demanding that "practice should be required by, or consistent with, prevailing international law," met with strong criticism by the members of the Commission. For example, Amado doubted whether this subheading was in keeping with *opinio juris sive necessitatis*. Hudson explained that this stipulation "was given by practically all authorities he had consulted."[106] Yepes (Columbia), on the other hand, "felt that the word "required" in Subheading (c) could not stand." If custom must be consistent with international law, "it ceased to be a source of that law." He pointed out that, for instance, "with regard to continental shelf, the custom was contrary to the prevailing international law."[107] A similar objection was raised by Amado. If "required" meant, that there had to be a law prior to the custom, it "ceased to be primordial source of law." Scelle was also of the opinion that "it was somewhat contradictory to state on the one hand that custom is the basis of law, and on the other, that it must be consistent with law." Yepes added that "custom could depart from prevailing international law, otherwise it had no raison d'être."[108]

In reply to this criticism, Hudson suggested another wording of Subheading (c): "conception that the practice is not inconsistent with pre-

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[104] *Ibid.*, p. 6. [105] *Ibid.*, p. 275. [106] *Ibid.*, p. 5.

[107] *Ibid.*, p. 6. While in Subheading (c) practice is referred to, Yepes spoke throughout of "custom". The interchangeable use of that term, once in the meaning of practice, in other cases of customary rule is characteristic of entire discussion on elements of custom in the Commission.

[108] *Ibid.*

vailing international law" As if apologizing for his draft, he added, that "the authors of Article 38 of the Statute of the International Court, and of Article 24 of the Statute of the Commission had no very clear idea as to what constituted international custom Hence it would be useful to lay down general principles so as to be able to comply with the provisions of Article 24 of the Statute of the Statute of the Commission"[109]

The last requirement by Hudson that "every element enumerated in Subheadings (a) to (d) should be established as a fact by a competent authority" was also rejected by the members of the Commission Yepes wondered "how a custom could be invoked before the International Court of Justice at the Hague if it must first 'be established as a fact by a competent international authority" "Did a rule of customary law not exist until it was so established?"—he asked Hudson replied to this that "a single State could not decide of its own accord that the constituents of custom were present" What he had in mind was the International Court of Justice Scelle, on the other hand, thought "that public opinion in the various States should be regarded as an international authority What was required, he continued, was a consensus of opinion expressed by the authorities which in any given State had the power to establish custom" Moreover, he argued that "national courts of justice were equally competent, since any court could establish the existence of a custom"[110]

The Chairman's opinion that the members of the Commission as a whole "shared Hudson's views" and that "it would be sufficient to make some slight alterations to Hudson's text to satisfy the Commission" proved too optimistic In the course of the discussion, in face of accumulating objections and differences, it was repeatedly indicated, that what the Commission had to do, was to establish a general conception of what constituted a rule of customary law The representative of the Secretary General, Kerno, took his stand in opposition to defining custom at all In his opinion, "all that was required at present was agreement in general terms, and if this could be reached, it would be a constructive achievement" Amado even wondered "whether it would not be preferable to cut out the part of the document giving Hudson's personal opinions," because

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109 *Ibid* 110 *Ibid*

he thought that "changes would have to be made in it on which it would be difficult to reach agreement "[111]

Under the pressure of criticism, Hudson introduced certain rather unimportant alterations to the elements of custom proposed by him In particular, in Subheading (b) he abandoned the requirement that practice establishing custom should continue over "a considerable period of time" and contented himself with "some period of time " As to Subheading (c), Hudson required only that practice should "not be forbidden by prevailing international law,"[112] and not, as before "conception that the practice is required, or consistent with, prevailing law "

These amendments did not satisfy the Commission Brierly wondered whether it was at all desirable for the Commission, as he put it "to embark on a question of doctrine, as it would be difficult to find a formula on which all members of the Commisision could agree " Cordova on the other hand thought that "a definition of the term 'customary law' would be useful, but too difficult to construe " Hudson still endeavoured to defend the part of his draft report concerning elements of international custom by advancing among other arguments that of "interest in the scientific world " He did not succeed, however, The Commission, by seven votes to three, decided to delete this part of the draft report [113]

The discussion here presented on elements of international custom is certainly very instructive It shows how divergent in fact opinions on

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[111] *Ibid*

[112] The subheadings rejected by the Commission read in their final wording as follows Before listing the various types of materials which serve as evidence of customary international law, the Commission deemed it appropriate to consider the elements which should be present before a principle or rule of customary international law can be said to have become established A good measure of agreement seems to exist among authors of treaties as to what these elements are As a guide for determining the character of the evidence of customary international law which should be made more readily available, the Commission concluded that the emergence of a principle or rule of customary international law is generally thought to require the presence of the following elements concordant practice by a number of States with reference to a situation falling within the domain of international relations, continuation or repetition of the practice over some period of time, conception by the States engaged that the practice is not forbidden by prevailing international law, and general acquiescence in the practice by States other than those engaged " *Ibid*, p 275

[113] *Ibid*, pp 275-276

that subject still are, although, as the rapporteur declared, he had based the elements proposed by him on an alleged unanimity in the doctrine of international law

The debates in the International Law Commission lead, however, also to certain positive conclusions, which to large extent agree with those arrived at upon analysis of the jurisprudence of the Permanent and the new Court The majority of the Commission was then of the opinion that there is no ground for precise determination of the element of practice In particular, there is no need for practice being general or long In general, the members of the Commission agreed that custom might arise very quickly nowadays by virtue only of a few precedents Also customary regional—that is, particular—rules are not excluded The element of acceptance was recognized as decisive Although variously defined, for the majority it amounted to tacit or presumed acquiescence manifested mainly by absence of protest against the practice Precisely in this sense, some of the members of the Commission used the term "*opinio juris sive necessitatis*"

An Attempt at Interpretation of the Elements of International Custom

The views of the drafters of the Statute of the Court, those expressed by the Court itself, and by the members of United Nations International Law Commission indicate that the present international law requires two elements for the existence of an international custom the element of practice (called the material element) and the differently named subjective element, corresponding to the requirement of "accepted as law" in Subparagraph 1(b) of Article 38 of the Statute of the Court [114] Here, however

[114] The opinions of writers on international custom have been many times discussed, especially in the works by Gianni, Basdevant, Kelsen and Mateesco See Bibliography Professor Sørensen writes 'Malgre les differences apparentes on voit s'en degager nettement les deux elements dont se compose la coutume d'apres la doctrine traditionnelle d'une part, un element materiel, la repetition generale de faits ou d'actions analogues, et, de l'autre, un element psychologique, *l'opinio juris sive necessitatis*, une certaine conviction de la necessite juridique des actes en question' Sørensen, *Les sources*, p 85 In a somewhat different way, this concordant doctrine has been described by Professor Guggenheim Bien que differant sur des points parfois importants, les

the agreement of opinions ends. As to details—that is, what must be the nature of practice and what is the essence of the subjective element—the divergence of views has, so far, been large. Only recently, most probably under the influence of the Court, an increasing tendency to converging of opinions on this subject can be observed.

Hence there seems to be a growing understanding that it is impossible to determine exactly and *a priori* what sort of practice may lead to the formation of international custom. This trend may be seen, for instance, in the express disregard by the Court of the sole requirement in Subparagraph 1(b) that practice should be "general." It is also striking that in the discussions in the International Law Commission, in fact, no one of the elements enumerated by Hudson withstood objections. In particular, it turned out that such conditions as longevity of the practice, the participation in it of a large number of States, and its agreement with the existing law are either relative or quite unnecessary.[115] One may risk saying, that in present international law there are no precise pre-established conditions for custom-creating practice, except the one general condition that it must give sufficient foundation for presumption that the States concerned accepted it as binding. The decision as to whether this condition has been fulfilled in a particular case must be left to the organ ascertaining the existence of custom.

The problem of the subjective element in international custom is much more complex.[116] Whereas practice constitutes what might be described

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auteurs qui adhèrent à la doctrine dominante affirment que la coutume implique la coexistence de deux éléments: un élément matériel (*consuetudo*), consistant en la répétition prolongée et constante des même actes extérieurs, et un élément psychologique (*opinio juris sive necessitatis*) consistant en la croyance au caractère obligatoire de l'usage ainsi créé." GUGGENHEIM, *Traité*, v. I, p. 46.

[115] See above for the pronouncements in the discussion in the International Law Commission and also SØRENSEN, *Les sources*, pp. 98, 102; MACGIBBON, *Customary International Law*, pp. 120-121.

[116] Professor MACGIBBON, in a chapter devoted to this element, wrote: "Article 38 (1) (b) of the Statute ... provides little warrant for the meaning which is most often attributed to this troublesome element in international custom." Quoting the opinion by Professor Briggs that the psychological element "has created more difficulties in theory than in practice", MACGIBBON added: "... the difficulties created in theory have been formidable." MACGIBBON, *Customary International Law*, p. 125.

as the raw material of custom, only the element of acceptance gives it the mark of law. That is why the differences of opinion on this subjective element of custom are closely combined with endless disputes on what is called the basis of the binding force of international law in general.[117] Another obstacle in reaching agreement on this element is the common use of different terms.

Special attention should be paid to the still widely applied latin term "*opinio juris sive necessitatis.*" Misunderstandings arise as regards the fact that this term, having a definite meaning in the history of legal theory, is being applied by certain contemporary authors in different connotations or shades of meaning.[118]

The requirement *opinio juris sive necessitatis* was introduced into the modern theory of customary law by the historical school, principally by PUCHTA, as a reaction against the voluntarist conception of custom (against the Roman *tacitus consensus populi* and Groatian *tacita conventio*). The historical school, which based law on "the spirit of nation" (*Volksgeist*), considered *opinio juris sive necessitatis* as requiring that practice should be an expression of "the legal conscience of the nation" (*Volksüberzeugung*). While the doctrine of international law has taken this conception over in the meaning that practice must be followed by a feeling of doing one's duty or doing what is right,[119] some authors use the term *opinio juris sive necessitatis* also in a more general meaning—namely, that practice should be accompanied by a conviction of acting according to a general sense of law, social needs, morality, etc.[120] Undoubtedly, the interpretation of international custom in the spirit of the historical school (with *opinio juris sive necessitatis*) is an interpretation with naturalistic tinge, since it implies that practice is only a manifestation of a certain already existing duty or right.

After the First World War this requirement was severly criticized by Professors KOPELMANAS and KELSEN, and after the last war, by Professor

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117 See Chapter Six.

118 See SØRENSEN, *Les sources*, pp. 105-111; KELSEN, *Théorie*, p. 262.

119 G. PUCHTA, *Das Gewohnheitsrecht*, Erlangen 1828, b. III, pp. 24-119, especially pp. 33-39; see also GUGGENHEIM, *Contribution*, p. 53 and SØRENSEN, *Les sources*, pp. 105-111.

120 GIANNI, p. 133; SØRENSEN, *Les sources*, p. 106.

GUGGENHEIM [121] Among the various objections raised against the subjective element conceived as a feeling of duty or right, the most convincing seems to be that practice is not by any means necessarily an expression of an already existing rule or sense of duty On the contrary, practice is a law-making factor, which leads to a change in the existing law Besides, practice is very often exercised not only without any feeling of acting according to already existing law, but even with full consciousness of acting contrary to it The toleration of practice justifies the presumption of its acceptance, which, in turn, leads to the establishment of a new customary rule [122] One might at most speak of fulfilment of *opinio juris sive necessitatis* when custom already exists, but not in the process of its formation

One may, of course, hold that, in fact, there is no essential difference between the condition that practice should be "accepted as law" and that it should be exercized according to an already existing duty, the former condition amounts to the latter and both are subjective and difficult to prove Such a conclusion would be, however, a too far reaching simplification, leading to misconceptions

Opinio juris sive necessitatis is a conception clearly combined with recognition of a sort of objective law, where practice is not a creative factor but only evidence of an already existing right or duty Even so, the Court in applying Subparagraph 1(b) of Article 38 of its Statute decisively based the existence of international custom on the element of the

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[121] Lazare KOPELMANAS, Custom as a Means of the Creation of International Law," *BYIL* 1937, pp 127-151, KELSEN, *Theorie*, p 262-266, GUGGENHEIM, *Les deux elements*, pp 275-284 Cf Roberto AGO, Science juridique et droit international, *RCADI*, v 90 (1956-II), p 938 The opinion denying any necessity for a subjective element was isolated and met with strong criticism For example Sir Gerald FITZMAURICE, who is far from adopting a position of consistent positivism, has written " the theory which denies the existence of any factor of consent, assent, acquiescence or recognition, and attributes the emergence of the rule simply to the usage itself and the settled practice irrespective of any subjective element (i e which rejects the necessity of the *opinio juris*) does not really bear examination ' FITZMAURICE, *Some Problems*, p 162, see also WOLFKE, *L'element, passim* After the last war, Professor KELSEN, and lately Professor GUGGENHEIM, recognized the necessity of a sort of subjective element See *infra*, p 56

[122] This argument was cited also in the discussions of the United Nations International Law Commission See *supra*, pp 44–45

will of States—strictly speaking, on practice presumptively accepted by the parties in the dispute. Acquiescence in a practice creates, then, new rules binding, at least, those States whose presumed acceptance of the practice can be ascertained. It was to that conclusion, it seems, that the majority of the members of the International Law Commission arrived when they agreed, together with Hudson, to recognize tacit acquiescence in practice as a sufficient condition of existence of a customary rule of international law.

We should add here that legal conviction—that is, a criterion suggesting psychic experience of the acting parties—being subjective and practically non-verifiable, is inconsistent with the required legal certainty. Even in municipal law, there is a tendency to avoid such criteria. Legal conviction of a State amounts to an anthropomorphism which is unacceptable in international relations, especially in a society consisting of members whose cultural heritages and social systems differ so widely.

In international relations, above all, objectively verifiable behaviour and attitude to such behaviour is decisive. If a State does not react openly against a certain practice, the presumption arises that it acquiesces in that practice and even that it is not opposed to the practice giving rise to a new rule of international law.[123]

True, a clear distinction between the requirement of acceptance based on presumed will of States, and that of legal conviction of States, does not remove the difficulties involved in the subjective element of international custom. Both "will of a State" and "legal conviction" are metaphors. There is, however, an important difference between them. While legal conviction of a State constitutes a vague, and hence unnecessary, element, one might say metaphysical, the will of State is something very real in international relations. This notion has a settled, agelong meaning and its application does not present particular difficulties.

The tendency to replace *opinio juris sive necessitatis* by the requirement of presumed acceptance can be seen also in the latest publications on international custom. For example, Sir Gerald FITZMAURICE in one of his articles on jurisprudence of the Court even divided customary rules of international law according to the role played in such law by the element

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[123] See *infra* Chapter Five.

of consent.[124] This view was referred to by Professor MacGIBBON in his article published in 1957 on "Customary International Law and Acquiescence." True, this author endeavours to justify the necessity of both requirements—*opinio juris sive necessitatis* and acquiescence; ultimately, however, he arrives at the conclusion that both these elements reduce to one—to consent.[125]

Professor TUNKIN in his 1958 lectures devoted at the Hague Academy to co-existence in international law, also based customary international law on the will of States:

> Recognition or acceptance by a State of a certain international practice as a rule of law means an expression of a will of a State, it is a consent to consider this customary rule as a rule of international law therefore as a juridically obligatory rule.[126]

This lecturer also noted that many writers who reject the concept of *pactum tacitum* are of the opinion that "recognition" or "acceptance" of, or "consent" to consider a rule as legally binding "constitute a decisive element in the process of the creation of a customary norm of international law." Professor TUNKIN also draws attention to the ambiguous use made of the term "*opinio juris sive necessitatis.*"[127]

Professor EHRLICH in the latest edition of his manual takes a pronounced stand in favour of presumed acceptance. Customary rule, according to him, binds because "it has been accepted presumptively by States as law. Hence it binds because one may presume that the State has given its consent in that rule."[128]

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[124] FITZMAURICE, *The Law and Procedure (1951-54)*, pp. 68-69; see *infra* Chapter Two.

[125] "The *opinio juris* is properly applicable to a practice only when a practice consists of submission to the exercise of a right, that is, when the practice is expressive of an obligation; and even then it is little more than the consequence of previous consent or acquiescence. It is this previous consent or acquiescence which is creative of the obligation: the consequent *opinio juris* may then accurately be said to be expressive of the rule in question, or evidence of it." MacGIBBON, *Customary International Law*, p. 144; see also *ibid.*, pp. 131, 132.

[126] TUNKIN, *Co-existence*, p. 13; see *ibid.*, pp. 9-18. Cf. BASDEVANT, *Règles*, p. 516; VISSCHER, *Coutume*, p. 356.

[127] TUNKIN, *Co-existence*, pp. 10, 15-16; see also *ibid.*, *Voprosy*, pp. 94-95.

[128] EHRLICH, *Prawo*, p. 23.

Further, Professor BIERZANEK when he writes on limitations on the freedom of the high sea stresses that such limitations "may be based only on the will of States expressed in a treaty, another legal act, or by tacit acquiescence "[129]

Even Professor GUGGENHEIM, who until recently rejected the necessity of any subjective element for the establishment of an international custom, in an article on local custom published in 1962 recognizes the condition of acceptance, at least on the part of the leading Powers [130]

Recently, in the practice of the Court, in the International Law Commission and in present-day doctrine an important role in the formation of international customs has been attributed to protest This concerns

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[129] Remigiusz BIERZANEK, *Morze otwarte w swietle prawa międzynarodowego*, Warszawa 1960, p 114, see also Bolesław WIEWIORA, *Uznanie nabytkow terytorialnych w prawie międzynarodowym*, Poznan 1961, p 79 Cf Cezary BEREZOWSKI, Kazimierz LIBERA, Wojciech GORALCZYK, *Prawo Międzynarodowe Publiczne*, Warszawa 1962, p 112

[130] After the last war Professor KELSEN admitted the necessity of a subjective element in the form of a sort of legal conviction, hence *opinio juris* He wrote "The second element is the fact that the individuals whose conduct constitutes the custom must be convinced that they fulfil a duty, or that they exercise a right They must believe that it is a legal norm " Hans KELSEN, *Principles of International Law*, New York 1952, p 307 Professor GUGGENHEIM refers to the conditions of formation of a customary rule called upon in the new edition of Kelsen's "Reine Rechtslehre" writing "Wie Kelsen mit Recht ausfuhrt 'ist dieser Tatbestand dadurch gekennzeichnet, dass sich zur Rechtsgemeinschaft gehorige Menschen in gleicher Weise verhalten, dass dadurch in die Gewohnheit durch ihre Akte konstituierenden Individuen der kollektive Wille ensteht, dass man sich so verhalten soll' " Professor Guggenheim adds "Was somit notwendig erscheint, ist ein doppeltes zunachst das Bestehen einer Praxis Sodann mussen die die Gewohnheit konstituierenden Akte in der Weise erfolgen, dass diese Praxis objectiv gultige Normen erzeugt, die als Gewohnheitsrecht von der jeweiligen Rechtsverfassung *anerkannt werden* " GUGGENHEIM, "Lokales Gewohnheitsrecht, *Osterreichische Zeitschrift fur offentliches Recht*, 1961, no 3-4, p 328 In particular the following sentence clearly indicates the requirement of acceptance on the part "of most important legal subjects ' "Nur bei nicht bilateraler Praxis erscheint daher das Entstehen eines Gewohnheitsrechtssatzes moglich, d h eine in einem nicht rationalen Verfahren erzeugte Norm, die einmal *von den wichtigsten Rechtssubjekten als rechtsverbindlich anerkannt ist*, und die daher auch fur die anderen Normadressaten ohne Zustimmung obligatorisch erscheint " *Ibid*, p 334 Italics added

also authors who object to the conception of international custom based on consent.[131]

What, however, is protest, if not the most evident expression of the will of a State to the effect that it does not acquiesce in a given practice and hence that it does not consent to the formation of a new customary rule? To maintain that objection against a practice is merely evidence of absence of a "conviction" or "feeling" that the practice is in accordance with a duty or right, is at least artificial The protesting State simply does not want to tolerate this practice and its eventual legal consequences [132] On the other hand, absence of protest against a practice does not necessarily mean that a given State considers it as consistent with existing law It means only that the State acquiesces in the practice and in its legal consequence And this is just what is decisive for the formation of international custom, and hence, for the establishment of a customary rule

From the facts and arguments here discussed the following general conclusions may be drawn

(1) In the present international law, the existence of an international custom, and hence the validity of a customary rule, requires a certain qualified practice, which cannot however be determined in detail in ad-

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[131] For example, Professor VERDROSS, who firmly insists on the criterion of legal feeling (*Rechtsbewusstsein*) holds at the same time so kann doch allgemeines Gewohnheitsrecht nicht gegen die Rechtsuberzeugung eines Kulturvolkes entstehen And as confirmation of his opinion he cites, *inter alia*, the objections—and consequently protests—of Norway in the *Fisheries* case against the application of the ten-mile rule to her coast Alfred VERDROSS, *Volkerrecht*, 3rd ed , Wien 1955, p 119, see also VISSCHER, *Coutume*, pp 358-359, J L BRIERLY, *The Law of Nations*, 5th ed , London 1955 p 60, H LAUTERPACHT, Sovereignty over Submarine Areas,' *BYIL* 1950, pp 393-398 Sir Hersh LAUTERPACHT, *The Development of International Law by the International Court*, London 1958, pp 379-381, Georg DAHM, Volkerrecht, v I, p 32 For more detailed discussion of the role of protest in modern theory of international custom, see MacGIBBON, *Customary International Law*, pp 125-131 See also WIEWIORA, pp 69-76

[132] Professor MacGIBBON defines protest in international law as follows A protest constitutes a formal objection by which the protesting State makes it known that it does not recognize the legality of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts created and that it has no intention of abandoning its own rights in the premisses " I C MacGIBBON, "Some Observations on the Part of Protest in International Law, ' *BYIL* 1953, p 298

vance. It must certainly be such as to give sufficient grounds for presumption that it has been recognized as expression of law by the States concerned.

(2) The latter subjective element does not consist in any feeling, any conviction of States, but precisely in presumed acceptance of the practice as expression of law.

CHAPTER TWO

FORMATION OF INTERNATIONAL CUSTOM

INTRODUCTORY NOTE

Knowledge of the process of formation of international custom is very important for the organ which ascertains customary rules in order to apply them in a concrete case The process itself is not, however, regulated by law, since custom is not consciously created by anybody. It arises in the course of a more or less complex process in the sphere of international social phenomena [1] Positive international law (in Article 38 of the Statute of the Court) defines only the conditions which must be fulfilled in order to give validity of a customary rule Nothing is said, however, as to how and when those conditions are to be fulfilled [2]

Writers on international law pay comparatively a lot of attention to the formation of international custom Such considerations, however, are rarely based on detailed analysis of the actual course of that process, since only recently, and still on an insufficient scale, have documents concerning State practice been available. Moreover, only recently has the inductive method acquired broader acceptance in the doctrine of international law [3]

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[1] The source of the customary law is the community, or, more accurately the way of life of the community " GOULD, p 139 Certainly, there also exist rules consciously created by the parties, not by means of express declarations of will but by means of conclusive facts or artificially provoked precedents Such rules are not customary rules, but true tacit conventions

[2] *Ibid* See also GIHL, p 82, HUBERT, *Prawo*, v II, pp 4-5

[3] " the immense material from which 'international custom ' may be gathered has hardly yet been touched by international lawyers Nothing could be worse than current repetition of quotations from the very limited repertoire of diplomatic notes which are taken over from one textbook into another " Georg SCHWARZENBERGER, "The Inductive Approach to International Law,' *60 Harvard Law Review*, (1946-1947), pp 593-594

In the present study, we have confined ourselves to certain preliminary statements and hypotheses concerning the formation of international custom

It seems desirable in the first place to distinguish the main stages of formation of customs and the notions and terms involved in such formation. The greatest number of misunderstandings are caused by confusing the moment of formation of a custom with that of ascertaining of an already existing custom. An international custom comes into being when a certain practice becomes sufficiently ripe to justify the presumption that it has been accepted by States as an expression of law At that moment the custom is regarded as formed and the corresponding customary rule of international law, which may at any time be formulated, begins to have binding effect.

On the other hand, by ascertaining an existing custom or directly a customary rule we understand such action as the establishment of the existence of an international custom (or the fulfilment of its elements), the formulation of the corresponding customary rule, and the fixing of its range of validity. Consequently, the formation of a custom and the ascertaining of custom or customary rule are two different notions to which different facts correspond in reality.[4]

Writers are, in general, in agreement that the moment of formation of a custom—and, hence, the moment in which a customary rule begins

[4] It is not excluded that in exceptional cases the formation of customary rules may coincide with the ascertainment of such All due reservations being made, as an example of such formation we might mention that of the rule which constituted the basis of the Nuremberg Judgment Even if there were pervious precedents, the appropriate rule was fully recognized spontaneously only in the course of the last war, more precisely only when war criminals could be punished and hence the legal basis for it had to be ascertained See El-Khoury's opinion in the United Nations International Law Commission, *YILC* 1950, v I, p 5, see also CYPRIAN, SAWICKI, *Prawo norymberskie*, Warszawa 1948, p 518, YOKOTA, "War as an International Crime," *Grundprobleme des internationalen Rechts* (*Festschrift fur Jean Spiropoulos*), Bonn 1957 p 458 A different view was presented by Professor KUNZ, ("The Nature of Customary International Law, *AJIL*, v 47 (1953), pp 668) One might say that in this case, lack of sufficient practice was balanced by the unanimous opinion of the entire international community On the other hand, it may be doubted whether true customary rules here come into play Considering the large role played by active will, it was rather a sort of intermediate rule See *infra*, Chapter Five

to have binding effect—cannot be ascertained, since it is practically speaking intangible.[5] We can ascertain only whether at a precise moment the custom exists, or not, and at most, upon analysis of practice, make certain anticipations concerning the evolution of a particular custom. Every active intervention by States concerned in the process of formation of international custom transforms it into a treaty rule, or at least an intermediate rule.[6]

While the object of ascertaining customary rules is to determine their content and range of validity at a certain period, the formation of custom, like international relations themeselves, is a continuous process.[7] Neither the formation of custom nor even the most authoritative ascertainment of a customary rule completely interrupts the incessant evolution of custom. Even codification of a customary rule does not halt this evolution by accumulation of practice.[8] It is precisely this continuous evolution of customary international law which compels us to a frequent ascertaining of customary rules, or at least to checking whether they still correspond to the actual international reality. The position of a court or other organ applying international customary law may be compared to that of a sailor on a shallow unregulated river. In nearly every case, before delivering a judgment, the court must make sure that the "current" of law is sufficiently "deep" to enable a decision in the case.

Continuous as it is, the evolution of international custom is not infinite. Customs develop and extinguish. It is only the exact establishment of the moment of such that is practically impossible. This, however, has no serious consequences for the administration of customary law. To settle a legal problem, it is important to know only whether the rule in question existed at what is called the "critical moment," and not at which moment it actually began to have binding effect.

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[5] See BASDEVANT, *Règles*, pp. 534-535; HUBERT, *Prawo*, v. II, pp. 4-5; SØRENSEN, *Les sources*, p. 111; GUGGENHEIM, *Les deux éléments*, p. 281.

[6] See *infra*, p. 104.

[7] See GIANNI, p. 168; Yvon GOUET, *La coutume en droit constitutionnel interne et en droit constitutionnel international*, Paris 1932, p. 57.

[8] See Cezary BEREZOWSKI, *Zarys międzynarodowego prawa publicznego*, Warszawa 1953, p. 36.

Mechanism of the Formation of International Custom

Notwithstanding the still scanty information available about the mechanism of international life in general, writers often describe the formation of international customs. Most frequently, they seek to set up an analogy with custom in municipal law—that is, customs binding in a society composed of individuals. Such an analogy, however, is no more than a very convenient and suggestive simplification, and is somewhat arbitrary. For example, there is Cobbet's well known figurative comparison with the formation of a path across a common, where it is difficult to pin-point the precise moment at which the route acquired the character of an acknowledged path.[9] A similar comparison for municipal custom was given by Renard, who compared developing custom to a rolling snowball.[10] Another typical description based on analogy to municipal customary law may be found in Fauchille. In the opinion of this author, international custom arises like all customs—that is, by repetition of actions in similar situations. Such conduct indicates, in Fauchille's opinion, that it answers need, and hence there are no grounds for not following such conduct in the future.[11]

Among newer descriptions of the formation of international customs which seem to take into account to a higher degree than their predecessors the specific features of the international society, primarily noteworthy is the mechanism presented by Professor McDougal to justify, in connection with customary maritime law, the alleged legality of American atomic bomb tests in the Pacific.

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[9] Pitt Cobbet, *Leading Cases on International Law*, 4th ed., London 1922, v. I, p. 5.

[10] G. Renard, *La valeur de la loi*, Paris 1928. (See Claude du Pasquier, *Introduction à la théorie générale et à la philosophie du droit*, 3rd ed., Neuchatel 1948, p. 49).

[11] "Comment s'établit la coutume? Comme se sont établie toutes les coutumes: par la répétition d'actes semblables. Une relation internationale s'étant produit, les Etats intéressés l'on traitée d'une certaine façon. La même relation s'étant reproduite à plusieurs reprises, entre les mêmes ou entre d'autres Etats, le même traitement lui a été appliqué—Cette répétition d'actes semblables démontre que la conduite suivie répond aux exigences de la situation. Pourquoi ne serait-elle pas aussi la conduite de l'avenir pour les hypothèses futures?" Fauchille, *Traité*, v. I. p. I, p. 42. Cf. Basdevant, pp. 534-535; Visscher, *Coutume*, pp. 356-357; Marcel Sibert, *Traité de droit international public—Le droit de la paix*, Paris 1951, v. I, p. 32; Gihl, p. 77.

If we disregard Professor McDOUGAL'S conclusions, his mechanism in its very general outline is highly convincing He understands customary maritime law not as a set of static rules, but as a continuous process of raising mutual claims and the adoption of an attitude to such claims by competent State organs (decision-makers) States advance through their organs unilateral claims (one might add by means of facts of conduct), and the other States appraise these claims in terms of the interests of the world community (and primarily of their own) and ultimately accept them (by means of tacit tolerance) or reject them (above all by means of protest).[12] Rightly Professor McDOUGAL has stressed that "it is not of course the unilateral claims but rather the reciprocal tolerances of the external decision-makers which create the expectations of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law"[13]

The mechanism here outlined applies in the opinion of, for instance, Professor MacGIBBON to all international customary law and helps in understanding the role of tacit consent in this process of formation of

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[12] "From the perspective of realistic description, the international law of the sea is a process of continuous demand and response, in which the decision-makers of particular nation-States unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding State and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them As such a process, it is living, growing law, grounded in the practices and sanctioning expectations of nation-States officials, and changing as their demand and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena" Myres S McDOUGAL, 'The Hydrogen Bomb Tests and International Law of the Sea," *AJIL*, v 49 (1955), pp 357-358. Further he wrote " these authoritative decision-makers projected by nation-States for creating and applying a common public order, honor each other's unilateral claims to the use of world's seas not merely by explicit agreements but also by mutual tolerances—expressed in countless decisions in foreign offices, national courts and national legislatures which create expectations that effective power will be restrained and exercised in certain uniformities of patter This process of reciprocal tolerance of unilateral claim, is too, but that by which in the present state of world organization most decisions about jurisdiction in public and private international law are, and must be taken" *Ibid*, p 358

[13] *Ibid*

custom.[14] Professor BIERZANEK also endorses MCDOUGAL'S views as drawing attention to the evolutionary character of customary rules. At the same time, he rightly criticizes MCDOUGAL'S conclusions as concerning atomic tests in the Pacific.[15] In fact, the above mechanism of formation of international custom seems to militate against the legality of such tests at that time, because precisely the requirement of tolerance by other States was not fulfilled.

As example of the development of new customs in conformity with the mechanism presented above, may be cited the practice of sending satellites into cosmic space over territories of other States. The fact that the Soviet Union and the United States of America mutually tolerate such practice and do not raise objections against such flights for peaceful purposes over their territories, and that the other States, who do not, as yet, participate in this practice, have not protested, justifies the conclusion that States do not consider such flights as infringing their sovereignty, and even that sovereignty does not extend into outer space.[16]

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[14] "This description of the forces at work in the formation of the law in a particular sphere is—for the most part--valid in relation to customary international law as a whole; and it may usefully be elaborated in order to clarify the function of acquiescence in the development of an international custom." MACGIBBON, *Customary International Law*, p. 115. MCDOUGAL'S description of the formation of customary maritime law obviously coincides with the lapidary description by Professor TUNKIN, who wrote: "... proces stanovlenia obyčnoi normy meždunarodnogo prava, tak že kak i dogovornoi normy, iest proces borby i sostrudničestva gosudarstv. Formirovane obyčnogo pravila proischodit w resultate obščenia gosudarstv, gde každoe gosudarstvo stremitsa k tomu, čtoby zakrepit w kačestve normy povedenia take pravila, kotorye sootvetstvovali by iego interesami." TUNKIN, *Voprosy*, p. 85.

[15] Professor BIERZANEK writes: "The idea that the right of using the high sea cannot be unlimited and that it must of necessity, as a consequence of the utilization by other States, be subject to limitations is correct... One may agree with the argument that the legal regime of the high sea has never been "immutable," that it is undergoing constant evolution and that international law should be interpreted in an "undogmatic" way." BIERZANEK, *Morze*, p. 306; see *ibid.*, pp. 105 and 114.

[16] "... whether State sovereignty extends into outer space, has already been tacitly answered negatively by practice and lack of protests on the part of any State in connection with the orbiting of space objects over their respecting territories." Jacek MACHOWSKI (Counselor, Polish Mission to the U. N.), "Selected Problems of National Sovereignty with Reference to the Law of Outer Space," *Proceedings of the American Society*

The mechanism here outlined of the formation of international custom seems to fit best to the present international reality. The most essential element of that mechanism consists in conduct being expression of certain claims, and the toleration of such conduct (hence claims) by other States. One might say that the general balance of the practice of States, and attitudes to such practice, in a certain section of international life—such attitudes accruing or cancelling each other—comprises the current binding customary law in that section.[17]

The Element of Practice in the Formation of International Custom

There arises above all the question as to whose practice contributes to the development of international custom. Of course, since we are discussing rules binding States, the practice concerned is that of State-organs and of organizations of States. It is, however, well known, for instance, that captains of private vessels, fishermen and pearldivers fishing in their own name on certain areas of the sea contribute by their conduct to the development of international customs concerning open sea, territorial

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of International Law at its fifty-fifth annual meeting held at Washington D. C. (further cited as *Proceedings*) April 27-29, 1961, p. 171. "During the last three and a half years, numerous satellites launched by both the United Stats and the Soviet Union have repeatedly passed over the territory of every nation on earth. No permission was sought in advance, none was expressly given by any State, and not a single protest has been registered by any other State." John Johnson (General Coucel of the National Aeronautics and Space Administration), "Remarks," *ibid.*, p. 167.. From these facts Mr. Johnson draws the conclusion that "no State has the right to exclude other States from the use of any part of 'outer space' obove (100 miles) altitude. The alternative theory is that, so long as the upward limit of territorial sovereignty is not defined by explicit agreement, the practice of the past three and a half years serves only to establish a right of passage for spacecraft of a scientific, exploratory, and non-military nature..." *Ibid.* See also the Resolution adopted by the United Nations General Assembly of December 20, 1961 (Res. 1721 (XVI)) on *Peaceful Uses of Outer Space.*

[17] For example, for Professor Lukin the sum total of facts of conduct of States constitutes the basis of the definition of international custom: "Meždunarodnyi obyčai javlaetsa sumoi primerov povedenia gosudarstvennych organov, svidedelstvujščej o tom, čto v opredelennoi sytuacji oni postupili imenno tak i eto svoe povedenne sčytali obiazatelnym." Lukin, p. 77.

sea, continental shelf, etc [18] The explanation of this fact may be found in the very essence of international custom The element of practice constitutes a sort of raw material of custom, the legal importance being added only by the element of acquiescence Therefore, whose behaviour contributes to the practice is not important, what is important is—to whom the practice is attributed, and above all, who it is who has acquiesced in it [19]

Still less important is the actual aim of the acting subject Governments are of course well aware nowadays of the consequence which may ensue from their action In particular, they know that their behaviour may lead to the establishment of a new international custom or to evolution (or abrogation) of an old one This by no means implies, however, that such end is necessarily the motive of the action leading to the formation of custom In such a case, what would be involved would be not a practice leading to custom but an active will to regulate a certain branch of international relations, and hence the creation of a treaty rule *sui generis* [20] The motive of conduct of State-organs is not the creation of international customs but the desire or need to satisfy their own or common requirements resulting from political, economic, etc , situations

Nor, in view of the fact that particular custom has been finally acknowledged by the Court and the modern doctrine of international law, is the number of States participating in the formation of customs material The conduct of even one State tacitly accepted as expression of law by another State may lead to the formation of a custom, and hence of a customary rule binding between those two States [21]

The principle of reciprocity—strictly speaking of presumption of reciprocity[22]—is certainly valid also in international customary law, but

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[18] See KOPELMANAS, *Custom*, p 149, D P O CONNELL, Sedentary Fisheries and the Australian Continental Shelf, *AJIL*, v 49 (1955), p 188, GIHL, p 78

[19] juridically relevant are all those facts which contribute one way or other to forming an agreement giving rise to a customary norm of international law TUNKIN *Co-existence*, p 15

[20] See *infra*, Chapter Four

[21] For example, the local custom ascertained in the *Free Passage* case of 1960 See *supra*, p 30 n 39 See also LUKIN, p 11

[22] See EHRLICH, *Prawo*, pp 18-19 Professor GIHL considers absence of reciprocity as a peculiar feature of customary law It is presisely the absence of reciprocity the

not in that law in its entirety It does not, for instance, embrace the customary exceptional rules consituting a sort of privilege of one or several States as against the whole of international society (for example, rights over historic bays) [23]

The time of duration of a practice has until recently been considered as essential in the formation of custom For centuries, the doctrine was unanimous that this process is very slow At present more and more frequently writers agree that an international custom may arise in a very short time [24]

The reason for that change is obvious, if we consider that the process of formation of a custom is entirely natural—one might say, assimilating itself with the very current of international life with which it changes and develops The rapid acceleration of the rhythm of international life necessarily accelerates the formation of customs A much longer space of time was necessary for the establishment of a regularity of conduct as regards, for instance, the right of innocent passage and for learning the attitude to it of States in the days when one vessel passed through territorial waters every week, than is necessary nowadays, when there are hundreds and even thousands of them every day At present, the practice of States and their attitude to the practice of other subjects may be in many fields ascertained even in the course of a single day, whereas in the times of Vattel it would require long years To take a concrete example, the principle

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circumstance that customary rules are binding in themselves without any promise of reciprocity on the part of other States—which makes international custom international law in the proper sense, a law for the international community reciprocity is the characteristic feature of international agreements " GIHL, p 85 On the other hand, Professor SIBERT, for instance, thinks that reciprocity is a condition of existence of an international rule SIBERT, *Traite*, v I, p 32

[23] See *infra*, Chapter Three

[24] Upon the decisions of the Court, Sir Gerald FITZMAURICE arrived at the following conclusion A new rule of customary law based on the practice of States can in fact emerge very quickly, if new circumstances have arisen that imperatively call for legal regulation 'FITZMAURICE, *The Law and Procedure (1951-1954)*, p 31, see also BRIERLY, *The Law*, pp 62-63, LAUTERPACHT, *Sovereignty*, p 393, MacGIBBON, *Customary International Law*, p 120, TUNKIN, *Voprosy*, p 85, BEREZOWSKI, LIBERA, GORALCZYK *Prawo*, p 111

of sovereignty in the air space arose spontaneously at the outbreak of the First World War.[25]

It has not taken long either for States to accept the conviction that their sovereignty does not extend into outer space.[26]

Not only can the requirement of practice be fulfilled more rapidly, but also quantitatively less practice is needed nowadays than in the past. In the times when the range of information about international life and, in general, means of communication, was very primitive, not only a longer practice, but also far more manifestations of it (precedents) were necessary to justify a legitimate presumption that a given practice was known and acquiesced in by the interested States. Today, the situation has changed completely, since, practically speaking, every event of international importance is universally and immediately known. Moreover, every government may make it known to all the world that it has no intention of tolerating a certain act or manner of conduct. This explains why it is not at present excluded that a custom (and hence a customary rule) can arise even on the basis of a few precedents.[27] Even the first atomic bomb test in the Pacific sufficed to provoke protests and thus to prevent legalization of such tests above the high sea.[28] Very few flights of satellites in the outer space have sufficed for the establishment of a reasonable presumption that States do not object to such flights over their territories for peaceful purposes.

The requirement of a practice being uninterrupted, consistent and continuous also no longer holds good. Everything depends on concrete circumstances. Certainly, interruptions of practice and inconsistencies in such practice often prevent the formation of a custom. This does not mean, however, that every inconsistency or break should lead to such

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[25] See pronouncements by Brierly and Alfaro in the International Law Commission, *YILC* 1950, v. I, pp. 5, 275; cf. TUNKIN, *Voprosy*, p. 85.

[26] See *supra*, p. 64.

[27] Professors CYPRIAN and SAWICKI hold that even a single precedent suffices for the formation of a customary rule. Such a possibility has also been accepted by Professor ROUSSEAU and lately by Professor TUNKIN. But, as Professor LUKIN rightly pointed out, such a rule would not constitute a typical customary rule. CYPRIAN i SAWICKI, p. 518; ROUSSEAU, *Principes*, p. 825; TUNKIN, *Voprosy*, p. 85; LUKIN, p. 81.

[28] See BIERZANEK, *Morze*, p. 114.

a consequence. On the contrary, a return to the same practice following interruption may sometimes constitute evidence of the force of uniformity in the conduct of States, by no means preventing the development of a custom.[29]

Until recently, there was considerable controversy among writers as to whether custom can consist in abstention. The discussion was initiated at the Permanent Court in connection with the *Lotus* case. In its decision, the Court accepted customs based on abstention provided that such abstention must be based on "being conscious of having a duty to abstain."[30] Judge Altamira in his dissenting opinion to this Judgment disagreed. He argued that a custom "must by its nature be positive in character," and a customary rule "must be positively supported by the acts which have occured."[31]

Among authors, opinions have been divided. GIANNI and STRUPP, for instance, required positive facts, whereas the majority, including SÉFÉRIADÈS, SCELLE, KELSEN, ROUSSEAU and SØRENSEN agreed that custom can arise as a result of abstentions.[32] Professor SØRENSEN demonstrated the relative character of abstention. According to him, abstention is often a result of positive decision or action—for example, of a decision by an administrative authority. The role of abstention depends also on the kind of custom developing. Abstention within the discretion of a State cannot, according to Professor SØRENSEN, have any effect on the formation of new customs. On the other hand, abstention is of decisive importance in case of formation of a custom abrogating or deleting an existing conventional or customary rule. Precisely abstention, upon tacit acquiescence by other parties, from following a certain rule leads to its abolishment.[33] Summing up, there is no ground for exclusion of abstention as a sort of practice leading to the formation of international custom. Everything depends on circumstances—that is, on the kind of abstention and the legal situation to which it applies.

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[29] See Judge Azedevo's opinion in the *Asylum* case, *ICJ Reports* 1950, p. 336.

[30] *PCIJ Series* A 10, p. 28.

[31] *Ibid.*, p. 96.

[32] See ROUSSEAU, *Principes*, pp. 834-836 and SØRENSEN, *Les sources*, p. 98 note 48.

[33] SØRENSEN, *Les sources*, pp. 98-101; see TUNKIN, *Co-existence*, p. 10.

The Element of Presumed Acceptance in the Formation of International Custom

Most misconceptions concerning this element result from not discerning the legal and pre-legal stage of development of custom—that is, of the development of a practice not yet ripened into a custom, and that of custom. To hold that only a practice accompanied by conviction of having a duty or right can lead to the formation of custom is obviously wrong. When a certain practice is accepted as an expression of law, we already have to do with a custom and hence also with a binding—though not yet formulated—customary rule of international law. On the other hand, the formation of custom occurs in the period before the practice is accepted as law; although, of course, the evolution of that custom does not stop at that moment.

How does practice come to be accepted as an expression of law? It has already been shown in Chapter One that the jurisprudence of the Court and the majority of writers agree that the element of acceptance is fulfilled tacitly only by means of presumption.[34] Precisely in this exists the elusiveness of the moment of formation of international custom. Since acceptance as expression of law is only presumed, one cannot speak of how it comes about. Certainly, we may assert, for the same reasons as with the element of practice, that there is a well grounded assumption that such acceptance can arise nowadays much more rapidly than before. Considering that current international practice is better and more immediately known, absence of objections against it tends more and more to prove that States do not consider the practice as contrary to their interests, and also, that they do not object the formation of a customary rule. It is also increasingly justified to rest content with presumption of acceptance of the practice as expression of law, in view of the better and better knowledge of international law and hence of the consequences of toleration of a new practice. The governments know that toleration of practice leads to its being legalized, to formation of a new customary rule. Hence their increasing watchfulness. International events are watched, and every

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[34] See *supra*, p. 28 et seq..

situation undesirable for a State provokes an immediate reaction for fear of consequences for that State of its being said to have acquiesced in a precedent leading to custom.[35]

The Role of Courts and Tribunals in the Formation of International Custom

Formally, the role of courts is confined to ascertaining and applying law which binds only the parties in the case. Any legislative competence *ex officio*, or binding ascertainment of customary rules for States not being parties to a dispute, is out of the question.[36] Considering, however, that the formation of international customs is spontaneous, what is important, it seems, is not the courts' function according to statutes, but the role they play in fact. And their informal share in the development of international customary law is undoubtedly considerable.

Seeking a legal basis for its decisions, courts gather and evaluate all available facts and circumstances which speak for (or against) the existence of a certain custom. Such material is, however, rarely complete and univocal. Consequently, the decision as to a binding rule often amounts to

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[35] See I. C. MacGibbon, "Some Observations on the Part of Protest in International Law," *BYIL* 1953, pp. 293-319; Lauterpacht, *Sovereignty*, p. 393; Gihl, p. 79. This may be seen in the increasingly frequent reservations made by States as regards recognition of certain facts as precedents, and in the part played by absence of protest in the practice of the Court as evidence of customary rules of international law. See Chapter Five. As regards, e.g., continental shelf, see Wojciech Góralczyk, *Szelf contynentalny, Studium prawno-międzynarodowe*, Warszawa 1957, p. 173. Recently Professor Bentz, in his article: "Le silence comme manifestation de volonté en droit international public" (*RGDIP* 1963/1, pp. 44-91), has attempted to question the rôle of absence of protest in the formation of international custom.

[36] "En définitive, la mission de la Cour est de dire le droit non de la créer." Charles de Visscher, *Théorie et réalité en droit international*, 2nd. ed., Paris 1955, p. 429. "No other authority may be ascribed to the decisions of the Court except that provided for in the Statute." Tunkin, *Co-existence*, p. 28. In continental law, the Swiss civil code of 1907 is the only notable exception, where in Article 1 there is an express authorization for the judge to decide "in default of custom according to rules which he would lay down if he had himself to act as legislator". Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London 1953, p. 404.

choosing the less doubtful alternative. In other words, a decision of the court on what is the law, is always based, to a greater or lesser degree, on free evalutation. Hence it is a truism to say, that a judicial organ ascertaining customs to some extent creates them.[37]

But even the very application of an already ascertained rule is in fact equivalent to creation of a particular rule by means of a more general rule for the settlement of a concrete case. A statement by the court, that a certain rule applies in settling a dispute involves a law-creating factor.[38]

Of course, in municipal law systems of modern legislature this role of the courts is comparatively less important, although not to be disregarded. It is otherwise in international law, many branches of which are still very rudimantary. Here, the contribution of the courts and tribunals in law-creation is of necessity much greater.

Also the very investigation of practice by the courts is of some effect on the further development or extinction of customs. A case in which a declaration is made by the court that there is no sufficient evidence for admission the existence of a custom may for long paralyze the development

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[37] "... partout [la jurisprudence] ... participe à l'élaboration coutumière des normes juridiques." KOPELMANAS, *Custom*, p. 143. "Wherever there are courts, the law grows in the hands of the judges. Yet, as a rule, courts are shy of saying so openly. They prefer to 'find' the law as it stands. Even to a casual observer it is evident how much the Permanent Court of International Justice, for instance, developed the law as it stood when the Court was established." SCHWARZENBERGER, *International Law*, p. 62; see *ibid.*, pp. 63-66; Krilov includes judicial decisions among sources of international law, S. B. KRILOV, "Les notions principales du droit des gens," *RCADI*, v. 70 (1947-I), p. 443; *cf.* GOULD, p. 141; TUNKIN, *Co-existence*, p. 28.

[38] "Application of law certainly involves a creative element as well as a statement on the applicability of a general rule to a particular case." Antoni DERYNG, *Główne tendencje rozwoju prawa narodów w świetle orzecznictwa Stałego Trybunału Sprawiedliwości Międzynarodowej*, Lwów 1932, p. 53. "The task of the judge is to ascertain what is the law according to the sources of the system, and then logically to subsume the concrete facts and the given rules. This view of the nature of a judicial decision is erroneous. In the first place because the application of a given rule is something more than merely logical subsumption. Secondly, and especially, because to a great extent judicial decisions are not an application of rules already given ... the concrete decisions arise largely out of impulses not previously established by rules." Ross, *Textbook*, p. 79-80; see also H. LAUTERPACHT, "Decisions of Municipal Courts as a Source of International Law," *BYIL* 1929, pp. 65-69.

of such custom. On the other hand, by drawing attention to a certain practice, the court may considerably accelerate its ripening into custom.

Courts and tribunals participate in the creation of international law primarily by way of their decisions and opinions.[39] The authority enjoyed by judicial precedents in international law, especially those of the International Court of Justice, is enormous. One may almost speak of the fetishization of precedent in that law. The deliberate activity of the Court, which consistently takes as a basis its own previous decisions is mainly responsible for this role of precedent. Following the Court, all concerned—other international organs, lawyers and writers—refer to precedents of the Court as to "ready-made" rules of international law.[40]

In the light of the Court's practice, the importance of municipal judicial precedents is less marked. It is dangerous to generalize however. Much depends on the authority which a judicial organ has acquired in the world. Not without reason, more and more stress is nowadays placed on publishing all decisions refering to international law handed down by municipal courts of various nations. The International Court and publicists often refer to such decisions. The reason for this lies in the fact that such judgments constitute evidence of acceptance of a given practice by the State to which the court belongs. Consequently, one cannot deny a certain role played by municipal courts in the development of customary international law.[41]

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[39] "De nombreuses normes juridiques ne sont devenues des règles coutumières que grâce à leur réception dans des décisions arbitrales et judiciaires." GUGGENHEIM, *Traité*, v. I, p. 52.

[40] "The jurisprudence of the Court may be considered as jurisprudence of a world court, and the rules ascertained in its decisions as raising a sufficiently strong presumption of binding force in international relations." EHRLICH, *Prawo*, p. 27; see *infra*, p. 142. In the United Nations International Law Commission, the case-law of the Court was strongly defended by Krilov, who stated: "The commission should not go any further than the International Court in the formulation of the basic considerations involved... [He] strongly deprecated any effort to undermine the case-law created by the Court." *YILC* 1955, v. I, pp. 198, 202; see also *ibid.*, 1954, v. I, pp. 66, 161; 1955, v. I, pp. 9, 178, 204, 208; 1960, v. I, p. 116.

[41] "It would be a mistake to over-estimate the difference between the binding and persuasive authority of international or national judgments". Georg SCHWARZENBERGER, *A Manual of International Law*, 3rd Ed., London 1952, p. 17; see LAUTERPACHT, *Development*, p. 20; TUNKIN, *Co-existence*, p. 30.

As to the role of courts and tribunals in the development of customary law, it may be doubted whether that role is only factual

Considering the universal reference to judicial precedents, not only by the courts and tribunals themselves, but also by other international organs—for example, the International Law Commission when preparing the codification of international customary law—even the most careful positivist must admit that this role of courts has been already accepted by the entire international community It might be said that whoever accepts the authority of a court must of necessity accept a minimum of its competence in the creation of customary international law.

There arises, however, another problem to what extent must this share in law-creation be conceded to judicial organs? The divergence of views on this subject is great It could be seen already in the discussions of the Advisory Committee of Jurists of 1920, where some of its members considered the activity of judicial organs as a sort of third (after treaties and custom) kind of "source of international law" (in the meaning of lawcreating factor) Other members wanted to limit the function of the Court exclusively to its application of positive law Ultimately, they agreed to declare judicial decisions "subsidiary means for the determination of rules of law" (Art. 38,1(d)), which indirectly also entails acquiescence in a degree of influence on law-creation [42]

In view of the present world political set-up, it seems, that the part played by judicial organs in the formation of customary international law should be reduced to an absolutely indispensable minimum. For, while it can be admitted that States have yielded to the necessity of giving the Court a minimum of such competence, at the same time—and this is precisely a confirmation of that fact—hesitate to bring their disputes before this organ of international justice One of the reasons for that reluctance lies precisely in their fear that the Court might abuse its discretion and might base itself on rules which are not yet (or any longer) recognized by the parties [43]

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[42] *Committee*, pp 189-187, 195, 293-294, 295, 296-7, 307-310

[43] See Jorge CASTAÑEDA, 'The Underdeveloped Nations and the Development of International Law," *International Organization*, Winter 1961, t XV/1, pp 41-42, R P ANAND, 'Role of the 'New' Asian-African Countries in the Present International Legal Order,' *AJIL* v 56 (1962), pp 387-404

Certainly, the lessening number of declarations of compulsory jurisdiction, and the practice of adding to them reservations contrary to the very idea of compulsory jurisdiction has its origin mainly in circumstances for which the Court is in no way responsible. In such a situation, however, prudence in the application of law is even more justified. Writers more and more emphasize that the liberty of the Court in the application of law should be limited to a strict minimum.[44] This minimum is determined by the presumed acceptance of a given rule or practice by the States concerned.

There may, of course, be legitimate doubts as to whether the customs, or established rules created to some extent by judicial organs, may be classified as rules of customary international law, or should be rather reckoned as a separate category of what is called judge-made law, or case-law. In our opinion, even if it be advisable to discern judge-made law in international law, there is no obstacle to applying it to customary law as well. Since it is not material whose activity constitutes the practice

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[44] HUDSON wrote: "The limitations which surround this process of finding the law have not been set by the Court, they are the general limitations which inhere in the judicial process. The Court is not free to cut out of whole cloth. It must make use of the available jural material." In a footnote he added: "The Court should not go so far as the direction given in Article 1 of the Swiss Code of 1907." Manley O. HUDSON, *The Permanent Court of International Justice, 1920-1942, a Treaties*, New York 1943, p. 605. A similar opinion was presented by Judge Krilov in his separate opinion to the Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*, *ICJ Reports* 1949, p. 219. From the point of view of the prospects of international adjudication, this problem has been dealt by Professor SCHWARZENBERGER: "If an international court or tribunal should acquire the reputation of an inclination to depart too far from the generally recognized rules of international law, it would find its list of pending cases suffered from a mysterious process of shrinkage... Thus, the surest way of developing international law on the judicial level is to curb severely any quasi-legislative tendencies within its own ranks." SCHWARZENBERGER, *International Law*, pp. 65-66; see also LAUTERPACHT, *Development*, p. 76. Interesting also is the opinion of Professor TUNKIN, who admits that the authority of international bodies may depend also on tacit agreement of the States concerned: "No international body may acquire greater authority than that provided for in the international agreement which has created this body, any alteration in this respect requiring new agreement between States, which in some cases may be also a tacit agreement." TUNKIN, *Co-existence*, pp. 29-30.

leading to custom, it is quite natural to apply judicial precedents to international practice, which being not only acquiesced in, but often even expressly accepted by States, contribute to the formation of international customs.[45]

The Role of Certain Other Factors in the Formation of International Custom

It is certainly impossible to name the innumerable factors which can still contribute to the formation of international customs. A few of them. however, which are particularly closely linked with customary law, deserve mention here.

(a) *International Usages*

Usage,[46] as we already know, is also a sort of qualified practice accepted by States, though not as expression of law, but of rules of other kinds (rules of comity, international morality, etc.)

Writers refer to cases in which usages have developed into international customs. There is, however, no ground for considering usages solely as a stage in the formation of custom. Usage can, and most often does constitute a ripe, well developed international practice *sui generis*. Usage, then, is not necessarily a practice less well founded or of shorter duration by comparison with international custom. On the contrary, usages are generally very old and, what is more striking—strictly followed.[47]

To establish distinction between usage and custom is often very difficult. It is, in fact, possible only in cases of conflict, where responsibility and sanctions come into play—that is, where the competent organ must decide, whether the abrogation of a certain practice constitutes infringe-

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[45] A different opinion is presented by, for instance, Professor Sørensen, who distinctly separates customary law from that created by judicial precedents. Sørensen, *Les sources*, pp. 153-155.

[46] See Introduction.

[47] "Le droit international d'aujourd'hui doit beaucoup à la courtoisie internationale, dont ses règles souvent dérivent." George A. Finch, "Les sources modernes du droit international," *RCADI*, v. 53 (1935-III), p. 585. See also Kosters, p. 228; Oppenheim, *International Law*, v. I, p. 25; Gihl, p. 80-82; Dahm, v. I, p. 33.

ment of law and, hence, entails responsibility (we have, then, to do with a custom) or whether there is only departure from practice followed by the States *ex gratia*, which constitutes no grounds for legal claim (hence a usage).[48] For example, the usage consisting in observance of certain forms of diplomatic correspondence will most probably never develop into custom. Whereas some privileges until recently granted by governments to diplomatic representatives out of courtesy (such as privileges concerning some exemptions from taxes) give to doubt as to whether they are any longer only voluntary concessions. The residence privilege of diplomatic envoys based once on comity, at present belongs to customary diplomatic law.[49]

(b) *International Agreements*

That treaties and international agreements in general can constitute, and frequently have been, a very important factor in the development of international customary law is already a truism.[50] Being a concrete regulation involving a certain section of international relations, a treaty constitutes a precedent—that is, an element of practice. As an expression of the will of the parties, the treaty is at the same time evidence of acquiescence in everything that is part of its content.

A treaty, however, can never of itself lead to the formation of international custom, because in international law the principle *pacta tertii*

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[48] See WOLFKE, *L'élément*, pp. 169-170.

[49] Sir Ernest SATOW, *A Guide to Diplomatic Practice*, 4th ed., London 1958, pp. 228-241, 244; FINCH, pp. 585-586.

[50] "Déjà dans la conception des siècles passés, la conclusion des traités est un acte qui ... peut contribuer à la formation d'une coutume de droit des gens." KOSTERS, p. 221. "Every treaty to some extent ... contributes to the formation and specification of rules of particular or common law." DERYNG, p. 39; MATEESCO, pp. 250-254. Several examples have been given by Professor GUGGENHEIM (*Traité*, v. I, pp. 51-52). Professor SCHWARZENBERGER writes of "widespread process of transformation of treaty law into international customary law. (*International Law*, p. 563). "Mnoge meždunarodnye obyčne normy obiazany svoim proischodenem meždunarodnomu dogovoru." LUKIN, p. 87. Recently in the International Law Commission, the part played by treaties in the formation of customs has been stressed by Professor Bartos (Yugoslavia). *YILC* 1961, v. I, pp. 257-258.

nec nocent nec prosunt is still valid [51] A treaty can, on the other hand, extend its binding force to other subjects of international law, if the conduct of such subjects—that is, practice—justifies the presumption that they accept the provisions of the given treaty as binding on them This will be, then, a sort of accession by way of custom It is, in fact, the most frequent procedure by which a treaty evolves into custom

For example, Professor TUNKIN, at that time Chairman of the International Law Commission, stated that "the principles of the United Nations Charter were binding on non-member States as an expression of customary international law" [52] One might, however, object in this example that many principles in the Charter are in fact merely very old customary principles, codified As a more typical example of customary extension of a treaty might be quoted the fact of honouring by States not members of specialized agencies of the United Nations of laissez passer issued by those agencies [53]

Finally, treaties concluded in a specific way form a practice of concluding treaties of a certain kind, and thus contribute to the development of the branch of customary law called "law of treaties" [54]

(c) *Declarations of State Organs*

Opinions on the legal consequences of unilateral declarations of States are divergent There is, however, no doubt that such declarations and pronouncements, being expressions of active will, can under certain conditions create obligations on the States They can also contribute to the formation of international customs, although not by themselves, but

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[51] Alfons KLAFKOWSKI in *Zarys prawa międzynarodowego publicznego*, pod redakcją Mariana Muszkata, Warszawa 1955, v II, p 104, see also *PCIJ Series* A 7, p 28

[52] *YILC* 1961, v I, p 258 In a discussion in 1955 Professor Zourek said, among others "There were many conventions which, after being signed by a certain number of States, had been explicitly or implicitly accepted by other States which had found them satisfactory for the solution of certain international problems But it[is] equally true that unless a treaty [is] signed or tacitly accepted by a State, it[is] not binding upon that State *YILC* 1955, v I, p 122

[53] R J DUPUY," Le droit relations entre les organisations internationales , *RCADI* v 100 (1960-II), p 539 Of course, it is difficult to state with certainty whether this is already a custom or only usage

[54] GOULD, p 294

solely as an element of acceptance of an already existing practice. Custom is built up, as we already know, by practice, and not only by a promise of practice or by opinions as to its necessity.

As Judge Pal rightly stated in his Dissenting Opinion to the Judgment of the International Military Tribunal for the Far East: "repeated pronouncements at best developed the custom or usage of making such pronouncements."[55]

(d) *Opinions of Publicists*

According to Subparagraph 1(d) of Article 38 of the Statute of the Court, judgments and opinions of writers constitute only subsidiary means of the determination of law. There is no question of any formal part being played by doctrine in the formation of international law. Moreover, the Court has only very rarely referred to doctrine as subsidiary means.[56] Writers themselves agree that nowadays the importance of their opinions in the evolution of international law has diminished considerably.[57] This does not mean, however, that one should disregard their role entirely.

True, the Court does not base itself officially on the authority of writers, especially of individual. It should, however, not be forgotten that the Court, whose contribution to the formation of customs is indisputable, is itself composed almost exclusively of most eminent representatives of doctrine. Moreover, several scientific societies of world reputation elaborate draft codifications of various branches of international law. These drafts, even if not accepted *in extenso*, are always taken into account, and have a strong bearing on the direction of development of customary law in the given

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[55] Radhabinod PAL, *International Military Tribunal for the Far East, Dissenting Judgment*, Calcutta 1953, p. 56; see GOULD, p. 610.

[56] See ROUSSEAU, *Principes*, pp. 130-132; SCHWARZENBERGER, *International Law*, pp. 548-561.

[57] For instance, Professor KOPELMANAS writes: "On pourrait peut-être leur [auteurs] reconnaître une place dans l'élaboration coutumière du droit et encore cette place paraît-elle bien modeste, pour ne pas dire inexistante." Lazare KOPELMANAS, "Essai d'une théorie des sources formelles du droit international," *Revue de droit international* (de Lapradelle), 1938, v. I, p. 124. The present role of the doctrine is described by this writer as "indirect source". *Ibid.*

field of international life.[58] Finally, the International Law Commission itself, whose function according to its Statute is not limited to determination of existing customary law and preparation of its codification, but also should contribute to "progressive development of international law" is composed of the best experts in such law. Not to mention the fact that the Commission in its activity fully takes into account the opinions of publicists.[59]

In what does the share of writers consist today? It consists in the analysis of facts and opinions and in drawing conclusions on binding customary rules and on trends of their evolution. Such conclusions, like all generalizations of this kind, involve unrestricted supplementation by introducing elements lacking and hence, a creative factor. Further, by attracting attention to international practice and appraising it, the writers indirectly influence its further evolution, and hence the development of customs.

At present, the influence of doctrine on the formation of international law in general is certainly rather behind-the scenes and anonymous. To disregard it would, however, be to say the least, unjustified.[60]

(e) *National Law*

Though national legislation cannot possibly of itself be binding in international relations, it is an indisputable fact that it constitutes a serious factor in the development of international customs in those fields which concern both national and international relations—for instance, the treatment of foreigners, granting of diplomatic privileges, regulations for foreign vessels in ports, etc.

The national law of a State or group of States can not only serve as a model to the other States, but it can also initiate international practice, and thus lead to the formation of an international custom. Krilov was certainly right in saying that "all sources of municipal law may become sources of international law as soon as they refer to international relations

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[58] See Chapter Five.

[59] *Ibid.*

[60] See ROUSSEAU, *Principes*, p. 818; SØRENSEN, *Les sources*, pp. 189-190; TUNKIN, *Voprosy*, pp. 142-143.

and are accepted by other States."[61] Such a role was played by British navigation regulations, which have been accepted by all maritime States.[62]

It should be added here that the factual reception by international law of well established principles and institutions of national law by way of practice may be sometimes even very desirable, but always under condition of fulfilment of the fundamental requirement—that is, the presumed acquiescence in such practice by the States concerned.[63]

(f) *The Role of the Great Powers*

When dealing with law-creating factors in international society, it is desirable always to remain aware of the fact that the share of States in the evolution of international law is not, and even cannot be, the same. It is an obvious fact, for instance, that maritime customs have of necessity been based principally on the practice of the sea Powers. It is self evident that in regulating some branches of international relations primarily those countries which are directly concerned contribute in building up the practice. There are, however, still other factors of a more general character—such as power, wealth and sheer size—which determine the role played in the evolution of international customs. It is well known from the history of the 19th century that the great Powers of the European Concert exercised in relation to the remaining States of Europe a hegemony which was not only political. On the initiative of those Powers, and under their authority, legal principles arose which were afterwards, more or less freely, accepted by the whole of international society.[64]

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[61] "Toutes les sources du droit interne d'un Etat peuvent devenir des sources du droit international du moment qu'elles touchent au domaine de relations internationales et qu'elles sont reconnues par d'autres Etats." KRILOV, *Les notions*, p. 444, "Le droit international coutumier se concrétise souvent sous forme de normes du droit interne." GUGGENHEIM, *Traité*, v. I, pp. 50-51; see also KOPELMANAS, *Custom*, pp. 147-148; ROUSSEAU, *Principes*, pp. 850-853; SØRENSEN, *Les sources*, p. 91; LUKIN, p. 131; TUNKIN, *Voprosy*, pp. 142-144.

[62] FINCH, p. 583; MATEESCO, p. 220.

[63] See H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, New York 1927, *passim*. See also Lucien SIORAT, *Les lacunes en droit international* (*Etudes de la fonction judiciaire*), Paris 1958, pp. 345-364.

[64] See Karol WOLFKE, *Great and Small Powers in International Law, from 1814 to 1920* (*From the Pre-History of the United Nations*), Wrocław 1961, *passim*. An interesting pronouncement on the role of great Powers has been made by Professor VISSCHER:

Today, in consequence of essential changes in the structure of international society and of the creation of the United Nations, the position of smaller nations has altered The possibility of the big Powers openly imposing rules on minor nations no longer exists, or at least has considerably diminished This does not mean, however, that the role of those big Powers in the evolution of international customs is today the same as that of other States Practice being the nucleus of customs, those States are the most important which have the greatest share in such practice—that is, in most cases precisely the great Powers This refers also to the element of presumed acceptance as an expression of law Such acceptance on the part of the great Powers frequently has a decisive effect, because the other States, for this or that reason, pay more heed to the opinion of those Powers than to that of minor States [65]

(g) *Practice of International Organizations*

International organizations base their activity on their statutes—that is, on conventional law It might seems therefore that there is not much room here for customary rules On the other hand, the activity of international organizations brings about an enormous intensification of international intercourse by multiplication of contacts between States, and, in general, a rapid development of international practice In this connection, there arise numerous occasions and needs for new customs [66] Moreover,

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Parmi les usagers, il en est toujours, qui, plus profondement que d'autres, marquent la terre de l'empreinte de leurs pas, soit en raison de leur poids, c'est-a-dire de leur puissance en ce monde, soit parce que leurs interets les appellent plus frequemment a effectuer le parcours C'est ainsi qu'apres avoir imprime a l'usage une orientation definie, les grandes Puissances s'en constituent encore les garants et les defenseurs Leur rôle qui de tout temps fut decisif dans la formation du droit international coutumier, est en conferer aux usages ce degre d'effectivite sans lequel la conviction juridique, condition de l'assentiment general, ne trouverait pas une base suffisante dans la realite sociale VISSCHER, *Theorie*, pp 183-184

[65] See SCHWARZENBERGER, *International Law*, p 35-36, TUNKIN, *Co-existence*, p 18

[66] 'The practice of international organizations has become an important element in the development of customary law" JENKS, *Common Law*, p 175 See also HUBERT, *Prawo*, v II, pp 3-4, KOPELMANAS, *Custom*, pp 132-138, SØRENSEN, *Principes*, pp 37-38, 91, TUNKIN, *Voprosy*, pp 123-134, Manfred LACHS, "Wspołczesne organizacje między-

the relatively short history of international organizations has already shown that the introduction of necessary amendments to their constitutions often meet with serious obstacles. Of necessity, therefore, the statutes are adjusted by practice itself. Thus new customs and consequently unwritten rules of conduct arise. Such amendments in constitutions and rules of procedure also frequently materialize in the form of formally not binding resolutions, actually executed in practice, with presumed acquiescence of all the members.[67]

Certainly, only a small part of such amendments introduced, for example, into the United Nations Charter or to the rules of procedure of its principal organs, have yet ripened into true international customary rules. On the other hand, too rigid criteria should not be applied here. If a certain practice has been established and brings about a factual amendment in the constitution of an organization with the presumed consent of its members, there is no reason whatsoever for not recognizing such a practice as an expression of a legally binding amendment.[68] For example, Article 18 of the League of Nations Covenant referring to registration of treaties was partly abrogated by means of accepted practice—that is, custom.[69] Among such amendments introduced by accepted practice

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narodowe i rozwój prawa międzynarodowego," *Państwo i Prawo*, 1963, no. 12, pp. 827-836; Krzysztof SKUBISZEWSKI, "Kompetencje prawodawcze wspólnot europejskich," *Przegląd zachodni*, 1962, nr 5, p. 10; *ibid.*, nr 6, p. 229.

[67] See F. Blaine SLOAN, "The Binding Force of a 'recommandation' of the General Assembly of the United Nations," *BYIL* 1948, pp. 18-19; see also A. J. P. TAMMES, "Decisions of International Organs as a Source of International Law," *RCADI*, v. 94 (1958-II), pp. 265-363; LUKIN, pp. 105-124.

[68] One can agree with JENKS, who writes: "Some flexibility of approach is essential if the authority of custom as such is to be preserved over a wide range of ground in respect of which we can reasonably hope that existing customary rules will continue to command general support." JENKS, *Common Law*, p. 104. See also Michael VIRALLY, "La valeur juridique des recommandations des organisations internationales," *Annuaire français* 1956, p. 89; Suzanne BASTID," De quelques problèmes juridiques posés par le développement des organisations internationales," *Grundprobleme des internationalen Rechts* (*Festschrift für Jean Spiropoulos*), Bonn 1957, p. 36; Jacob ROBINSON, "Metamorphosis of the United Nations", *RCADI*, v. 94 (1958-II), pp. 497-589.

[69] See the pronouncement by Yepes in the International Law Commission, *YILC* 1950, v. I, p. 6.

may be included the already mentioned practice of the Security Council to the effect that abstention of a permanent member present at a meeting is not assimilated to the exercise of the right of veto.[70]

In connection with international organizations, a whole new branch of law, sometimes called internal law of international organizations, is being developed. It embraces rules referring to relations between the organs of organizations and between such organizations and the members of their staffs.[71]

Here also, in addition to written rules—such as rules of procedure, regulations, etc.—a new branch of customary law *sui generis*, supplementing those written provisions, may be discerned. Such an emerging internal custom is referred to in the Advisory Opinion concerning the *Administrative Tribunal of the I. L. O. upon complaints made against the Unesco.*[72]

Value of the Records of the Court in the Reconstruction of the Process of Formation of International Customs

When available material which could throw more light on the formation of international customs is being sought, priority of attention should be paid to the documents published by the International Court of Justice. It may be presumed that that party before the Court which endeavours to base its claim on the alleged customary rule does its utmost to present all available evidence of such custom. The other party, on the contrary, will oppose all possible documents and arguments showing the non-evistence of such custom. The decision of the Court constitutes a synthesis, supplemented and thoroughly considered in all aspects by individual and dissenting judges in their separate and individual opinions. It follows, then, that the published documents of the case before the Court, where it has been necessary to ascertain a customary rule of international law,

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[70] See *infra*, p. 108.

[71] See Karl Zemanek, *Das Vertragsrecht der internationalen Organisationen*, Wien 1957, p. 101. Professor Kocot proposes the term "infrainternational law". Kazimierz Kocot, Nowe tendencje w dziedzinie zródeł prawa narodów, *Zeszyty Naukowe Uniwersytetu Wrocławskiego, Seria* A Nr 34, Prawo VIII, 1961, p. 184. See also Skubiszewski, p. 239.

[72] *ICJ Reports* 1956, p. 91; see also Lukin, p. 521; supra, p. 41.

of necessity contain the fullest and most objective description of the formation of the custom in question. Particularly useful are such documents for the reconstruction of the formation of customs existing between the parties in the case, since such are in possession of all possible evidence as to their State practice. It is certainly unthinkable that any single expert or even a team of private experts, could give a fuller and more reliable description of the formation of custom than that reconstructed with the aid of the publications of the Court.

CHAPTER THREE

KINDS OF CUSTOMARY RULES OF INTERNATIONAL LAW

UNIVERSAL CUSTOMARY RULES

Among problems concerning not so much customs as rather customary rules of international law, of interest is that of their division into different kinds, especially the division into universal and particular customary rules [1]

For instance, the question arises as to the conditions under which the universal validity of a customary rule can be admitted According to Subparagraph 1(b) of Article 38 of the Statute of the Court, and also the opinions of numerous writers, a general practice—that is, a practice of the majority of States suffices.[2] Such a view is acceptable, however, only with certain reservations A customary rule of international law can bind only those subjects as regards whom it may be presumed that they have recognized it

This does not mean that the assumption of the binding force of a certain

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[1] "L'existence de telles coutumes particulieres, soit multilaterales, soit bilaterales, est generalement admise " SØRENSEN, *Les sources*, p 104 See also REUTER, *Droit*, p 36, Gaetano MORELLI, "Cours general de droit international public," *RCADI*, v 89 (1956-I), p 458, ROUSSEAU, *Principes*, pp 839-842, SCHWARZENBERGER, *International Law*, p 20, DAHM, pp 32-33, FITZMAURICE, *The Law and Procedure (1951-54)*, pp 68-69, LUKIN, pp 83-84 In the jurisprudence and doctrine, "general", "regional," and "local customs" in fact mean customary rules

[2] *E g*, Professor Ross states "Customary international law may be either special (comprizing only a small number of States) and then binding on these only, it may be general (comprizing the great majority of States) and is then binding all States, on such, too, as have not taken part in the process of objectivation, either because there was not occasion to do so or because they have only recently come into existence " ROSS, *Textbook*, p 87

rule *erga omnes* must be based on an investigation of the practice and opinions of all States Since customary rules of international law are based on the presumption that the practice is known and accepted as an expression of law, there is nothing to prevent such a presumption arising as regards all States, if the practice of at least some States and its toleration by the remainder endorses it

There are certainly numerous universally binding customary rules They include, for example, the general principles of maritime and diplomatic law. Before admitting such universal validity some caution is, however, advisable. It happens, for instance, that the universal validity of a rule is, in fact, only apparent. This may be seen in the notorious difficulties encountered in attempts to codify such allegedly universal principles [3]

In international practice, the problem of the universal validity of customary rules is, however, not so important as it would appear at first glance. The organs applying international law are never obliged to determine whether a given rule binds all States. Similarly as with conventional law, it is of immediate importance only to declare whether a certain rule binds at a given moment a specific State. The knowledge of the degree of "universality" of the rule, however, helps ascertaining whether it binds a particular subject. The larger the number of States which have accepted the rule, the stronger the presumption that it is also accepted by a State which has not participated in the formation of the custom.

In connection with the universal validity of customary rules of international law, reference should be made to what are called "principles of international law," often referred to by the Court in its decisions [4] Accord-

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[3] "The universality of international law must be taken with a pinch of salt " SCHWARZENBERGER, *International Law*, p 15 " the body of rules which have met with general acceptance and can be clearly understood as obligatory is much smaller than might be supposed " I C MacGIBBON, "The Scope of Acquiescence in International Law," *BYIL* 1954, p 185 Jenks pointing to the necessity of investigating customary international law on broader geographical basis came to the following conclusion "Customary rules of which we have been apt to assume the validity too readily may be found to have less basis in general acceptance than had been supposed " JENKS, *The Common Law*, p 104

[4] For example, in the case concerning *Certain German Interests in Polish Upper Silesia* (merits) of 1926 the Court declared " this follows from the principle of respect

ing to that Court's own definition, these principles constitute rules of international law applied "between all nations belonging to the community of nations.[5] Professor SØRENSEN—rightly it seems—criticized this definition as being too broad. He argued that the Court applied the term "principle of international law" rather to those universally recognized rules which were so firmly established as to need no justification.[6]

While eshewing a detailed analysis of those principles, which would transgress the scope of this work, one may venture the conclusion that, whatever their origin, they must, as universally binding rules of international law, also fulfil the requirements of customary rules.[7]

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for vested rights, a principle which, as the Court has already had occasion to observe, forms, part of generally accepted international law ..." *PCIJ Series* A 7, p. 42. In the Advisory Opinion on *Treatment of Polish Nationals and other persons of Polish Origin or Speach in the Danzig territory*: "The general principles of international law apply to Danzig subject, however, to the treaty provisions binding upon the Free City ..." *Ibid.*, A/B 44, pp. 23-24. Principles of international law have also been mentioned, for instance, in the Advisory Opinion concerning *Reparation for Injuries Suffered in the Service of the United Nations*: "... the situation is dominated by the provisions of the Charter considered in the light of the principles of international law." *ICJ Reports* 1949, p. 182; see also *supra*, Chapter One.

[5] "... the Court considers that words 'principles of international law' as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of nations ... it is impossible ... to construe the expression 'principles of international law' otherwise than as meaning the principles which are in force between all independent nations ..." Judgment in the *Lotus* case, *PCIJ Series* A 10, p. 16-17.

[6] SØRENSEN, *Les sources*, pp. 112-115.

[7] This view is shared also by Professor SØRENSEN, *ibid.*, pp. 115-117. While, for instance, Professor ROUSSEAU considers those principles as different from conventional and customary rules and from principles mentioned in Subparagraph 1(c) of Article 38 of the Statute of the Court. ROUSSEAU, *Principes*, pp. 913-914. As an example of application by the Court of the term "principle of international law" distinctly in the meaning of customary rule, the *Lotus* case might be cited: "The Court... in the fulfilment of its task of itself ascertaining what the international law is ... has included in its researches all precedents, teachings and facts ... which might possibly have revealed the existence of one of the principles of international law ... *PCIJ Series* A 10, p. 31. These principles have been discussed in detail by, for instance, Professor SØRENSEN (*Les sources*, pp. 112-122), ROUSSEAU (*Principes*, pp. 913-924), SCHWARZENBERGER (*Fundamental Principles*, *passim*), CHENG, pp. 1-26.

PARTICULAR CUSTOMARY RULES

In Subparagraph 1(b) of Article 38 of the Statute of the Court, only a general practice is mentioned, hence to the exclusion of particular customary rules This has been strongly criticized by, among others, Professor BASDEVANT who demanded a broad interpretation of that article [8] This demand was, it seems, met by the Court, a fact which ultimately led to definite recognition of particular customary rules

As example of ascertainment such a rule by the Court, without however using the term "particular custom," one may mention the Advisory Opinion concerning the *Free City of Danzig and the International Labour Organization* In that opinion, a "practice" is mentioned which seems to be "well understood by both Parties "[9] Similarly, in the Opinion on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, a particular customary rule is involved binding only the States—members of the Commission.[10]

Regional—and hence particular—custom was expressly mentioned for the first time only in 1950 in the *Asylum* case.[11] This precedent was referred to in the case concerning the *Rights of Nationals of the United States of America in Morocco*, in which "regional custom" was replaced by the term "local custom "[12]

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[8] BASDEVANT, *Regles*, p 486

[9] *PCIJ Series* B 18, p 13 See also *supra*, p 33

[10] *Ibid*, B 14, p 17 See SØRENSEN, *Les sources*, p 104

[11] "The Colombian Government has finally invoked 'American international law in general' In addition to the rules arising from agreements which have already been considered, it has relied on alleged regional or local custom peculiar to Latin American States

The Party which relies on a custom of this kind must prove " *ICJ Reports* 1950, p 276 See also *supra*, p 29

[12] ' when dealing with the question of the establishment of a local custom peculiar to Latin-American States, [the Court] said ' *ICJ Reports* 1952, p 200 To denote particular rules, both the Court and writers use interchangeably the terms "regional custom" and "local custom", the former, however, rather for customs between several States belonging to one region, the latter—customs referring to two States only *Cf* Paul GUGGENHEIM, *Lokales Gewohnheitsrecht*, pp 327-334, and G COHEN-JONATHAN, 'La coutume locale," *Annuaire français de droit international*, v VII (1961), pp 119-140

The most decisive recognition of particular customary rules may be found in the *Right of Passage over Indian Territory* case of 1960 In the Judgment, the Court even explicitly rejected the argument raised by India that customary rules between two States only are inadmissible

> it is objected on behalf of India that no local custom could be established between only two States [13] It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States [14]

Those precedents show beyond all doubt that the Court, contrary to the provision of Subparagraph 1(b) of Article 38 of the Statute, has acknowledged customary rules binding a few or even only two States

Among particular customary rules may be included also the rules binding the entire international society in relation to one or a few subjects of international law Such rules might be called exceptional customary rules of international law, since they amount to an exception from general principles for the benefit of one or several States [15] To such rules belong all sorts of historic rights, as, for instance, the right to historic bays or the

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[13] This objection was raised by Professor GUGGENHEIM, acting on behalf of Indian Government in this case He explained his opinion in detail in the article "Lokales Gewohnheitsrecht COHEN-JONATHAN, on the other hand, did not share this opinion He, to be sure recognized bilateral customary rules of international law, but distinguished them from general and regional rules from the point of view of burden of proof COHEN-JONATHAN, *La coutume*, *passim*

[14] *ICJ Reports* 1960, p 39

[15] A similar division has been introduced by Sir Gerald FITZMAURICE It seems necessary to distinguish three cases 1 Where a general rule of customary law is built up by the common practice of States 2 Where a special right different from, and in principle contrary to, the ordinary rule of law applicable is built up by a particular State or States, through a process of prescription leading to the emergence of a usage or customary or historic right in favour of such State or States 3 Special rights, i e such as would not exist under ordinary law, may, however, be acquired by one State, not as against the world in general (as under 2), but against another particular State " FITZMAURICE, *The Law and Procedure (1951-54)*, pp 68-69 See also MacGIBBON, *Customary International Law*, p 122

special delimitation of the territorial sea For example, Sweden has enjoyed the right of exceptional (4 mile wide) territorial sea and Norway, as confirmed by the Court in the *Fisheries* case, is entitled to an exceptional method of delimitation of the basic line [16]

Also, rights to territory not based on treaty can be caracterized as exceptional customary rules, since for the acquisition of such rights the same conditions are necessary as in the case of customary right—that is, actual exercising of the right on the said territory (hence practice) and its toleration by the other members of international society An example may be found in the case of the *Minquiers* and *Ecrehos Inslads* The Court took as evidence of the rights to those islands primarily the practice of one party,[17] (even including medieval precedents) and acquiescence in that practice by the other party to the dispute [18]

Among authors who include sovereign rights to territory in international customary law are Professors SØRENSEN and LAUTERPACHT Sir Gerald

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[16] See EHRLICH, *Prawo*, p 525, *ICJ Reports* 1951, pp 130,139 GRZEGORCZYK has given the following definition of historic bays "A historic bay is an internal bay over which littoral States exercise sovereign rights based upon a geographical title proved by an historic title " By historic title, GRZEGORCZYK understands "constant and peaceful exercising of sovereign rights on a certain bay by littoral States without opposition on the part of other States " Mieczysław GRZEGORCZYK, *Zatoki historyczne, Studium prawno-międzynarodowe*, praca doktorska, Krakow 1961, (typed), p 170

[17] The Court declared, *inter alia* "Of the manifold facts invoked by the United Kingdom Government the Court attaches, in particular, probative value to the acts which relate to exercise of jurisdiction and local administration and to legislation and periodical official visits to the Ecrehos since 1885 *ICJ Reports* 1953, p 65, see *ibid*, p 64-66

[18] Here is the Court's conclusion, which confirms the customary character of the rights which were the subject of dispute "The Court, being now called upon to appraise the relative strength of the opposing claims to sovereignty over Ecrehos in the light of the facts considered above, finds that the Ecrehos group in the beginning of the thirteenth century was considered and treated as an integral part of the fief of the Channel Island which were held by the English King, who in the beginning of the fourteenth century exercised jurisdiction in respect thereof The Court further finds that British authorities during the greater part of the nineteenth century and the twentieth century have exercised State functions in respect to the group The French Government, on the other hand, has not produced evidence showing that it has any valid title to the group *Ibid*, p 67 See also *PCIJ Series* A/B 53, p 44

FITZMAURICE and Professor PINTO extend such law to embrace historic and prescriptive rights in general [19]

OTHER CRITERIA OF DIVISION OF CUSTOMARY RULES

In addition to dividing up customary rules according to their range of validity, it seems useful to discern rules which regulate for the first time a certain branch of international life from those which only abrogate, amend or supplement existing rules [20]

As an example of the former the developing customary rules concerning outer space may be cited These rules, disregarding certain legal fictions extending State sovereignty "*usque ad coelum*" regulate for the first time a branch of reality which until recently it was impossible to regulate by law at all Among typical customary rules amending old ones may be included the rules concerning continental shelf, since they do but extend the rights of the littoral States [21]

It is possible, of course, to take the view that, formally speaking every new rule deletes or amends already existing rules For every rule to some extent limits the primordial liberty accorded to States by international law [22] In practice, however, there is undoubtedly a difference between cases involving a rule which regulates some branch of life untouched by the law and cases involving a rule which is in open conflict with

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[19] " the acquisition of a historic right by prescriptive means is merely a special case of the creation of right by custom or usage " FITZMAURICE, *The Law and Procedure (1951-54)*, p 39, see also *ibid*, p 31 note 3 A similar opinion, even with express reference to Sir Gerald FITZMAURICE, is represented by Professor MacGIBBON " historic, prescriptive and customary rights share common process of development " MacGIBBON, *Customary International Law*, pp 119-120 Professor PINTO wrote deliberately 'Source reconnue par le droit international, la coutume, cree, transforme, eteint les regles et les obligations, conformement a son regime juridique propre Le recours a la prescription est donc inutile " Roger M PINTO, "La prescription en droit international,' *RCADI*, v 87 (1955-I), p 449 Cf BENTZ, p 85

[20] Professor MORELLI divides international customs into introductory (*introductive*) and abrogative (*abrogative*) MORELLI, *Cours*, p 453

[21] See BIERZANEK, *Morze*, pp 280-282

[22] "If there is no norm imposing upon the State (or another subject of international law) the obligation to behave in a certain way, the subject is under international law legally free to behave as it pleases KELSEN, *Principles*, p 305

preceding rules.[23] Whereas in the former case the ascertaining organ may be satisfied with even weak evidence of the existence of such a rule,[24] in the latter the requirements of necessity will be more rigid, because the new factor of comparison of the binding force of the previous rules with that of the new one comes into play.

Some writers question the very existence of an abrogative power of international customs and require as a condition of existence of a customary rule precisely its conformity with the prevailing law. In the International Law Commission, such a view was, as we already know, represented by HUDSON. Among the elements necessary to the existence of customary rules of international law he mentioned that the practice should be required by, or consistent with, the prevailing international law. Other members of the Commission, however, rightly exposed the false reasoning which lead to such opinion.[25]

Indeed, a static conception of international customary law which limits its abrogatory power does not seem justified. One cannot exclude the evolution of any rule. One must, however, expect more rigorous requirements to be involved in the case of custom which is in conflict with, deletes, or amends old rules.

Among other divisions of customary rules, reference should be made to the classification by GIANNI into "custom in the narrower sense" and "custom in the broader sense" (*coutume dans le sense restreint*; *coutume dans le sens large*). Among the former that writer includes customs com-

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[23] This problem is linked also with the institution of *desuetudo*—that is, the extinction of a treaty or of its parts by means of mutually tolerated abstentions—hence custom. See SCHWARZENBERGER, *International Law*, pp. 535-537.

[24] A sort of confirmation of this view may be found in the following pronouncement of the Court referring to sovereign rights in the *Legal Status of Eastern Greenland* case: "It is impossible to read the records of decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the exercise of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim." *PCIJ Series* A/B 53, p. 46.

[25] See *supra*, Chapter One. LAUTERPACHT, limiting the abrogative power of custom referred to the principle *ab injuria jus non oritur*. LAUTERPACHT, *Sovereignty*, p. 398. Such maxims have been sharply and it seems rightly criticized by Professor Schwarzenberger in "The Fundamental Principles of International Law," *RCADI*, v. 87 (1955-I), pp. 195-385.

prised of practice accompanied by *opinio juris sive necessitatis* conceived as common legal conviction (*conscience juridique commune*). "Custom in the broader sense," on the other hand, includes rules binding also States which have not participated directly in the formation of those rules —for example, general principles of law referred to in Subparagraph 1(c) of Article 38 of the Statute of the Court.[26] It seems, however, that this division is not essential in view of the fact that the moment of formation of custom is impalpable,[27] and hence it is often difficult to state whether the practice of a given State actually participated in the evolution of the custom or only joined on to an already existing custom.

To avoid misunderstandings, it must be stressed again that every customary rule can be expressed in two forms—as right and as duty. These two forms are, however, not two different rules but only correlatives of one and the same.[28]

The Problem of Hierarchy of Customary Rules

Closely linked with the classification of customary rules into kinds is the problem of the appropriate hierarchy. In particular, whether the principle *lex specialis derogat legi generali* applies to international customary law.[29]

Here, a general remark is first necessary. The principle *lex specialis derogat legi generali* is applicable in particular to those cases in which *lex specialis* distinctly follows from a more general rule or where it constitutes an exception from such a general rule—hence, where *lex specialis* is posterior to the general rules. These conditions are fulfilled in municipal law, in which the principle originates. Modern municipal law, in general, constitutes a certain hierarchic system of rules, where the binding force of special rules is based upon more general rules of higher order. More-

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[26] Gianni, pp. 119-120, 135.

[27] See Chapter Two.

[28] Ross, *Textbook*, p. 27. See the remark quoted above on Professor MacGibbon's article. *Infra*, p. 18.

[29] See Basdevant, *Règles*, p. 494. See also Georges Scelle, "Essai sur les sources formelles du droit international," *Recueil Gény*, v. III, p. 413; Verdross, *Völkerrecht*, p. 129; Schwarzenberger, *The Fundamental Principles*, pp. 195-385.

over, in a modern State, in the case of new general rules being instituted, to avoid doubts, express provisions are issued abrogating the old special rules While customary law—and the same can be said of almost the entire international law—is formed in a decentralized way.[30] This law, then, is not an arranged system of correlated rules, but, at best, a collection of rules of various origin more or less arbitrarily systematized by writers [31] Thus a general application of the principle *lex specialis derogat legi generali* to international law is out of the question In particular, it can be applied to international customary law only when there is no doubt that a certain particular customary rule follows from a general one or constitutes an exception to such.

As an example of such special rule may be cited the Norwegian system, already mentioned above, of delimitation of the territorial sea.[32] The principle *lex specialis derogat legi generali* was also applied in the *Free Passage* case The Court, ascertaining a local customary right in favour of Portugal, considered it unnecessary "to examine whether general international custom or the general principles of law accepted by civilized nations may lead to the same result "[33]

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[30] *Cf* KELSEN, *Principles*, pp 20, 402

[31] A true system of rules is being constituted by the rapidly growing set of provisions based upon the United Nations Charter *Cf Ibid*, p 403

[32] See *supra*, p 35

[33] "Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal has acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result " *ICJ Reports*, 1960, p 43 The Court even more decisively came down on the side of according higher rank to particular custom in the following passage "Where the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations *Such a particular practice must prevail over any general rules* " *Ibid*, p 44 (Italics added)

Chapter Four

CUSTOMARY RULES AND OTHER RULES OF INTERNATIONAL LAW

The Arrangement of Kinds of Rules in Article 38 of the Statute of the Court

For a better understanding of the specific features and importance of customary international law, it is essential to determine its relation to other kinds of rules. This problem emerged to some extent during the elaboration of Article 38 of the Statute of the Court.

In the final draft of the Advisory Committee of Jurists, it was even expressly emphasized that the Court must apply in the accepted order the kinds of rules enumerated.[1] Later on, however, as a result of discussions in the Subcommission of the Third Committee of the League of Nations First Assembly, the provision was deleted.[2]

The discussion on this subject in the Advisory Committee was short and did not clear up the most important question—as to what were the criteria by which the order of the kinds of rules in Article 38 were established. Some relevant information is to be found in Baron Descamps' comment on his proposal, which included the following: "All agree that, when rules are expressly laid down by a general or special treaty between the parties, it is the first duty of a judge to apply them."[3]

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[1] "The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following..." *Committee*, p. 678. For the final text of Article 38, see supra, p. 20.

[2] Société des Nations, Actes de la première Assemblée, Séances des Commissions I, pp. 385 and 534. See also Sørensen, Les sources, p. 238; Schwarzenberger, International Law, pp. 54-57.

[3] *Committee*, p. 322.

Next, he mentioned the importance of customary law which he maintained, however, must "be followed by the judge in the absence of expressed conventional law."[4] In the course of the debates, Descamps once more stressed that the Court should not "apply international custom and neglect the treaty. If a well known custom exists, there is no occasion to resort to a general principle of law. We shall indicate, said Descamps, an order of natural *précellence*, without requiring in a given case the agreement of several sources."[5]

Lord Phillimore (Great Britain) argued that the proposed order "simply represented the logical order in which these sources would occur to the mind of the judge."[6] De Lapradelle (France) and Altamira (Spain), on the other hand, were of the opinion that "this expression [in the order following] might be considered superfluous, since the order in which the sources should be consulted was already indicated in the enumeration."[7]

Opposed to there being a duty to adhere to the arrangement proposed was Ricci-Busatti (Italy). He thought that "the judge should consider the various sources of law simultaneously."[8] According to him, the reservation concerning order of succession is superfluous, since it might suggest the idea that the judge was not authorized to draw upon a certain rule before having first applied the rules enumerated first. "This would be, in Ricci-Busatti's opinion, a misinterpretation of the Committee's intention."[9] Hagerup (Norway) shared this opinion and "wished to have the expression *'en ordre successif'* suppressed."[10]

At the end of the discussion in the Committee, Baron Descamps himself declared that he "wished to keep the expression, but attached little importance to it."[11]

Although, in face of divergent opinions it is difficult to state with certainty, what finally did preclude the arrangement of kinds of rules

[4] *Committee*, p. 322. See *supra*, p. 22, note 9.

[5] *Ibid.*, p. 337.

[6] *Ibid.*, p. 333.

[7] *Ibid.*, s. 338.

[8] *Ibid.*, 332.

[9] *Ibid.*, pp. 337, 338.

[10] *Ibid.*, p. 338.

[11] *Ibid.* See Manley O. HUDSON, *La Court Permanente de Justice Internationale*. Paris 1936, pp. 192-194, 628.

enumerated in Article 38, the fact that the author of the original draft himself did not attach much importance to the enumeration shows that there were no essential considerations of a theoretical character at stake. but rather only practical ones.[12]

In general, doctrine is unanimous that the binding force of conventional and customary law is the same.[13] For the judge, however, the difference in application of conventional and customary rules is enormous. Suffice it to mention, for instance, the much greater precision and ease of determination of content and range of validity in the case of conventional rules and, in consequence, the much stronger—by comparison with other rules—persuasive impact for the Court and the parties.[14] Professor SØRENSEN rightly states that a judge prefers such a rule as requires a minimum of definition before it is applied to a given case.[15]

Thus, it seems that objectivation and, above all, verifiability of the will of the parties—strongest in conventional law—are the most decisive criteria of the arrangement of the kinds of rules in Article 38. For an international court, these criteria are decisive, since its authority and the authority of its decisions depends on the will of the parties. For, we must not forget that in international life, whether we like it or not, the will of States is still conclusive and that, in particular, the organs of international justice still act exclusively upon authorization from and initiative taken by

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[12] See SØRENSEN, *Les sources*, p. 244; see also HAEMMERLÉ, p. 141; VISSCHER, "Contribution à l'étude des sources du droit international," *Recueil Gény*, v. III, p. 397.

[13] "Tout le monde est d'accord pour leur reconnaître en principe même valeur." Louis Le FUR, "Règles générales du droit de la paix," *RCADI*, v. 54 (1935-IV), pp. 208—209; "La doctrine reste en générale attachée à l'idée que le traité et la coutume ont la même force juridique et, partant, une valeur dérogatoire réciproque." ROUSSEAU, *Principes*, p. 860. Similarly Professor TUNKIN stated: "The binding force of conventional and customary norms of international law is the same." TUNKIN, *Co-existence*, p. 21; a different view represents Professor LUKIN, p. 103.

[14] See SØRENSEN, *Les sources*, pp. 243-244; SCELLE, *Précis*, v. I, p. 53. "Les traités écrits constituent en règle quelque chose de plus sur et de plus palpable." Karl STRUPP, "Les règles générales du droit de la Paix," *RCADI*, v. 47 (1934-I), p. 331; see also VISSCHER, *Contribution*, p. 397; HAEMMERLÉ, p. 141.

[15] "... le juge préfère celle qui exige le moins de concrétion et de précision pour être conforme aux faits de la cause." SØRENSEN, *Les sources*, p. 249; see also VERDROSS, *Völkerrecht*, p. 127.

the parties.[16] Moreover, failing an effective international executive organ, the execution of judicial decisions also still depends, in fact, on the good-will of the losing party. Hence, when there are no other more important considerations, conventional law, being the most univocal expression of what the parties have agreed to, will always be considered first.[17]:

There are only few examples in the practice of the Court of express application of the hierarchy established in Article 38. As a rule, however, the Court has taken as a basis conventional law wherever there was a treaty binding the parties. For example, in the Advisory Opinion on the *Question concerning the Acquisition of Polish Nationality* of 1923, the Court declared:

> Though generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the treaty obligations referred to above.[18]

Similarly in the Advisory Opinion concerning the *Free City of Danzig and the International Labour Organization*:

> The general principles of international law apply to Danzig subject, however, to the treaty provisions binding upon the Free City and the decisions taken by the organs of the League under these provisions.[19]

As has been pointed out by Professor SCHWARZENBERGER, the Court has not always been consistent. For instance, in the Advisory Opinion on *Reparation for the Injuries Suffered in the Service of the United Nations* it seems as if priority (over conventional rules) was given to principles

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[16] Charles de VISSCHER, "Reflections on the Present Prospects of International Adjudication," *AJIL*, v. 50 (1956), *passim*.

[17] This argument has been raised by the drafter of Article 38 himself. See *supra*, p. 22. Professor HUBERT writes: "The arrangement of groups of rules, as they are enumerated in Article 38 paragraph 1, indicate a hierarchy of rules. The rules of created law are the most important, the rules of ascertained law (customary law) come only next in order. This is in agreement with the prevailing doctrine and with the international reality. For, the will of States which have concluded certain international conventions is still of decisive importance in international relations." HUBERT, *Prawo*, v. II, p. 14. See also FITZMAURICE, *Some Problems (1951-54)*, p. 173.

[18] *PCIJ Series* B 7, p. 16.

[19] *Ibid.*, A/B 44, pp. 23-24. See also the separate opinion presented by Judge Anzilotti in the Case concerning the *Legal Status of Eastern Greenland, ibid.*, A/B 53, p. 76.

of international law.[20] Professor SCHWARZENBERGER sees in it "the tendency to assume that the parties to any particular treaty have not intended to depart from the rules of international customary law." If, then, there are no express provisions to the contrary, treaties are likely to be interpreted in the light of customary principles of international law.[21]

Enumerated third in Subparagraph 1(c) of Article 38 are what are called the general principles of law accepted by civilized nations. Their being placed after customary rules is justified by the fact that this heading was originally contemplated by the drafters of the Statute as an additional authorization for the Court to seek a basis of decisions outside positive rules of international law, in order to avoid *non liquet*. Further, the same arguments may be adduced for putting such principles after customary rules, as those which were used to justify the placing of the latter after conventional rules. General principles are certainly the most abstract, and hence the will of States is least objectified in them.

The problem of order of priority of those rules will be much more complicated if to general principles mentioned in Subparagraph 1(c) are subjoined fundamental principles, allegedly binding as *jus cogens*. An analysis of that question exceeds, however, the scope of the present study.[22]

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[20] "The Court is here faced with a new situation The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law." *ICJ Reports* 1949, p 182

[21] See SCHWARZENBERGER, *International Law*, p. 57

[22] See also *infra*, p 112 From the point of view of the application of rules, we should distinguish the hierarchy of rules suggested especially by the normativistic school on the basis of their binding force. According to the latter school, treaty law is alleged to lower in hierarchy because its binding force is based upon the principle *pacta sunt servanda*. Professor KELSEN writes: "That a treaty is law-creating fact, that by a treaty obligations and rights are established, or in other terms that a treaty has binding force, is due to rule of customary international law which is usually expressed in the formula *pacta sunt servanda*. This rule is the reason of validity of treaties With respect to its reason of validity, the conventional law is inferior to the customary law The latter represents a higher level in the hierarchical structure of the international legal order than the former." KELSEN, *Principles* p. 314. See also GUGGENHEIM, *Traite*, v. I, p 57 Without questioning the importance of this principle, primarily as a fundamental principle of

Delimitation of Customary and Conventional Rules

In order to bring into fuller relief the features which distinguish customary from conventional rules, much more important than the question of hierarchy is to draw the border line between those two kinds of rules of international law. This problem has not so far been much discussed. In fact, neither for traditional voluntarists nor for naturalists of various schools is there any essential difference between a conventional and a customary rule. For the former, the customary rule constitutes no more than a modification of a conventional rule, where the will of the parties is not expressed in words but by facts of conduct. For the latter, both, conventional and customary rules are but an expression of objective law, independent of the will of States.[23]

It suffices, however, to confront the elements which contribute to the creation of each of those kinds of rules to see that the customary rule is by no means a modification of the conventional rule, but differs from it essentially.

As we know, the formation of international custom, and hence the validity of a customary rule, requires the existence of an already regulated area of collaboration between States in the form of qualified practice and of tacit, presumed acceptance of such practice as an expression of a legal duty or right by the subjects concerned. On the other hand, the international conventional rule is created by an express active will to regulate a certain area of reality not yet arranged according to the needs and intentions

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international morality, which has already been codified in the United Nations Charter, it is hardly possible to agree with the view indicated above. From a logical point of view, the principle *pacta sunt servanda* as a rule on rules is certainly of "higher level", but this does not necessarily mean that it is reason of validity or older as a legal rule, in view only of the existence in it of the word "pacta". Cf. Gould, p. 40; Lukin, p. 56.

[23] Professor Visscher is right when he writes about the traditional voluntarist conception of international law as follows: "Pour avoir tenté de ramener la coutume internationale à la fiction d'une convention tacite entre Etats, cette doctrine s'est condamnée à ne pénétrer ni son fondement, ni les véritables ressorts de son action. Au lieu d'observer les faits dans leur réalité et en prise directe, elle les a envisagés d'un point de vue arbitrairement choisi d'après un postulat non vérifié." Visscher, *Coutume*, p. 356. Yet one might add that this criticism might be raised also against other theories.

of the parties.[24] In both cases, then, the existence of the two elements is necessary: an element of will, and what might be defined as an element of reality to which such will refers.[25]

The most essential difference between conventional and customary rules lies, it seems, precisely in different elements of will and reality in the two kinds of rules. Whereas in the event of creation of a conventional rule, the will of the subjects is operative—that is, in general, aims at changing the *status quo*—and is at the same time clearly manifested; in the event of customary law, such will reduces to mere tacit acquiescence in the practice. The same concerns the element of reality to which both kinds of rules refer. Whereas the creation of a conventional rule refers, in general, to an area of reality not yet regulated according to the needs and wishes of the parties, the formation of a customary rule is linked with a reality at least partly regulated in the form of qualified practice.[26]

To illustrate this difference between customary and conventional rules, we may have recourse to a certain simplified model, and present the whole

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[24] It is difficult to include among typical treaty rules those which consist only in the formulation and confirmation of certain already existing regularities in practice (for example, the codification of customary rules). They will constitute rather intermediate rules.

[25] "Le terme 'droit positif' ne peut point être conçu sans la présence de certains phénomènes psychiques ayant rapport à certaines actions humaines." Frede CASTBERG, "La méthodologie du droit international public," *RCADI*, v. 43 (1933-I), p. 316. "A legal rule ... in principle combines an 'ought' and an 'is'." Quincy WRIGHT, "The Strenghtening of International Law," *RCADI*, v. 98 (1959-III), p. 129. "A chaque norme du droit international correspond un processus réel ... auquel la conception normative vient conférer le caractère spécifique de règle juridique." GUGGENHEIM, *Traité*, v. I, p. 16.

[26] Professor Visscher characterizes this difference somewhat otherwise: "A la différence de la coutume, le traité est l'oeuvre, sinon toujours réfléchie, du moins délibérée, de la volonté des Etats. Tandis que dans le processus coutumier la règle de droit s'induit par la voie du raisonnement d'une série d'attitudes dont la coordination et la légitimation ne s'établissent dans la perspective du droit qu'à posteriori, dans le traité, au contraire, c'est au départ même que la volonté de créer du droit s'affirme de façon à la fois directe et expresse." VISSCHER, *Coutume*, p. 589. That writer quotes further a correct statement by Hauriou as regards this point: "... le traité international, par l'ampleur des intérêts qu'il embrasse et des forces mises à son service, est probablement la manifestation la plus frappante de la volonté humaine attaché à s'emparer de l'avenir pour la soumettre à un certain ordre." *Ibid.*, pp. 589-590; see also *ibid.*, *Cour générale*, p. 476.

of international law in the form of a parabola between two axes of coordinates. The vertical axis would denote the changing element of will, starting from passive toleration up to decisive, active expressions of will. The horizontal axis, in turn, would represent the changing reality from the most chaotic—from the point of view of the needs of the subjects—through reality actually already regulated by the subjects themselves (that is, qualified practice) up to a natural order which does not require even toleration, since it imposes itself.

According to this scheme, the whole international law would fall within two limits, between pure will and pure fact, or, in other words, between the impossibility of a legal rule arising and the absence of necessity of such a rule. There cannot, for instance, arise a binding conventional rule dividing the legendary Atlantis into sectors, since no such isle exists. On the other hand, there has been no need (at least so far) for a rule securing to States free utilization on their territory of solar energy, because such utilization is exercised without any objections and is not questioned by anybody, hence it does not require any (even passive) toleration.[27]

As may easily be seen, in this model, conventional rules correspond to the arm of the parabola approaching the vertical axis—that is, where the yet unregulated reality is accompanied by active and clearly manifested will. Customary rules, on the other hand, correspond to the arm approaching the horizontal axis, where the already factually regulated reality (qualified practice) needs only passive acquiescence to form a custom and, hence, a customary rule of international law.

The demarcation point between customary and conventional rules would fall in the section of the parabola where passive toleration of factually regulated reality passes into active will to change the as yet unregulated reality.

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[27] In connection with the limits of law, a remark comes to mind that man's interference in nature in a constructive, and unfortunately, also a destructive sense is making such rapid progress that it is increasingly difficult to name sections of life which certainly would not require protection or regulation on an international scale in the immediate future.

The Necessity to Discern Intermediate Rules

Although the delimitation of conventional and customary law attempted here seems to be relatively precise having regard for the possibilities in this respect of the social sciences, that by no means implies that the border line traced is sharp. On the contrary, in practice, it is found that many rules on closer examination give trouble as to their classification as between the two kinds of rules. Those are the rules which, because of the variety of elements which have contributed to their formation, lie in the no-man's-land between customary and conventional rules. Moreover, the conclusion is forced on us that, as time goes on, numerous—especially customary—rules lose their character as such and become what might be defined as intermediate or mixed rules.

Customary rules in the course of time become more and more often expressly accepted in official pronouncements, treaties, etc., by State organs and the organs of international organizations. In addition, such rules undergo codification, or at least attempts at codification. In this way, there arise multilateral conventions, or drafts of such conventions, containing, to be sure customary rules which are already binding, but adequately adjusted to modern needs and conditions. It is a truism that every attempt at codification introduces new elements.

In short, one might say that elements of active will agglomerate on customary rules and thus more or less extend the range of validity of the rule in question over a reality not yet regulated by practice. The new rule which arises in consequence of such agglomeration of various elements is neither any longer a typical customary rule nor yet a conventional one, and, what is more important, its binding force is not based exclusively on practice acquiesced in. It should be further added here that the increasing practice and elements of active will constitute, with the original rule, an inseparable entity. The place of such an intermediate rule on the parabola of rules of international law tends to shift more and more towards the point of demarcation with conventional rules.

As examples may serve the oldest and most important customary principles such as that of *pacta sunt servanda*, which was confirmed by the great Powers of the European Concert at the London conference

of 1871,[28] and finally codified in the United Nations Charter. Mention may also be made of the customs of war on land comprised in the Brussels Declaration of 1874. This Declaration served later as a basis for the final codification of the law of war in the Hague conventions of 1907. Further, such principles as freedom of the high sea or diplomatic immunities can hardly be considered nowadays as purely customary, especially since they have been codified in multilateral conventions. Neither can they be treated as typical conventional rules merely because they have been codified.[29]

Conventional rules undergo similar evolution but in the opposite direction. In the course of their application, they become overgrown with practice, which supplements and even amends them with the acquiescence of the parties, hence, by means of custom. To argue that such practice discloses the intentions of the parties only at the moment of conclusion of the treaty is pure fiction. Conventional rules, together with the practice of them, originate a new resultant rule, more o less differing in content and range of validity from the original rule. Consequently, the place of such originally conventional rules shifts with the passage of time towards customary rules.

Examples of the process described above are numerous. Suffice it to recollect here the history of the Vienna regulations concerning the ranks of diplomatic envoys. In the course of a century and a half, those principles have become so overgrown with practice that today it is impossible to indicate the category of rules among which they should be classified. Certainly the organ which is to apply them, would refer to both, customary and conventional evidence as well, if it considered any such reference as necessary.

From among the latest examples of customary evolution of conventional rules, the evolution of paragraph 3 of Article 27 of the United Nations Charter may be cited. The unwritten amendment introduced by practice consists in that the abstention of a permanent member at the meeting

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[28] *Nouveau Recueil Général des Traités*, 1 série, v. XVIII, p. 275.

[29] As a typical example may serve Paragraph 6 of Article 36 of the Statute of the Court. See p. 41.

of the Security Council is not assimilated to the exercise of the right to veto.[30]

A similar case was mentioned in one of the recent Advisory Opinions of the Court (1962) concerning Article 11 paragraph 2 of the United Nations Charter. The Court explained the term "action" in that paragraph in the light of the practice of the Organization.[31] This Opinion met with strong criticism, directed, however, not against the possibility of amendment of the provisions of the Charter by tolerated practice but against considering the practice involved in that specific case as fulfilling the condition just mentioned. For instance, Judge Korecki in his separate opinion did not at all question the importance of practice in general; he only denied that in the particular case the practice had been sufficiently consistent By way of justification he quoted the protests and reservations raised by the Soviet Union to resolutions of the United Nations organs and the factual non-execution of those resolutions by several Members.[32] Thus, the arguments against the correctness of the Court's opinion not only do not undermine the possibility of amending the provisions of the Charter by means of tolerated practice, but even confirm such possibility. Further

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[30] "It is already well known that an unwritten amendment to the Charter has taken place in the practice of the Security Council, namely, to the effect that the abstention of a permanent Member present at a meeting is not assimilated to the exercise of the right to veto " *ICJ Reports* 1962, p 291 See *ibid*, pp 292, 300, see also TUNKIN, *Voprosy*, pp 111-112 Professor LACHS writes as regards this unwritten amendment as follows "La vie a cree l'interpretation N'est-il point significatif que les grandes Puissances aient su se mettre d'accord sur ce point que l'abstention ne constitue pas le veto?" Manfred LACHS, "Le probleme de la revision de la Charte des Nations Unies," *RGDIP* 1957, no 1, p 62 Certainly this is correct But it is hardly possible to agree with the definition of the above cited unwritten amendment as "interpretation" since it is evidently at variance with Article 27 of the Charter, which requires a unanimous vote of all permanent members of the Security Council

[31] The Court declared, *inter alia*· "The practice of the Organization throughout its history bears out the forgoing elucidation of the term 'action' in the last sentence of Article 11, paragraph 2 [of the Charter] " and it arrived at the conclusion that "the argument which seeks, by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect to the maintenance of international peace and security, is unfounded " *ICJ Reports* 1962, p 165

[32] *Ibid*, pp 255, 260, 262, 263, 266, 271, 278, 279, 280

confirmation is to be found in the separate opinion of Judge Winiarski, President of the Court, who said, *inter alia*:

> The way in which the parties have consistently applied a convention may certainly provide evidence of their intention for the purpose of its interpretation. Furthermore, if a practice is introduced without opposition in the relations between the contracting parties, this may bring about, at the end of a certain period, a modification of a treaty rule, but in that event the very process of the formation of the new rule provides the guarantee of the consent of the parties.[33]

The value of distinguishing intermediate rules has also recently been pointed out by certain writers. For example, Professor SØRENSEN showed that the resolution of 11 December 1946 confirming the legal principles in the Charter of the Nuremberg Court and in its judgment was not, to be sure, one of the "sources" enumerated in Article 38 of the Statute of the Court, although they had a fundamental significance for ascertaining the rule of international law. In Professor SØRENSEN's opinion, a resolution which had not been based upon earlier practice or jurisprudence could not create a new rule. "Such resolution is, according to that author, halfway between a treaty and custom." As a treaty, it is expression of the will or common opinion of the States, not requiring however declaration by all parties. As custom, such resolution presupposes certain links with past practice. Its legal significance does not, however, depend on formal proof of its concordance with practice.[34] It should still be added here that the general customary rule so confirmed is neither any longer customary rule *sensu stricto*, nor a conventional rule, but, to be precise, a sort of inter-

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[33] *Ibid.*, pp. 230-231; see also *ibid.*, pp. 231-234.

[34] "Une résolution ne pourrait pas créer une norme juridique nouvelle sans fondement dans la pratique ou la jurisprudence antérieure. La résolution se place ainsi à mi-chemin entre une convention et une coutume. Comme la convention, elle est l'expression d'une volonté ou d'une opinion commune de la part des Etats, mais elle n'exige pas la déclaration d'engagement de la part de chacune des parties. Comme la coutume, elle présuppose certains points d'attache dans la pratique antérieure, mais sa valeur juridique est indépendante d'une preuve formelle de sa conformité avec la pratique." SØRENSEN, *Principes*, pp., 99-100. See also Philip C. JESSUP, *A Modern Law of Nations*, New York 1952, p. 46. Elswhere, Professor SØRENSEN even uses the term "treaty of mixed content," but in reference to codifications which embrace provisions reproducing a customary rule supplemented by special provisions of a technical or administrative character. *Ibid.*, pp. 80-81.

mediate rule. Its full ripening as a rule of international law follows from customary practice and conventional elements (active will of States expressed in the resolution of the General Assembly).

The necessity to distinguish the category of intermediate rules follows also from the latest opinions promuglated by Professor TUNKIN. This concerns primarily those conventional rules which by means of custom have extended their validity to embrace other States, or whose content has evolved with tacit agreement of the parties. Professor TUNKIN cites as an example of such evolution that of the principle expressed in the Kellogg Pact and of the rules of procedure of the Security Council (Art. 27 paragraph 2 of the Charter) already referred to.[35]

Certainly, the introduction of a new category of rules might be abandoned if we assume that in each case the prevailing element is conclusive. The emphasis on the existence of intermediate rules seems, however, useful because a large part, if not the majority, of precisely those rules most firmly established in international life belong in fact to such intermediate rules. The differentiation of them contributes, therefore, to a more realistic approach to most fundamental problems of international law.

All that has been said so far about the need to distinguish intermediate rules suggests that, strictly speaking, the problem of classification of rules is by no means so important in international law as it would seem at first glance. Of importance is to ascertain the content and range of validity

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[35] "Slučai izmenenia obyčnych norm meždunarodnogo prava dogovornym putem vesma časti. Novaia, dogovornaia norma vnačale obyčno ochvativaet bolee uski krug gosudarstv, čem staraia, obyčnaia norma. Raširene sfery priznania i deistviia novoi normy neredko proischodit ne tolko dogovornym, no i obyčnym putem, v rezultate čego dla odnich gosudarstv ona možet iavlatsa dogovornoi, a dla drugich, priznavšich jej obyčnym putem, obyčnoi normi. Eto—kakby smešanye obyčno-dogovornye normy." TUNKIN, *Voprosy*, p. 110. Further, Professor TUNKIN writes on the Paris Pact of 1928: "Novoe soderžanie etogo principa bylo priznano opiat—taki častnično dogovornym, častnično obyčnym putem." The amendment to item 3 of Article 27 of the United Nations Charter by means of tacit toleration of practice has been described by Professor TUNKIN as follows: "V praktike Soveta Bezopasnosti v rezultate iavno vyražennogo ili molčalivogo soglasiia členov Soveta ustanovilos tolkovane, soglasno kotoromu vozderžane postoianogo člena Soveta Bezopasnosti pri golosovani ne rasmatrivivaetsa kak golosovania protiv i ne mešajet priniatiu rešenia." *Ibid.*, pp. 111-112. See also Kazimierz LIBERA, *Zasady międzynarodowego prawa konsularnego*, Warszawa 1960, p. 61.

of a rule which can serve as a basis for settling a concrete legal problem or dispute, rather than to which category the rule belongs The rule applied to the settlement of a concrete problem is most frequently a built-up rule to the content and validity of which, both customary and conventional elements have contributed

A similar conclusion, is seems, has been arrived at by the International Law Commission In its Report of 1950 we read

> Perhaps the differentiation between conventional international and customary law ought not to be too rigidly insisted upon A principle or rule of customary international law may be embodied in a bipartite or multilateral agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force, yet it would continue to be binding as a principle or rule of customary international law for other States Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law [36]

Customary Rules and "General Principles of Law Recognized by Civilized Nations"

Subparagraph 1(c) of Article 38 of the Statute of the Court has provoked considerable discussion and is still subject to strong controversies [37]

It was accepted by the Advisory Committee of Jurists in 1920 only after considerable resistance, mainly on the part of the members who were nationals of the great Powers On the other hand, the author of Article 38, Baron Descamps, and jurists of minor countries considered the insertion of that subparagraph necessary to avoid *non liquet* The other members, led by Root and Phillimore, were against such a broad

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[36] *YILC* 1950, v II, p 368

[37] Among authors who have paid particular attention to this problem, reference should be made to Professors Rousseau (*Principes* pp 887-927), Sørensen (*Les sources*, pp 123-150), Schwarzenberger (*Fundamental Principles, passim*), Peretiatkowicz (*Ogolne zasady prawa jako zrodlo prawa międzynarodowego a tendencje kosmopolityczne*, Poznan 1956, *passim*), Lauterpacht (*Development*, pp 158-172), Korecki ("*Obšcie principy prawa*" *w międunarodnym pravie*, Kiev 1957), Lukin, (pp 88-100) and Tunkin (*Voprosy*, pp 146-157) A detailed analysis of the practice of applying such principles may be found in the principal work by Bin Cheng (*General Principles, passim*)

basis of jurisdiction.[38] Root argued that "[nations] will not submit to such principles as have not been developed into positive rules supported by an accord between all States."[39] "America, declared Root, would never give its adherance to a treaty for compulsory jurisdiction outside the limits of recognized rules."[40] Lord Phillimore, on the other hand, thought that the principles mentioned in Paragraph 3 (now: 1(c)) "might be included in point 4, because it was through custom that general principles come to be recognized..."[41]

Paragraph 3 of the project was finally accepted by the Committee only on assurances being given by the drafter that the point would be a safeguard against "relying too much on the judges' own subjective opinion."[42] To Root's objection that the principles varied from country to country, Descamps answered that that might be true as regards certain rules of secondary importance, but not as concerns "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations."[43]

The objections raised against the mention of general principles among the rules to be applied by the future court, together with the explanation by the author of the original project, justify the conclusion that the drafters of the Statute ultimately agreed exclusively to rules of international law already universally known and accepted. Any doubts in this respect were finally removed by the clause added to Article 38 in 1946: "The Court, whose function is to decide in accordance with international law..." These words explicitly limit the application of principles only to such as have been already recognized in international relations.[44]

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[38] See *supra*, p. 23. See also *Committee*, pp. 286-287, 293-296, 308-311, 314-315, 333-334, and 597.

[39] *Committee*, 287.

[40] *Ibid.*, p. 309.

[41] *Ibid.*, p. 334.

[42] *Ibid.*, p. 311.

[43] *Ibid.*, pp. 308-311.

[44] Professor BIERZANEK stressed that this amendment "makes it necessary to interpret the disputed source of international law (Subparagraph c) restrictively. It prevents — in his opinion — the acceptance of the interpretation of Article 38 postulated by some authors, according to which this Subparagraph authorizes the Court to apply national

Subparagraph 1(c) has not, so far, been quoted *in extenso* in the practice of the Court.[45] The Court, to be sure, has applied various principles using different terms—in general, however, without any hint as to their origin. In many cases, it clearly follows from the decisions that which have been at stake are customary rules of international law, while in other cases—precisely certain general principles recognized in the municipal law of the majority of States.[46]

For instance, a principle clearly originating with municipal law, *ejus est interpretare legum cujus condere*, was quoted by the Court in its Advisory Opinion concerning the *Delimitation of the Polish-Czechoslovakian Frontier* (*Jaworzina*) as regards interpretation of a decision of the Conference of Ambassadors[47]: In the Advisory Opinion concerning *Interpretation of Article* 3, *paragraph* 2, *of the Treaty of Lausanne* (*Frontier between Turkey and Iraq*) the Court applied "the well known rule that nobody can be judge in one's own suit."[48]

The best, though only indirect, evidence that the Court applied principles already recognized in international relations is its statement in the 1929 case concerning *Free Zones of Upper Savoy and the District of Gex*:

> Whereas the Court, having reached its conclusion simply on the basis of an examination of the situation of fact in regard to this case, need not decide as to the extent to which international law takes cognizance of the principle of "stipulations in favour of third Parties.[49]

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aw of civilized States or rules of natural law differently understood." Remigiusz BIERZANEK, "Rozstrzyganie sporów międzynarodowych w systemie ONZ," *Państwo i prawo* 1946, fasc. 2, p. 26. See also CHENG, p. 2 note 5.

[45] In the *Free Passage* case, only the term "general principles of law recognized by civilized nations" was cited. Subparagraph 1(c) was referred to only in separate and individual opinions. Judge Krilov, in his dissenting opinion concerning the Judgment in the *Corfu channel* case, mentioned general principles, dropping, however, the expression: "civilized." He declared: "In the present case, the Court cannot found an affirmative reply to ... either on the existing international convention or on international custom (as evidence of a general practice) or again, on any general principle of law (recognized by the nations)." *ICJ Reports* 1949, p. 219.

[46] See *supra*, Chapter One.

[47] *PCIJ Series* B 8, p. 37.

[48] *Ibid.*, B 12, p. 32.

[49] *Ibid.*, A 22, p. 20.

In the *Factory at Chorzów* case (claim for indemnity—jurisdiction) the Court quoted the principle of "estoppel" as "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts."[50]

A procedural principle "admitted in all systems of law" but at the same time "recognized by international decisions" was applied in the *Corfu Channel* case in 1949.[51]

These few examples, especially the last three, show clearly that the Court applied general principles admitted by States in their legal order, principles also recognized, however, in international relations.

A detailed analysis of the problems arising out of Subparagraph 1(c) of Article 38 lies beyond the scope of the present study. It seems, however, that the position adopted by the members of the Advisory Committee of Jurists, the amendment to Article 38, and the examples taken from the Court's decisions and opinions justify the conclusion that the principles which may serve as a basis of judicial decisions, whatever their origin, must fulfil, and do actually fulfil, the requirements of customary rules of international law.[52] If we add, that the Court has not as yet explicitly applied Subparagraph 1(c), we may reach the conclusion that the whole dispute about the question as to whether the principles embraced by that subparagraph constitute a third—different from customary law—category of rules of international law, is somewhat academic.

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[50] *Ibid.*, A 9, p. 31.

[51] "... the victim of a break of international law is often unable to furnish direct proof of facts giving rise to responsibility, such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions." *ICJ Reports* 1949, p. 18.

[52] A similar view was expressed by Scelle in the International Law Commission. Opposing the opinion that the principles referred to in Subparagraph 1(c) refer only to principles of national law, he held that "the Statute of the Court referred ... to the principles of international law as well as to principles of municipal law." According to Scelle that was perfectly logical, since "any principle of international law had its origin in custom, which was actually a repetition by States of acts covered by their municipal law. Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law ... "*YILC* 1949, p. 206.

The authorization of the Court in point 1(c) of Article 38 to apply general principles of law recognized by civilized nations, as completion of positive law, has remained a dead letter [53] Subparagraph 1(c) has not become, as Lauterpacht expressed it, "mortal blow to positivism,"[54] because States still do not agree to the application of rules which have not been expressly or tacitly accepted in the relations between them The Court as if mindful of this, avoids, though perhaps not always consistently, open application of principles whose validity in international law might be questioned.

Certainly, the statement that there is no necessity for explicit separation of general principles of law from customary rules does not preclude the possibility, and even the advantage, of including into international law rules from other normative systems. Neither does it preclude the usefulness of separate treatment of such rules or principles, even if only as a result of their specific origin

Customary Rules and Resolutions of International Organizations

Attention should be paid not only to the kinds of rules enumerated in Article 38 of the Statute of the Court, but also to resolutions of international organizations.

Disregarding the problem as to whether they do or do not constitute a completely new category of rules of international law, in order to define their relation to customary law it suffices to see what elements of will and practice contribute to their binding force.

Generally speaking, the resolutions of organizations are, like treaties, expressions of the active will of States or of organs of organizations acting in their name to regulate a certain hitherto unregulated section of international life. Hence, from the point of view of relation to customary law,

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[53] Lukin arrives at the same conclusion, writing, inter alia, možno z polnom osnovanem utverždat, čto punkt "c" st 38 Statuta Meždunarodnogo Suda OON byl i ostaetsa praktičeski mertvoi punktoi " Lukin, p 100

[54] "En ce qui concerne la science du droit international, [Art 38 1(c)] a porte un coup mortel au positivisme dans l'une de ses plus importantes manifestations, c'est-a-dire dans sa theorie des sources des decisions judiciaires " Lauterpacht, "Regles generales du droit de la paix," *RCADI*, v 62 (1927-IV), p 164

there are no obstacles to comparing to treaty law decisions which bind the members automatically by virtue of the statute.[55]

More complicated is the problem arising in the case of resolutions which do not bind the member-States. This majority of resolutions might be compared to conventional rules only on additional express confirmation, and exclusively in respect of those States which have given such confirmation. As regards resolutions which are non-binding, unconfirmed, factually performed in spite of nonconfirmation, an analogy may be drawn with unratified treaties implemented in spite of non-ratification. This, of course, is a rough simplification. For, while one might dispute whether resolutions, formally not binding, but passed with the required majority of votes, bind at least morally all the members of the organization, in the case of unsigned or unratified treaties, such doubts do not, in principle, arise at all.

The relation of not binding resolutions to customary rules will depend on the votes cast by particular member-States. In other words, on the degree to which their active will is engaged and on their conduct on the passing or rejection of the resolutions. A resolution not binding but later explicitly accepted as binding, would have on the parabola of rules a place analogous to that of treaty rules. A resolution not confirmed but executed in practice will lead to the establishment of a typical intermediate rule. The same applies to rules partly executed in practice, partly ratified by means of resolutions of the organization.[56] As regards States which voted against or abstained but which nevertheless later adhered in practice to the provisions of such resolutions, one might draw an analogy with a customary rule *sensu stricto*, since there exist no traces whatever of active will on the part of those States.

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[55] See Philip C. JESSUP, "Parliamentary Diplomacy, An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations," *RCADI*, v. 89 (1956-I), p. 204; TAMMES, *Decisions*, p. 268; MacGIBBON, *Customary International Law*, p. 128, 144; LUKIN, pp. 105-122.

[56] See *supra*, p. 107, the example given by Professor SØRENSEN.

Chapter Five

ASCERTAINING CUSTOMARY RULES OF INTERNATIONAL LAW

Introductory Note

The problem of ascertaining customs and customary rules of international law has seldom been discussed in isolation from that of the formation of custom, although these two processes—ascertaining and formation—are different, and only to a certain degree influence each other. The manner of formation of custom determines the means of ascertaining it. On the other hand, the action of ascertaining custom, or directly customary rules, influence the further development of custom. This factual interdependence is probably the reason why some authors see no need to separate these two processes.[1]

Undoubtedly, it might be said that every fact which constitutes evidence of validity of a customary rule has constituted a link in the development or at least consolidation of the corresponding custom and customary rule, whereas only a small fraction of facts and factors which play a part in the formation of custom can be used as evidence of it for the organ applying international law. As means of ascertaining permissible only are such objectively verifiable facts and documents as show that certain rule binds the subject against which the rule is to be applied.

The formation of and ascertaining customary rules are then two different things, one might say, *ex definitione*. Whereas in the case of formation

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[1] "... the distinction between law-finding and law-creating is somewhat relative." Schwarzenberger, *International Law*, p. 10. See also *ibid.*, pp. 25-27; H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law," *BYIL* 1929, p. 81.

of custom there come into play factual relations of subjects of international law, the conduct, views and needs of such subjects, ascertaining custom, and hence customary rules, includes precisely the ways and means of ascertaining such conduct and views to determine whether a customary rule is binding and what is its content and range of validity [2] Ascertaining then amounts to proving the existence of a customary rule to solve a certain legal problem

Evidently, such ascertaining may take place an unlimited number of times in various ways and, what is more important, by various organs or even private persons—for example, writers No such determination is, however, either final or binding on anybody except the parties who have submitted to the decision of the appropriate organ. The presumption of validity of a customary rule in relation to other members of international society is, however, stronger or weaker depending on the number of ascertainments and on the authority of ascertaing organs

Ascertaining Customary Rules in the Light of the Statute of the Court

Searching universally conventional law for information on ascertaining customary rules, we must halt at Subparagraph 1(d) of Article 38 of the Statute of the Court, where "subsidiary means for determination of rules of law" are mentioned, hence precisely evidences also (or even primarily) of customary rules of international law In that subparagraph, only two means are mentioned—judicial decisions and the teachings of publicists [3]

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[2] Witemberg defines the term "evidence' (preuve), *inter alia*, as le moyen de determiner chez le juge la representation du fait jusque-la ignore, mais qu'il doit connaitre " J-C Witemberg, "La theorie des preuves devant les juridictions internationales," *RCADI*, v 56 (1936-II), p 5 See also J K Lalive, "Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice," *Schweizerisches Jahrbuch fur internationales Recht*, v VII (1950), pp 77-103 For short survey of opinions concerning ascertaining customary rules of international law since Grotius, see Mateesco, pp 247-250

[3] For the text of Article 38, see p 20

In connection with this subparagraph, doubt may arise as to whether the Court is authorized to consider also other means. This has, however, been to some extent cleared up by the very discussion in the Advisory Committee of Jurists in 1920. From that discussion it follows that the present Subparagraph 1(d) was originally contemplated not as enumeration of "subsidiary means for the determination of rules of law" but as independent "sources" of international law, over and above treaties, customary law, and general principles.[4] Subparagraph 1(d) was an expression of the tendency, represented mainly by Descamps, to recognize the broadest possible competence to the Court as regards filling gaps to avoid *non liquet*. In the course of the discussion, however, Descamps, under pressure of criticism, withdrew somewhat from his original position reducing the role of the jurisprudence and doctrine. He declared: "Doctrine and jurisprudence do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only to clarify."[5]

Accordingly, in the second reading of the draft, Descamps proposed an amendment to point 4 (the present Subparagraph 1(d)), adding the words: "as subsidiary means of determining the rules of law."[6] Thus the object of inserting that subparagraph was changed. Consequently, there are no reasons for considering Subparagraph 1(d) as a full enumeration of evidence, as may be seen from the expression "subsidiary." Moreover, the entire work of the Advisory Committee shows that, in fact, only the

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[4] The original project by Descamps of Subparagraph 1(d) of the present Article 38 ran as follows: "... la jurisprudence internationale, comme organe d'application et développement du droit." (in English translation: "international jurisprudence as a means for the application and development of law.") "Jurisprudence" in this project embraces also opinions of writers. *Committee*, pp. 306, 548. In Descamps' comment to this project he explained his view, adding: "Let us... no longer hesitate ... to insert, amongst the principles to be followed by the judge in the solution of the dispute submitted to him, the law of objective justice, at any rate in so far as it has twofold confirmation of the concurrent teachings of jurisconsults of authority and of the public conscience of civilized nations." *Ibid.*, p. 324.

[5] *Ibid.*, p. 336.

[6] *Ibid.*, 584, 597. The reservation in Subparagraph 1(d) referring to Art. 59 of the Statute was added only later in the League of Nations. See *infra*, Chapter Five.

rules to be applied by the future court, and not their evidence, was the subject of discussion [7]

The eventually accepted wording by the Committee of point 4 of Article 35, corresponding to present Subparagraph 1(d) of Article 38, of the Statute of the Court, is a not very successful compromise between two opposing trends in the Committee Therefore, it cannot be recognized, as an enumeration of the means of determining rules of law It is rather an express authorization to use also, among others, judicial decisions and teachings of publicists as means helping in determining the rules enumerated in Subparagraph 1(a-c), hence also of customary rules [8]

The Practice of the Court

(a) *Free Evaluation of Evidence and the Burden of Proof*

The general freedom of choice and evaluation of evidence is reserved indirectly to the Court even in Articles 48,52 and 53 of its Statute [9] Directly,

[7] In order to stress that the Court should apply customary law as well as written law, Phillimore proposed the insertion of the following words "rules of international law from whatever source they may be derived" *Ibid*, p 295 And further (summary in the records) " custom is formed by usages followed in various public and formal documents, and from the works of writers who agree upon a certain point" *Ibid*, p 334 Borchard, too, rightly argued " international courts, not being restricted by those technical rules of evidence which were a concommitant of the jury system, and international law being admitted in an early stage of development, all types of record and opinion may constitute the instruments of persuasion" Edwin, M Borchard, "The Theory and Sources of International Law," *Recueil Geny*, v III, p 349 Similarly Witemberg

quelle que soit la conception de la coutume qu'on adopte, la regle de droit coutumier resulte toujours de l'examen d'un ensemble de faits" Witemberg, p 38 See also Hudson, *Cour*, p 595 It should be added that precisely the term "source", applied in various meanings, has been one of the main causes of misconception among the members of the Committee

[8] Cf Kelsen, *The Law*, p 532

[9] "Art 48 The Court shall make all arrangements connected with the taking evidence Article 52 (the Court) may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents Article 53 (1) Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim (2) The Court must, before doing so, satisfy itself that the claim is well founded in fact and law

however, it has been stressed only on the Court's decisions and opinions, for example, in the case concerning *Certain German Interests in Polish Upper Silesia* (question of jurisdiction) [10]

The Court enjoyed complete freedom especially in the choice and evaluation of evidence of existence (or non-existence) of customary rules This may be seen in the numerous cases already mentioned (Chapter I) in which the Court applied various rules without any comment [11] In other cases, it accepted or rejected at its own discretion the evidence of customary rules presented by the parties, or it undertook investigations in this respect on its own initiative.[12] This can be clearly seen in the *Lotus* case Investigating the validity of a customary rule invoked by one of the parties, the Court did not limit itself to arguments and documents presented by the parties but undertook research on its own initiative Thus the Court arrived at the conclusion that "the arguments advanced by the French Government either are irrelevent to the issue or do not establish the existence of a principle of international law "[13]

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[10] ' nothing which the Court says in the present judgment can be regarded as restricting its entire freedom to estimate the value of any arguments advanced by either side on the same subjects during the proceedings on the merits " *PCIJ Series* A 6, pp 15-16 The Court is entirely free to estimate the value of statements made by the parties " *Ibid*, *A* 7, p 73

[11] See *supra*, pp 37–39

[12] For instance, in the case of the *Free Zones of Upper Savoy and the District Gex* (Judgment) the Court decided "From the general point of view, it cannot lightly be admitted that the Court, whose function is to declare law, can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive Unless otherwise provided, it must be presumed that the Court enjoys the freedom which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or other of the two propositions, but also reject them both " *PCIJ Series* A/B 46, p 138

[13] "The Court will now proceed to ascertain whether general international law contains a rule prohibiting Turkey from prosecuting Lieutenant Demons For this purpose, it will in the first place examine the value of the arguments advanced by the French Government, without however ommitting to take into account the possible aspects of the problem, which might show the existence of a restrictive rule applicable in this case " *Ibid*, A 10, p 22 Further "The Court observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all

Apparently, a somewhat different attitude has been adopted by the new Court as regards customary particular rules. In the *Asylum* case, it declared that "the Party which relies on custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party."[14]

The same principle was literally repeated, with express reference to the previous precedent, in the case concerning the *Rights of Nationals of the United States of America in Morocco.*[15] Although, as follows from the content of the latter decision, the Court by no means confined itself to evidence submitted by the United States, but itself examined the whole material and all the circumstances.[16] In the *Free Passage* case, also, it was necessary to ascertain a customary particular rule. The Court did not, however, consider it appropriate to invoke the principle formulated for the first time in the *Asylum* case. From the Judgment in this case it can be concluded that this time also the Court did not limit itself to analysis of evidence presented by the parties.[17]

In the light of the above examples, it seems clear that laying the burden of proof of customary particular rule on the party which calls upon such a rule is simply a consequence of the universally recognized principle that the party is obliged to furnish evidence of facts advanced by it. This prin-

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precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement." *Ibid.*, pp. 31.

[14] *ICJ Reports* 1950, p. 276.

[15] *Ibid.*, 1952, p. 200. This principle was also referred to by Judge Klaestad in his separate opinion to the *Nottebohm* case: "... one should, as in the *Asylum* case, enquire whether a rule derogating from that principle is established in such a manner that it has become binding on Liechtenstein. The Government of Guatemala would have to prove that such a custom is in accordance with a constant and uniform State practice 'accepted as law'." *Ibid.*, 1955, p. 30. This Judge came to the conclusion that evidence of such custom had not been furnished: "But no evidence is produced by that Government purporting to establish the existence of such a custom." *Ibid.*

[16] "The Court has examined the earlier practice, and the preparatory work of the Conference of Algeciras of 1906, but not much guidance is obtainable from these sources." *Ibid.*, 1952, p. 209. See *ibid.*, pp. 186-187, 195, 199, 200, 210-211.

[17] "The Court will proceed to examine whether such a right as is claimed by Portugal is established on the basis of the practice that prevailed between the Parties ..." *Ibid.*, 1960, p. 40.

ciple, however, binds only the parties and not the Court. At any rate, it cannot in any respect restrain the initiative of the Court in the choice and evaluation of evidence material to the ascertainment customary rules.[18] There are also no grounds for the assumption that the Court applies customary particular rules only on the initiative of the parties and not *ex officio*.

(b) *Ascertaining Elements of Custom*

The ascertainment of customary rules often amounts to proof of the fulfilment of the elements on which the custom is based. Information as to evidence accepted by the Court as proof of particular elements of custom can be obtained from those decisions in which the element of practice and of acceptance as expression of law have been considered separately.

A striking example of such separate consideration of each element of custom is to be found in the *Lotus* case. As evidence that the strict territorial principle of penal prosecution is not binding, the Court cited the judicial practice of numerous countries (including one of the parties to the dispute), which permits prosecution of offences committed abroad, provided that one of the constituent elements of the offence—in particular the effects of it—has taken place on the territory of the prosecuting State. In this case, the decisions of municipal courts quoted undoubtedly constitute evidence as to the conduct of States in certain situations, and hence are evidence of the element of practice. As evidence of recognition of that practice by other States—that is, evidence of the element of presumed acceptance as an expression of law—the Court referred to the absence of protest by those States.[19]

In the Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube* as in the matter of evidence as to its execution of its functions by the Commission on the section of the river as far as Braila—that is, the element of practice—the Court accepted the exercise the Commission of its jurisdiction on this section—in particular, the records of judicial decisions. On the other hand, absence of opposition to this practice by Rumania served as evidence of its acceptance.[20]

[18] See WITEMBERG, pp. 44-45; LAUTERPACHT, *Development*, pp. 378-379.

[19] *PCIJ Series* A 10, p. 23. See *ibid.*, pp. 28, 29.

[20] *Ibid.*, B 14, p. 17.

Among post-war examples one might quote the Advisory Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.* In that case, the Court rejected the principle of inadmissibility of unilateral reservations to multilateral conventions. The opinion is based on, among other things, a practice, consisting of numerous cases of such reservations made by States. As evidence of acceptance of that practice by other contracting parties to multilateral conventions, the Court contented itself with tacit acquiescence in those reservations.[21]

In the *Fisheries* case, the Court as evidence of implementation of the Norwegian system of delimitation of the territorial sea, cited, *inter alia*, decrees promuglated by the Norwegian Government on introducing this system. On the other hand, absence of protest against this system by States concerned, particularily by the plaintiff (the United Kingdom), constituted evidence of recognition of that system.[22] Finally, in the *Free Passage* case, where the existence of a local custom was at stake, the undisputed fact of free passage through Indian Territory enjoyed by the civil population and Portuguese officials, and by goods, was acknowledged as evidence of practice. As regards acceptance of that practice by the defendant State (India), the Court *expressis verbis* declined to require proof of that element.[23]

These few examples, in which the delimitation of the element of practice and of presumed acceptance is relatively distinct, show the great variety of evidential material of which the Court has made use in ascertaining customary rules. There is, it seems, no doubt that every document demonstrating the conduct of States in certain situations can serve as evidence of the element of practice.[24] The situation is different when it comes to proof of the requirement of presumed acceptance. As can be seen from the cases cited above, the Court has not actually taken as a basis of decisions any separate evidence of that element but has recognized its

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21 *PCIJ Reports* 1951, pp. 21-22.

22 *Ibid.*, 1951, p. 138.

23 *ICJ Reports* 1960, p. 40.

24 The importance of certain fundamental kinds of documents as evidence of practice was discussed further. See *infra*, Chapter Five.

fulfilment by virtue of the practice itself and its being tolerated by the States concerned.[25]

Let us examine this more closely in the light of the jurisprudence of the Court.

In the *Lotus* case the Court stated, *inter alia*:

> No arguments have come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happened to be at the time of the offence.[26]

As evidence of absence of presumed acceptance, the Court referred to the decisions of municipal courts of many countries which had followed a different principle.[27] Recognition of that other principle was deduced from absence of protest:

> Again, the Court does not know of any cases in which Governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently . it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons.[28]

In the same case, the Court based the proof of non-acceptance of a customary principle concerning the refusal of extradition by the United Kingdom to American authorities of a seaman who had committed homicide on board of an American ship stating:

> This case, to which others might be added, is relevant ... in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.[29]

Similarly, the Court rejected a positive proof of "tacit consent" as unsatisfactory and accepted a negative proof. As regards the French argument that it followed from the rarity of judicial decisions that a tacit consent had been given on the part of the States, and, that this "conse-

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[25] This has also been noticed by Professor SØRENSEN, (*Les sources*, p. 110).

[26] *PCIJ Series* A 10, p. 23.

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*, p. 27.

quently, shows what positive international law is in collision cases" the Court declared. "The alleged fact does not allow one to infer that States have been conscious of having such a duty, on the other hand there are other circumstances calculated to show that the contrary is true "[30]

Among arguments challanging recognition of such principle, the Court included the decisions of municipal courts concerning ships in collision From those decisions it followed that the jurisprudence in this matter had not been uniform [31] Moreover, the Court once more raised the argument of absence of protest " it does not appear that States concerned have objected to criminal proceedings in respect to collision cases before the courts of a country other than the flag of which was flown, or that they have made protests "[32] Summing up, the Court stated

This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction [33]

A further clear instance in which the Court took as a basis the presumption of knowledge of the practice and of the consequences of its acquiescence may be found in the comment made by the Court on two decisions cited in the *Lotus* case referred to above

It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia — Oncle-Joseph* case and the German Government in the *Ekbatana — West-Hinder* case would have committed to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law [34]

The importance of absence of objection by the States concerned was stressed by the Court also in the *Chorzów Factory* case

The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzow Factory [35]

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[30] *Ibid*, p 28
[31] *Ibid*
[32] *Ibid*, p 29
[33] *Ibid*
[34] *Ibid*, p 29
[35] *Ibid*, A 17, p 29

In the Advisory Opinion of 1930 concerning the *Free City of Danzig and the International Labour Organization* the Court recognized the fact of acceptance of a practice solely upon the basis of the circumstance of that practice.[36]

In the Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube* the Court, in addition to practice, cited as evidence of acceptance of the competence of the Commission as far as Braila only tacit acquiescence:

> In this usage the Rumanian delegate tacitly but formally acquiesced, in the sense that the *modus vivendi* was observed on both sides according to which the sphere of action of the Commission in fact extended in all respects as far as above Braila.[37]

In the course of the proceedings, Rumania herself conceded that it had tolerated the practice of the Commission. She denied only that "toleration could serve as a basis of creation of a right."[38] It should be stressed that only the Rumanian Judge *ad hoc* was opposed to recognition by the Court of tacit acquiescence as sufficient evidence of acceptance.[39]

If we assume that sovereign rights to territory not founded upon a treaty are also customary rights of a sort, the case concerning the *Legal Status of the South-Eastern Territory of Greenland* deserves mention. There the Court conceded that Norway had recognized Denmark's sovereign rights over all Greenland by the fact of signing with her bilateral and multilateral conventions. The Court added: "... thereby (Norway) ... has debarred herself from contesting Danish sovereignty over the whole of Greenland."[40]

From the *Asylum* case, in which, as we already know, the Court for the first time cited the wording of Subparagraph 1(b) of Article 38, it

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[36] *PCIJ Series* B 18, pp. 12-13, See, p. 33, note 51.

[37] *Ibid.*, B 14, p. 17. The importance of absence of protest may be seen also in the following statement by the Court in the course of the same Opinion: "In the long period of time that has elapsed since the conclusion of the Treaty of London, matters had continued in a more or less satisfactory way, and no one denied that the European Commission had exercised some powers on the sector from Galatz to Braila, no matter what the legal ground and nature of these powers may have been." *Ibid.*, p. 27.

[38] *Ibid.*, p. 17.

[39] *Ibid.*, p. 105-106.

[40] *Ibid.*, A/B 53, p. 69.

follows unequivocally that the evidence of practice (i e facts of granting asylum, bilateral and multilateral conventions, etc) by the plaintiff were accepted as showing the recognition of that practice by the defendant party, Peru The Court, however, did not accept the existence of such custom because of absence of ratification of the treaties cited and because of inconsistencies in that practice [41] The Court stated absence of adherance to the practice by the defendant party, Peru, exclusively upon the attitude of this State, hence upon indirect evidence [42]

It should be added that in this case also, individual Judges in their dissenting opinions explicitly accepted absence of objection against a practice as sufficient evidence of adherance to practice Judge Badavi Pasha held that practice known to the States but against which they had not objected, was at stake He thought that "the absence of such denunciation is conclusive proof that the practice continues and is definitively recognized "[43]

Further, the Canadian Judge, Read, based the proof of existence of custom upon absence of protest stating that "there is no one instance cited by either Colombia or Peru, in which the Party to the Convention has refused to grant or to recognize diplomatic asylum to a political offender in times of political disturbances on the ground that he was seeking to escape from arrest "[44]

On the other hand, Judge *ad hoc* Caseido Castilla saw the fulfilment of the psychological element *opinio juris sive necessitatis* in the fact of acceptance by the parties of Article 18 of the Bolivar Agreement He then took as a basis indirect proof of behaviour of the parties [45]

In the Advisory Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the Court

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[41] *ICJ Reports* 1950, p 277

[42] "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 *Ibid*, pp 277-278

[43] *Ibid*, p 306

[44] *Ibid*, p 325

[45] *Ibid*, p 369

based its conclusions concerning the absence of assent to the practice exclusively on the practice itself and on the attitude adopted by other States.[46]

Among the most representative cases illustrating the Court's practice in ascertaining the subjective element of custom, should be included the *Fisheries* case. Here, the Court consistently accepted absence of protest as evidence of the subjective element of custom. We read in the Judgment:

> The Court will confine itself at this stage to noting that in order to apply this principle, several States have deemed it necessary to follow the straight baseline method and that they have not encountered objections of principle by other States.[47]

In another point of the same Judgment, the Court declared:

> The Court having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and it encountered no opposition on the part of other States.[48]

Further:

> From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from the foreign States.[49]

Finally, in the same case, similarily as in the *Lotus* case, the Court based the proof of acceptance of practice on the presumption that States knew the practice and its consequences. The Court stated:

> The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact... The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her systems against the United Kingdom.[50]

In conclusion the Court declared that "the Norwegian system had been consolidated by a constant and sufficiently long practice, in the face

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[46] *Ibid.*, 1951, pp. 25-26; see *supra*, p. 34.
[47] *Ibid.*, p. 129.
[48] *Ibid.*, p. 136
[49] *Ibid.*, p. 138.
[50] *Ibid.*, p. 138-139.

of which the attitude of the Governments bears witness to the fact that they did not consider it to be contrary to international law."[51]

It is noteworthy that, as in the *Asylum* case, the Court attributed decisive importance to recognition of practice by that party in the dispute against which the customary rule had to be applied Thus the Court refused recognition of what is called the ten-mile rule for bays as regards Norway, "who always opposed any attempt to apply it to the Norwegian coast "[52] The latter example shakes Professor Schwarzenberger's allegation that the requirement of "implicit" consent of all the States applies only to particular customary rules.[53]

An additional strengthening of the opinion that toleration of practice is sufficient evidence of its acceptance, may be found in the separate opinions in that case The Judge of the unsuccessful party in the case, McNair only denied that United Kingdom had known the Norwegian system (that is, the practice) but he did not question the principle itself that toleration of practice amounts to acceptance [54] The Canadian Judge, Read, even expressly pronounced in favour of proof of acceptance of practice based upon its toleration [55]

In the *Nottebohm* case, the Court accepted the practice of States as evidence of their views.[56]

The best and most striking example of presumed acceptance of the practice as expression of law is to be found in the *Free Passage* case, where the Court entirely and *expressis verbis* abandoned proof of that element

This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occured

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[51] *Ibid*, p 139

[52] *Ibid*, 131 See also *supra*, p 34

[53] See SCHWARZENBERGER, *International Law*, p 42

[54] *ICJ Reports* 1951, pp 171, 180

[55] *Ibid*, p 197

[56] "*The practice of certain States* which 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, *manifests the view of these States* that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States since 1868 "*Ibid*, 1955, p 22 Italics added

when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[57]

In another part of the same Judgment, the Court, instead of applying the term "accepted as law," spoke, as in the Advisory Opinion concerning the *Free City of Danzig and the International Labour Organization* of "a practice well understood between the Parties, by virtue of which Portugal has acquired a right of passage."[58] Thus the Court considered the two expressions, "accepted as law" and "well understood," as being equivalent.[59]

In all the cases indicated above of referring to proof of the element of acceptance, the Court took as a basis either circumstances of practice, or tacit toleration of the practice, manifesting itself above all in absence of protest. The Court, then, entirely resigned from positive proof of acceptance of the practice as expression of law, at the same time taking into account all evidences to the absence of such acceptance. The Court refused recognition of a customary rule, especially as regards the State which consistently opposed a practice or the application of a rule already binding other States.

Resignation from positive proof of the element of consent by the Court has already had its repercussions in the latest doctrine of international law. More and more writers stress the fact that absence of protest will suffice as evidence of acceptance.[60]

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[57] *Ibid.*, 1960, p. 40. The Court did not recognize the customary right of passage to armed forces because the British, and afterwards the Indian authorities had protested against such a claim. *Ibid.*, p. 41.

[58] *Ibid.*, p. 43.

[59] In this Judgment, only the Judge *ad hoc* of the unsuccessful party, India, raised the argument of absence of acceptance foreseen in Subparagraph 1(b). The Portuguese Judge, on other hand, stressed that in case of custom there is no question of express consent; it must be tacit. *Ibid.*, pp. 120-122, 127.

[60] See discussion of that problem by SØRENSEN. In the period between the wars, this criterion was mentioned by DERYNG: "... general practice raises the presumption of acceptance of this practice as legal rule also against States concerned. Of course, a counter proof is always possible." DERYNG, p. 52. See also S. SÉFÉRIADES, "Aperçu sur la coutume juridique internationale et notamment sur son fondement," *RGDIP* 1936, p. 144. Recently Professor SCHWARZENBERGER has explicitly pointed to the juris-

The reasons why the Court and numerous writers are satisfied with the proof of practice and absence of protest as evidence of acceptance of practice are of an opportunist character. A positive proof of acceptance of practice by a state is extremely difficult to effect. Even more difficult is the proof of a subjective element comprehended as conviction of legal necessity of a practice (i e. the traditional *opinio juris sive necessitis*) To avoid this difficulty, it has been necessary to rely on negative proof—that is, absence of such presumed acceptance, since this manifests itself in positive conduct, mainly in the form of protest [61]

In addition to the difficulty of proving the element of acceptance as an expression of law, the resignation from such proof is justified also by other reasons, which have also found confirmation in the jurisprudence of the Court. The States simply know current international practice and

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prudence of the Court, stating "If a subject of international law fails to protest against an alleged infraction of international law by another Power, it may act at its peril In the light of the liberal use made of tolerance and acquiescence by the World Court in the *Fisheries* case (1951) it appears no longer safe to rely on the presumption against the renunciation of rights" SCHWARZENBERGER, *International Law*, p 552 See *ibid*, pp 302-308 The role of tacit acquiescence has been discussed at length by Professor MacGIBBON in his article *Customary International Law and Acquiescence, passim*

[61] This has been noted above all by Professor SØRENSEN, who has arrived at the following correct conclusion "Pretendre qu'une coutume ne prenne naissance que lorsque les actes de fait sont accomplis dans une conviction de leur nécessite juridique ou sociale, sans posseder les moyens de prouver si cette condition est realisee, une telle attitude aboutirait inevitablement a une impasse Pour en sortir, il faut, ou bien renoncer a realiser cette condition, ou bien se contenter d'une presomption en faveur de son accomplissement, de sorte qu'il faut prouver qu'une certaine pratique n'a ete basee sur une *opinio juris* pour lui derober le caractere juridique presume' SØRENSEN, *Les sources*, p 108 *Ibid*, *Principes*, p 51 Professor SØRENSEN leans to the second alternative He does not exclude, however, the possibility of proof of the element of acceptance Ultimately, he is for leaving this to the free decision of the judge *Les sources*, pp 108-111 A similar opinion was presented by LAUTERPACHT "While it is impracticable to demand positive proof of the existence of legal convition in relation to a particular line of conduct, it is feasible and desirable to permit proof that in fact the *opinio juris sive necessitatis* was absent There is no warrant for the assumption that the requirement of proof of the absence of a sense of legal obligation is impracticable or necessarily so exacting as to be unfair—even though it may be true that the state of mind of a Government may not be more easy to ascertain than the state of mind of an individual" LAUTERPACHT, *Development*, p 380 See *ibid*, pp 379-381, 386-388

the legal consequences of its toleration [62] While it is hardly possible to speak of "legal conviction" or a "feeling of duty," etc , in respect to a State, especially when a custom is only in *statu nascendi*, it is entirely in agreement with the present international reality to presume that States know the international practice and know that its tolerance leads to formation of customary rights and corresponding duties, hence to an international customary rule One might, of course, have some doubts as to whether this knowledge of international practice is already universal But the better and more rapid the spread of information concerning current events in every corner of the world, and the more universal and better the knowledge of international law, the more justified is the presumption of acceptance of international practice and of its legal consequence

It is precisely in this knowledge of practice and of its consequences that the main difference between municipal and international customary law consists, and that often makes an analogy between them misleading For, whereas the knowledge of practice and especially of the consequences of its toleration are in the case of individuals most frequently pure fiction, it is otherwise where States are concerned The latter always have employed expert jurists to watch international events and immediately to raise objections if a practice or even a single act (that is, precedent) may be for those States undesirable In other words, in international relations resignation from positive proof of acceptance of practice as expression of law is entirely justified if the practice is sufficiently express [63]

Clearly, the practice must be such as to justify presumption of its acceptance as an expression of a binding rule of law This can be presumed by virtue of the circumstances of the practice For instance, it depends on whether departure from the practice entails consequences and what is the nature of those consequences—whether States have cited this practice as evidence of their right, etc The evaluation of those circumstances must, however, be left to organs authorized by the parties concerned

Certainly, we may already admit that absence of protest against a certain practice is sufficient evidence that a State considers this practice as

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[62] L Etat est presume connaitre le droit international La fiction juridique correspond meme beaucoup plus a la realite en droit international qu'en droit interne WITEMBERG, p 33

[63] WOLFKE, *L'element*, p 164

not contrary to its interests and, moreover, that it does not object to the formation of a customary right in favour of the acting State. And precisely this is most decisive for the proof of acceptance of law. It should only be repeated once more that the reasons for which the States abstain from protesting, like the reasons for the conclusion of treaties, cannot, except in drastic cases, be taken into account, because of legal security.[64]

Also unfounded, it seems, is possible objection that States often abstain from protesting simply because the practice does not concern them. Such an argument may easily be refuted. If a practice does not concern a State and, hence, that State shows no interest in this practice, it is evident that it should also be indifferent to such State whether the practice is likely to lead to the formation of a custom or not.

(c) *Evidence of Previously Ascertained Customary Rules*

From the process of ascertaining the existence of customary rules in the practice of the Court—that is, the method of investigation as to whether the elements of international custom are fulfilled—it is desirable to distinguish the method of application of customary rules which have already been ascertained previously. Here, of particular importance seems to be the question as to whose was the ascertainment and how did the Court found its decisions.

As has already been shown when discussing the elements of international custom, the Court has frequently applied various rules without calling upon any authority or evidence.[65]

In other numerous instances, the Court attributed the greatest importance to its own decisions—strictly speaking, to its own judicial precedents in which a customary rule had been ascertained.[66]

For instance, the Court has as many as three times referred to a rule determined by itself, according to which "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear

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64 See Chapter Four.

65 See *supra*, Chapter One.

66 In this case, "judicial precedent" means every instance of application of a rule, whether for the first time or not.

in itself."[67] In the case of *Readaption of the Mavrommatis Jerusalem Concession* (Jurisdiction) the Court referred to a "construction which clearly flows from the previous judgments." It is striking that the Court accepted as an additional argument supporting the binding force of that construction the fact that both parties had shown "a disposition to accept the point of view adopted by the Court."[68] The Court invoked a principle ascertained in the Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube*. It declared:

> ... as the Court has had occasion to state in previous judgments and opinions, restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty.[69]

The Court referred also in the *Chorzów Factory* case (merits) to its own decisions and those of arbitral tribunals.[70] Two previous decisions were quoted by the Court in the case concerning the *Payment of Various Serbian Loans issued in France* to support a principle concerning the taking up of a case by a State on behalf of its nationals before an international

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[67] In the *Lotus* case, the Court declared: "The Court must recall in this connection what it has said in some of his preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of an convention is sufficiently clear in itself." *PCIJ Series* A 10, p. 16. This principle was explicitly repeated in the Advisory Opinion on the *Jurisdiction of the European Commission of the Danube*: "The Court adheres to the rule applied in its previous decisions that there is no occasion..." *Ibid.*, B 14, p. 28. For the third time, it was quoted in the Advisory Opinion of 1948 on *Conditions of Admission of a State to Membership in the United Nations—Art. 4 of the Charter*: "The Court ... does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion ..." *ICJ Reports* 1948, p. 63.

[68] "The Court sees no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound, more especially seeing that the two parties have shown a disposition to accept the point of view adopted by the Court." *PCIJ Series* A 11, p. 18.

[69] *Ibid.*, B 14, p. 36.

[70] "This principle, which is accepted in the jurisprudence of arbitral tribunals ..." *Ibid.*, A 17, p. 31. See *ibid.*, p. 47. "In Judgment No. 8 ... the Court has already said that reparation is the indispensable complement of a failure to apply a convention." *Ibid.*, p. 29. "It may be admitted, as the Court has said in Judgment No. 8, that..." *Ibid.*, 61-2.

tribunal.[71] The Court called upon the jurisprudence of both, the new Court and old one, in the *Ambatielos* case (Merits: Obligation to arbitrate).[72] The Court has not hesitated even to declare that it considered it its duty to apply principles already applied by it in arriving at its previous decisions.[73]

It should be added here that not only the Court itself but also the parties and individual judges in their individual and dissenting opinions, have called upon previous decisions of the Court as evidence of validity of customary rules For instance, in the *Nottebohm* case the Court stated

> Guatemala has referred to a well-established principle of international law which is expressed in Counter-Memorial, where it is stated that "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection " This sentence is taken from the Judgment of the Permanent Court of International Justice No 76, p 16[74]

Judge Read in his dissenting opinion to the case of certain Norwegian Loans confirmed a principle based on the practice of both Courts, the old and the new.[75]

From the few examples cited above, it is evident that the Court attributes to its own precedents much greater importance than is envisaged

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[71] "In this connection, reference should be made to what the Court has said on several occasions, and in particular in Judgments Nos 2 and 13, namely, that by taking up a case on behalf of its nationals before an international tribunal, a State is asserting its own right" *Ibid*, A 20/21, p 17

[72] "The Court is not departing from the principle, which is well established in international law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration without its consent" *ICJ Reports* 1953, p 19 See also *PCIJ Series* A/B 61, p 215, 243, A 9, p 23, A/B 44. pp 24, 28, A/B 50, p 374, A/B 64, p 20

[73] "Under international law, the Organization must be deemed to have those powers which, are conferred upon it by necessary implication as being essential to the performance of its duties This principle of law was applied by the Permanent Court (*Series* B, No 13, p 18) and must be applied to the United Nations" *ICJ Reports* 1949, pp 182-183

[74] *Ibid*, 1955, p 13

[75] "It is true that it has been the established practice of this Court, and the Permanent Court, to permit the Parties to modify their submissions up to the end of the oral Proceedings" *Ibid*, 1957, p 80

in Subparagraph 1(d) of Article 38 of the Statute of the Court, where judicial decisions are mentioned only as "subsidiary means" In this fact, the law-creating activity of the Court most expressly manifests itself [76]

Ways and Means of Ascertaining Customary Rules in the Light of the Work of the International Law Commission

The wording of Article 24 of the Statute of the International Law Commission, together with comments in the Report of the Commission of 1950, confirms what has been said so far as concerning the ascertaining of customary rules of international law [77] Striking above all is the omission in that article, and in the Report, of ways and means of ascertaining the element of acceptance of the practice as an expression of law This is, however, a logical consequence of the views expressed in the Commission as regards the elements of international custom They agreed then that a presumption based upon practice—in particular, absence of protest—suffices as evidence of acceptance [78] The next important confirmation of what has been said above may be found in the emphasis placed by the Commission on the impossibility of exhaustive enumeration of all kinds of evidence of customary law [79]

In Part Three of the Report of the Commission of 1955, the following kinds of evidence of international customary law are enumerated and briefly discussed

A Texts of international instruments
B Decisions of international courts
C Decisions of national courts
D National legislation

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[76] See *supra*, Chapter Two

[77] For the text of Art 24 of the Statute of the Commission see, p 42 n 87

[78] See Chapter One

[79] "Evidence of the practice of States is to be sought in a variety of materials The reference in article to 'documents concerning State practice' supplies no criteria for judging the nature of such 'documents' Nor is it practicable to list all numerous types of materials which reveal State practice on each of the many problems arising in international relations" *YILC* 1950, v II, p 368

E. Diplomatic correspondence

F. Opinions of national legal advisers

G. Practice of international organizations[80]

This enumeration requires completion, however, because it does not include doctrinal opinions, which to be sure constitute a secondary, but still important, "subsidiary means of the determination of rules of law," mentioned in Article 38 of the Statute of the Court. The omission is of course not accidental, in view of the fact that the Commission dealt with the problem of "making the evidence of customary international law more readily available,"—primarily with materials not yet published.[81]

Noteworthy also is the not very clear distinction between ascertaining international customary law *sensu largo*, which embraces such evidences as facts and documents and the methods of proof, from "means and ways of making the evidence more readily available"—that is, principally containing descriptions of the facts and documents mentioned as serving evidence. There is certainly an essential difference between, for instance, Judgments of the Court and a collection of Judgments making them more readily available. For this confusion of evidence with means of making it more readily available the term "source of law" is also to be blamed, since into that term is packed, as into a single sack, not only reasons for the formation of rules and its evidences, but also publications making these evidences available.[82]

One might, of course, limit the problem of ascertaining international customary law precisely to "means and ways of making the evidence of that law more readily available," which has been the main concern of the Commission. This rather tends, however, to be a purely technical problem, whereas the present discussion is primarily concerned with ascertaining

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[80] *Ibid.*, pp. 368-372.

[81] See *Ways and Means*, p. 85.

[82] This was stressed by Professor Hubert in his comment on the term "source". Criticizing the division of sources into those in the material and those in the formal sense, he insisted that "such division is wrong, since the factor to which the rule owes its creation and a document (that is, the "monument" which facilitates the ascertaining the content of a rule) are two different things. The latter should be rather called source in the technical sense... One should speak rather of means, with the aid of which the rules of law are ascertained." HUBERT, *Prawo*, v. II, p. 1. Cf. EHRLICH, *Prawo*, p. 21.

customary rules *sensu stricto*—that is, facts and documents referred to by courts and other organs for ascertaining the principles of that law or the individual elements of custom

The Evidential Value of Certain Means of Ascertaining Customary Rules

In face of the great variety of evidence which may be used for ascertaining customary law[83] we have, of necessity, confined ourselves to a short description of only a few of the most important of them.

Generally speaking, we might divide them into evidences deriving from the addressees of the ascertained rules themselves—that is, from States which have to hold themselves bound by the rules, and those evidences deriving from common international organs A separate category is constituted by evidences furnished by the writers on international law and even, in some cases, by other private persons

The first category includes treaties, diplomatic correspondence, unilateral declarations of State organs, and decisions of national courts The second—decisions and opinions of international courts and tribunals, and the practice of international organizations and conferences

(a) *Treaties*

A treaty, being express and most easily available to objective analysis as a manifestation of State practice and of the views of the contracting parties, is among the most important evidences in international customary law.[84]

[83] Such evidence will obviously be very voluminuous and also very diverse There are multifarous occasions on which persons who act or speak in the name of the State do acts or make declarations which either express or imply some view on a matter of international law" Brierly, *Law*, p 61

[84] "There is no doubt that an international treaty referring to the existence of an international custom constitutes unchallangeable evidence of the existence of such custom" Cezary Berezowski, *Zarys międzynarodowego prawa publicznego*, Warszawa 1953, p 35, "It is hardly disputable that treaties when so multiplied furnish exceedingly reliable as well as very readily available evidence perhaps, indeed, the very best evidence of the general practice of nations, whether or not the particular practice has been previously accepted as customary international law" Wallace McClure, *World Legal Order (Possible Contribution by the People of the United States)*, Chapel Hill 1960, p 149 See also, e g, Libera, p 133

The importance of treaties as evidence of customary rules (that is, of their existence, content, and range of validity) may be at least twofold The fact of a treaty being concluded in a specific way constitutes a precedence, or example of practice, which may contribute to the formation of custom concerning the procedure of concluding international agreements of a certain kind, in that case, treaties are themselves evidence of practice Moreover—in fact most frequently—a treaty may contain reference to a practice or to established customary rules and thus become evidence of the element of acceptance

The examples of calling upon international instruments as evidence of customary rules are very numerous One might say that they have always been referred to for this purpose Here are a few examples from the practice of the Court

In the *S S Wimbledon* case, the Court based the principles of neutrality of international canals upon "precedents afforded by the Suez and Panama canals, "hence also on treaties concerning those canals [85] In the Advisory Opinion on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (frontier between Turkey and Iraq)* the Court called upon the Covenant of the League of Nations, to strengthen the principle of unanimity of States [86] In the Advisory Opinion concerning the *Free City of Danzig and the International Organization of Labour*, the Court stated the establishment of a practice upon the basis, *inter alia*, of agreements concluded [87] The international river law is mentioned in the case of 1929 relating to the *Territorial Jurisdiction of the International Commission of the River Oder* [88]

In view of the fact that sovereign rights to territory are also a sort of customary rights, the Court's opinion on the evidential value of treaties in the *Eastern Greenland* case is worth mentioning here The Court stated, *inter alia*

> The importance of these treaties is that they show a willingness on the part of States with which Denmark has contracted to admit her right to exclude Greenland To some of these treaties, Norway has herself been a Party, For the purpose of the present

[85] *PCIJ Series* A 1, p 28
[86] *PCIJ Series* B 12, p 30
[87] *Ibid*, B 18, pp 12-13
[88] *Ibid*, A 23, p 27 See also SØRENSEN *Les sources*, p 96

argument, the importance of these conventions, with whatever States they have been concluded, is due to the support which they lend to Danish argument that Denmark possesses sovereignty over Greenland as a whole ... These treaties may also be regarded as demonstrating sufficiently Denmark's will and intention to exercise sovereignty over Greenland...[89]

In the *Electricity Company of Sofia and Bulgaria* case the Court declared:

... the above quoted provision of the Statute (Article 41 par. 1 of the Statute) applies to principles universally accepted by national tribunals and likewise laid down in many conventions to which Bulgaria has been a party—to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given[90]

To support the principle expressed in Article 36 Paragraph 6 of the Statute of the Court, in the *Nottebohm* case (Preliminary Objection) the Court also invoked the Hague conventions of 1899 and 1907, and even the opinion expressed by the rapporteur of the convention of 1899.[91]

An example of referring to a draft of a multilateral convention may be found in the final Judgment in the *Nottebohm* case (Second Phase). The Court, accepting the principle that "in order to be capable of being invoked against another State, nationality must correspond with the factual situation," based its decision not only on bilateral treaties concluded by the United States, but also upon drafts of a convention relating to the conflict of nationality elaborated by the Hague conference of 1930 for the Codification of International Law.[92] On the other hand, in the *Lotus* and *Asylum* cases, the Court did not take treaties into account as evidence of customary rules only because they did not apply to those

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[89] *PCIJ Series* A/B 53, pp. 51-52, 68-69.

[90] *Ibid.*, A/B 79, p. 199. The assertion quoted is at the same time one more evidence to the fact that the Court has attached particular importance to recognition of the legal basis of judgment by the parties to the dispute even when "universally accepted" principles are at stake.

[91] "This principle was expressly recognized in Article 48 and 73 of the Hague Conventions ... to which Guatemala became a Party. The Rapporteur of the Convention of 1899 has emphasized the necessity of this principle ... This principle has been frequently applied and at times expressly stated." *ICJ Reports* 1953, pp. 119-120.

[92] *Ibid.*, 1955, p. 323. This has been criticized by Judge Read. *Ibid.*, p. 39.

cases or because they had not been ratified by a sufficient number of States, in particular by the parties to the dispute.[93]

It should be stressed, however, that the concordance of contents of treaties by itself constitutes neither sufficient evidence nor presumption that the rest of international society accepts those provisions as law. The recurring provisions in numerous treaties do not of themselves constitute sufficient evidence of customary rules binding other States. On the contrary, such treaties may often express exceptions from general customary law.[94] For example, in the *Lotus* case, France invoked treaties reserving jurisdiction to the State whose flag was flown. The French advocate saw in those treaties expression of a custom to the effect that jurisdiction always binds exclusively to the State whose flag is flown. The Court, on the other hand, did not accept this view, considering the treaties quoted as a conventional exception to a general principle.[95]

(b) *Judicial Decisions*

Interpretation of the Reservation Contained in Article 38, Subparagraph 1(d) of the Statute of the Court.—The importance of judicial decisions as evidence of customary rules follows even from Subparagraph 1(d) of Article 38 of the Statute of the Court. Certain doubts may arise, however, as regards the clause: "Subject to the provisions of Article 59,"[96] which reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

This clause was inserted in Subparagraph 1(d) only on the proposal of the Council of the League of Nations. As HUDSON declared, the draft-

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93 *PCIJ Series* A 10, p. 27; *ICJ Reports* 1950, p. 277.

94 Of course, it is rather a problem concerning the significance of treaties as a custom-creating factor. See LAUTERPACHT, *The Development*, pp. 377-379. SØRENSEN, *Les sources*, pp. 97-98; KOSTERS, p. 231; KUNZ, *Nature*, p. 668; GUGGENHEIM, *Traité*, v. 1, p. 52.

95 "As regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on stateowned ships of a particular country in respect of ships of another country on the high seas." *PCIJ Series* A 10, p. 27. See SØRENSEN, *Les Sources*, p. 98.

96 See *supra*, p. 20.

ers of this reservation foresaw that the decisions of the Court would "have an effect of moulding and modifying international law" and they wished to leave it open to a State to oppose such consequences of decisions.[97] But this explanation is neither full nor convincing. In particular, from the point of view of ascertaining customary rules, there remains the principal question, how are we to understand the express admission of judgments as a means of the determination of rules "subject to the provisions of Article 59"—that is, with the reservation that the decisions have binding force only as between the parties and in respect of that particular case.

A discussion of various interpretations of that reservation in Subparagraph 1(d) may be found in the book by Professor SØRENSEN. According to one of such interpretations, the reservation is simply a stress laid on the principle *res judicata*.[98] As is rightly shown by Professor SØRENSEN, this explanation is not convincing, since such stress is, especially in Subparagraph 1(d), superfluous.[99]

Another interpretation concentrates on the term "decision" used in Article 59. From this it is said to follow that the reservation in Subparagraph 1(d) refers only to the decision *sensu stricto* and not to the comments added. According to this interpretation, there is no obstacle to accepting as precedent, for instance, an ascertainment a customary rule in the Court's comment to its own decision.[100] This explanation sounds very convincing, indeed. The Court itself, however, excluded such an interpretation in the case on *Certain German Interests in Polish Upper Silesia*. It declared that Article 59 does not exclude giving purely declaratory decisions, and added: "The object of this article is simply to prevent

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[97] HUDSON, *Permanent Court*, p. 207. As Professor SØRENSEN states: "La portée de cet article et sa signification pour l'autorité des précédents ont été assez controversées." SØRENSEN, *Les sources*, p. 157.

[98] SØRENSEN, *Les sources*, pp. 157-158.

[99] *Ibid.*

[100] *Ibid.*, p. 159. See W. E. BECKETT, "Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour Permanente de Justice Internationale," *RCADI*, v. 39 (1932-I), pp. 140 *et seq.* A similar view is presented by Professor HUBERT (*Prawo*, v. II, p. 16). Referring to the reservation in Subparagraph 1(d), he wrote, *inter alia*: "... one may apply precedents establishing principles of law in previous judgments, but not actual decisions." *Ibid.*

legal principles accepted by the Court in a particular case being binding upon other States or in other disputes "[101] This declaration was repeated once more *in extenso* in the interpretation of the former Judgment [102] Thus, the Court itself expressly stated that such principles ascertained in its Judgments are not binding either in other cases or in respect to other parties

On the other hand, we already know that the Court makes full use of its own precedents as evidence of customary rules In the light of this fact, most convincing seems to be a third interpretation of the reservation in Subparagraph 1(d) of Article 38—namely, that it is directed against a too rigid application of the Anglo-American system of judicial precedents (case-law) In other words, the object of the reservation would not be limitation of the competence of the Court, but on the contrary, to strengthen it by expressly dispensing the Court from the duty of adhering to its own decisions To such conclusion we are led by the opinion expressed by HUDSON, when he wrote, in connection with Article 59, about the Anglo-American principle of *stare-decisis* [103] A similar idea has been expressed by LAUTERPACHT [104]

Decisions and Opinions of International Courts and Tribunals —As we have already seen, judgments and opinions of international courts, especially of the Hague Court, are of decisive importance as evidence of customary rules The Court has invoked them almost as being positive law [105]

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[101] *PCIJ Series* A 7 p 19 [102] *Ibid*, A 13, pp 20-21

[103] la Cour ne peut considerer ses decisions anterieures comme faisant loi pour elle dans l avenir, elle doit conserver la liberte de modifier, le cas echeant, lors de toute affaire ulterieurement soumise a sa decision, le droit ou la regle de droit appliques dans une affaire anterieure Le Statut, toutefois, n'exige pas de la Cour qu'elle ne tienne aucun compte de decisions anterieures et il ne l'empeche pas d y attacher un grand poids HUDSON *Cour*, p 629

[104] In the international sphere there is no room for rigid veneration of precedent To that extent the emphatic language of article 59 of the Statute of the Court which limits the formal authority of the decision to the case actually before the Court is not without usefulness or significance LAUTERPACHT, *The Development*, p 19

[105] *PCIJ Series* A 9, p 31, A 17, p 31 and 47, A/B 53, p 46, *ICJ* Reports 1951, pp 131, 1949, p 186 See also the examples discussed by Professor SØRENSEN (*Les sources*, pp 162 174) and LAUTERPACHT (*The Development*, s 9-18) The latter

It has also several times based its decisions on precedents from arbitration tribunals, but has not attached to them great importance. In particular, it has never recognized them as sufficient evidence of customary rules This is obvious in view of the differences between the Court and an arbitration tribunal. Whereas the Court is a permanent judicial organ acting by virtue of a statute accepted by the whole of international society, and its Judges are chosen from among the best world experts in international law, arbitration tribunals, are in general, *ad hoc* organs, and the nomination of arbitrators is made primarily from the point of view of the confidence of the parties in them The legal authority of arbitration precedents is weakened by the greater liberty left to such tribunals, especially as regards the law to be applied Finally, the authority of arbitration precedents has been diminished considerably by the profound revolution which is taking place in the whole of international society [106]

Extensive use of judicial decisions, especially of those of the Court, for ascertaining customary rules is also made by the United Nations International Law Commission For example, at the beginning of the Session of 1951 the Assistant Secretary General, Kerno, informed the members of the Commission that "the following week the International Court of Justice would be giving its opinion with regard to reservations to multilateral conventions" and he added "The Commission would need to take that factor into consideration when discussing its agenda "[107]

Professor François, at that time rapporteur of the Commission, in the discussion on the width of the territorial sea declared in 1955 that he "had followed the [International Court of Justice] in the *Nottebohm* case by drawing a distinction between the right of States to take certain

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author wrote "In fact, the practice of referring to its previous decisions has become one of the most conspicuous features of the Judgments and Opinions of the Court *Ibid*, p 9 The practice of the Court has also been quoted by individual judges in their separate and individual opinions For example, in the Advisory Opinion concerning *Conditions of Admission of a State to Membership in the United Nations* Judge Krilov cited the practice of the old Court, declaring 'From the standpoint of consideration, the practice of the Permanent Court should be taken into account by the Court *ICJ Reports* 1948, p 108

[106] See *infra*, Chapter Six

[107] *YILC* 1951, v I, p 2

measures and the obligation on others to recognize the effects of those measures "[108]

Those two pronouncements—chosen at random—in the United Nations International Law Commission on the importance of Judgments of the Court for the codification work show not only the importance of judicial decisions as evidence of customary rules, but also their indirect contribution they make to the progressive development of international law [109]

Decisions of National Courts.—In Subparagraph 1(d) of Article 38, judicial decisions are mentioned without distinction as between the judgments of international and national courts There is, however, an essential difference between those two kinds of organs. An international court or tribunal is a common organ of the States, and its decisions bind at least the States-parties to the case The jurisdiction of municipal courts, on the other hand, is limited to the territory of a single State.

This difference has been stressed in the report of the Commission. While decisions of international courts and tribunals have been mentioned without comment, in the case of municipal courts the Commission has added a rather elaborate explanation as to why internal judicial decisions are of lesser significance as evidence of customary rules of international law. The Commission stated, *inter alia*, that decisions of national courts on questions of international law are frequently based on international law only in so far as provisions of the latter have been incorporated into national law This incorporation is necessarily limited The national courts often have no opportunity to hear the views of any government As the Commission stated

> even where the theory prevails that international law is a part of the national law, a national court may base its decisions on principles of international law only in the absence of a controlling national statute or regulation or precedent [110]

The Court has refrained from granting express recognition of probative value to decisions of national courts In the *Lotus* case the Court declared

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[108] *YILC* 1955, v I, p 176
[109] See Chapter Two
[110] *YILC* 1950, v II, p 370

So far as the Court is aware there are no decisions of international tribunals in this matter, but some decisions of municipal courts have been cited Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other [111]

In fact, the Court not only has not disregarded evidences based upon such decisions, but has even of its own initiative taken them as a basis.[112] As an example may serve its pronouncement in the same case When analysing the British case-law referring to jurisdiction in cases of collision on the open sea, it stated "This development of English case-law tends to support the view that international law leaves States a free hand in this respect "[113]

The role of municipal decisions as evidence is also well characterized by Judge Finlay in his dissenting opinion

The decision of course proceeded upon the view which the English Court took in the international law on this point, but it was international law which they had to apply The decision is not binding upon this Court but it must be regarded as of great weight and cannot be brushed aside as turning merely on a point of English municipal law [114]

Summing up, we might say that the Court and the International Law Commission fully recognize and make use of international decisions and to a limited extent also of national judicial decisions as evidence of customary rules of international law. Moreover, neither the stipulations in Subparagraph 1(d) of Article 38 that judicial decisions should be merely "subsidiary means of the determination of rules of law" nor the reservation referring to Article 59 in the same subparagraph have had any tangible effect on the practice of the Court.

(c) *National Legislation*

In the Report of the International Law Commission, considerable importance has been attributed to national legislation as evidence of customary international law. We cite from that Report

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[111] *PCIJ Series* A 10, p 28

[112] *Ibid*, p 23 In this case, municipal decisions served as evidence of the practice and opinions of States and not as evidence of customary rules

[113] *PCIJ Series* A 10, p 30

[114] *Ibid*, p 54 See SØRENSEN, *Les sources*, p 94, SCHWARZENBERGER, *International Law*, p 60

> The term legislation is here employed in a comprehensive sense: it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promuglated by executive and administrative bodies. No form of regulatory disposition affected by a public authority is excluded. Obviously, they serve as an important store house of evidence of State practice...[115]

Further, the Report contains a list of existing publications setting out national legislation.[116]

The absence of more extensive comment here on the importance of national legislation is justified, in view of the fact that its significance as evidence of State practice is indisputable. Doubts arise only when we try to state, whether, and in what degree, equivocal legislation can suffice for the formation of a customary rule of international law.

The Court has several times mentioned municipal law when ascertaining customary rules. For instance, in the *Fisheries* case, as evidence of existence of "the Norwegian system of delimitation of ... territorial sea the Court accepted, *inter alia*, decrees promuglated by the Nowegian Government in 1812, 1869 and 1935.[117] An interesting example of calling on national law may also be found in the following argumentation in the Advisory Opinion of 1954 concerning the *Effects of Awards of Compensations Made by the United Nations Administrative Tribunal.* Rejecting the contention that the United Nations General Assembly "is inherently incapable of creating a tribunal competent to make decisions binding on itself," the Court stated: "... it is common practice in national legislature to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being."[118] True, this is not an example of calling upon national legislation but above all of analogy.

The pronouncement by Judge Altamira in his separate opinion in the *Lotus* case is perhaps also worth mentioning here. In his view, although national law does not of its own nature belong to the domain of international law, and is not capable of creating an international customary rule, "it may ... be of considerable value in showing what in actual fact is the opinion of States as concerns certain international questions in

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115 *YILC* 1950, v. II, p. 370.

116 *Ibid.*

117 *ICJ Reports* 1951, pp. 134, 140. See also *ibid.*, 132; *ibid*, 1950, p. 41.

118 *Ibid.*, 1954, p. 61.

regard to which States have not yet committed themselves by means of convention or in regard to which no custom recognized by States has so far been built up "[119]

The legitimacy of that opinion is confirmed above all by the International Law Commission in the codification of some branches of international law. In their draft-schemes, the rapporteurs of the Commission make full use of all possible material, including national legislation, for ascertaining the content of customary rules of international law. Moreover, the Commission takes account of this legislation indirectly, when States base on their legislation their opinions of the drafts of the Commission.[120]

Undoubtedly, the importance of national legislation as evidence is limited primarily to individual elements of custom—that is, to evidence of the practice and of its acceptance as expression of law

(d) *Diplomatic Correspondence*

The importance of diplomatic correspondence as evidence both of customary rules and the elements of custom—primarily of the element of acceptance as an expression of law—requires no comment [121] The Court makes full use of such correspondence attaching to it decisive importance. This is best illustrated by the *Fisheries* case, in which the Court made the following comment on a French note and the reply to it by the Norwegian Government

Equally significant in this connection is the correspondence which passed between Norway and France 1869-1870 On December 21st, 1869, only two months after the promulgation of the Decree relating to the delimitation of Sunnmore, the French Government asked the Norwegian Government for an explanation of this enactment In a Note of February 8th, 1870 the Ministry of Foreign Affairs, replied as follows Language of this kind can only be construed as the considered expression of a legal conception regarded by the Norwegian Government as compatible with international law And indeed, the French Government did not pursue the matter [122]

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[119] *PCIJ Series* A 10, p 96 This pronouncement constitutes at the same time an argument speaking for the role of municipal law in the formation of customs

[120] See *YILC* 1950, v II, pp 53 and 155, *ibid*, 1955, v I, p 2

[121] "The diplomatic correspondence between Governments must supply abundant evidence of customary international law" *YILC* 1950, v II, p 371

[122] *ICJ Reports* 1951, pp 135-136

In this case diplomatic correspondence served as evidence of knowledge of international practice and at the same time of its tacit recognition. For, precisely by virtue of the exchange of diplomatic notes quoted, the Court declared:

> The Court having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States.[123]

Similarily, diplomatic correspondence was cited in the *Free Passage* case.[124]

Among evidences of customary rules the International Law Commission has mentioned also opinions of legal advisers of States. It has warned, however, against attributing too much importance to this evidence because, as the Report states: "the efforts of legal advisers are necessarily directed to the implementation of policy."[125]

Neither the Court nor the Commission have considered this kind of evidence.

(e) *The Practice of International Organizations and Conferences*

The rapidly developing activity, at least since the creation of the League of Nations, of international organizations has only recently become the subject of more detailed investigations. The results are, however, still relatively modest. The international Law Commission has also confined itself to stating: "Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States relations to the organizations."[126]

There are already in the jurisprudence of the Court examples of citing the practice of organizations as evidence of developing customs. The case of the Jurisdiction of the *European Commission of the Danube between Galatz and Braila* is one of the first of such examples. The Court determined the jurisdiction of the Commission above all upon the jurisdiction

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123 *Ibid.*, pp. 136-137.

124 *Ibid.*, 1960, p. 41. See also *ibid.*, 1952, p. 200.

125 *YILC* 1950, v. II, p. 372. See GUGGENHEIM, *Traité*, v. I, p. 50.

126 *YILC* 1950, v. II, p. 372.

factually exercised by it on the disputed section, with the tacit consent of Rumania.[127] The Court also invoked regulations issued by the Commission and applied with the knowledge and acquiescence of Rumania.[128] It should be added that the evidential material for this Advisory Opinion was gathered with the consent of Rumania by a special committee appointed by the Advisory and Technical Committe for Communications and Transit of the League of Nations. The Court has several times invoked the results of investigations by this special committee.[129]

In the Advisory Opinion concerning the *Free City of Danzig and the International Labour Organization* the Court indirectly invoked the practice of international organizations, namely that of the High Commissioner of the Free City of Danzig acting on behalf of the League of Nations.[130]

In the Advisory Opinion on *Reservations to the Convention and Punishment of the Crime of Genocide*, the Court, in turn, mentioned the practice of the Secretaries General of the League of Nations and the United Nations in connection with the registration of treaties. In that case the Court, however, did not recognize this practice as sufficient evidence of the views of the parties to the convention.[131] In another paragraph of the same opinion, the Court referred to the divergence of States' views in the Legal Committee of the United Nations General Assembly as regards the admissibility of reservations to multilateral treaties.[132]

It is clear from the above examples that the role of the practice of international organizations as evidence of customary rules in the Court's jurisprudence has not been limited to relations between the organizations and States. There is also no reason whatsoever for such limitation. If we assume that practice of organizations embraces all actions undertaken,

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[127] *PCIJ Series* B 14, p. 17; see *supra*, p. 33.

[128] *Ibid.*, p. 53.

[129] *Ibid.*, pp. 9, 14, 46, 53, 55.

[130] *Ibid.*, B 18, pp. 12-13; see also *ibid.*, A/B 44, p. 39.

[131] "... the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom." *ICJ Reports* 1951, p. 25.

[132] "... the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views." *Ibid.*, p. 26.

not only by collective organs, but also by particular members or groups of members of organizations by virtue of the Statute, it becomes clear that such practice may provide evidence for every kind of customary rule—that is, referring to relations between the organs of organizations, the organs and the members, between the organs and the members of the personnel, between individual organizations, and also between particular members.

Alongside the practice of international organizations, reference should be made to international conferences, since, in fact, conferences are primitive international organizations *ad hoc*.[133] Conference practice served as evidence of the customary rule of unanimity of States in the *Advisory Opinion on Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (frontier between Turkey and Iraq)*.[134]

(f) *Opinions of Publicists*

Although, in Subparagraph 1(d) of Article 38 of the Statute of the Court judicial decisions and opinions of publicists are enumerated side by side, the official importance of the latter is nowadays considerably less. One might say that it corresponds exactly to the role foreseen in the statute—that is, only as "subsidiary means of the determination of rules of law."[135]

The Court has mentioned rarely such opinions, without giving the names of writers and only after other kinds of evidence have been heardf In the *Lotus* case, for example, the Court used as basis the opinions o.

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[133] See WOLFKE, *Great and Small Powers*, p. 6.

[134] "... the rule of unanimity, which is also in accordance with the unvarying tradition of all diplomatic meetings or conferences is explicitly laid down by Article 5, paragraph 1 of the Covenant." *PCIJ Series*, B 12, p. 30. See also Judgment to the case concerning *Rights of Nationals of the United States of America in Morocco*, *ICJ Reports 1952*, p. 209.

[135] See the extensive discussion of the role of the doctrine as a source, with reference to the practice of the Court, by Professor SØRENSEN (*Les sources*, pp. 177-190) and LAUTERPACHT (*The Development*, pp. 23-25). See also SCHWARZENBERGER, *International Law*, pp. 26-27; Hubert, *Prawo*, v. I, p. 208; *ibid.*, v. II, pp. 8, 16; ROUSSEAU, *Principes*, pp. 816-820; HUDSON, *Cour*, p. 621; GOULD, pp. 142-143; EHRLICH, *Prawo*, pp. 29-30. For a survey of older opinions, see MATEESCO, pp. 230-232.

writers but expressly refrained from pronouncements on their probative value

> as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, there is no doubt that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly But the important point is the significance attached by them to this principle, now it does not appear that in general, writers bestow upon this principle a scope differing from or wider than that explained above On the other hand, there is no lack of writers who definitely come to the conclusion that such offences must be regarded as if they had been committed in the territory of the State whose flag the ship flies [136]

The Court several times referred to "opinions of writers," opinions of the doctrine," "constant doctrine," and the like, in its decisions and opinions of the prewar period [137] On the other hand, the new Court has, as yet, even more rarely called upon this kind of evidence For instance, in the *Nottebohm* case the Court declared

> the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality
>
> The same tendency prevails in the writings of publicists and the practice [138]

In the same Judgment, the Court once more called upon doctrine in a similar way "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond "[139]

The somewhat secondary importance accorded oficially to the opinions of publicists does not, however, fully reflect their actual role in the ascertaining customary rules of international law Although formally speaking there are no grounds for awarding an independant role to the opinions of private persons, their informal importance is certainly still considerable It cannot, of course, be compared to what it was in the times when the doctrine constituted almost the sole source of information as concerning

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[136] *PCIJ Series* A 10, p 26

[137] *Ibid*, A 1, p 28, B 6, p 36, A 6, p 20, A/B 41, p. 45

[138] *ICJ Reports* 1955, p 22

[139] *Ibid*, p 23

international law, as concerning the practice and as concerning opinions of governments.[140] This kind of importance of the doctrine has gone, it seems, for ever. The role of contemporary doctrine, however, has not diminished, but has rather changed its character. The writers simply relieve the judge, and, in general, all those whose task is to solve problems of international law. In particular, writers supply ready answers to the question as to whether a certain customary rule of international law is already (or still) binding. Such opinions, when they originate from writers of high reputation and if, still more important, they are convergent, their persuasive force is such that they cannot be disregarded. Undoubtedly, the members of the Court, even no appropriate mention is made in the records, make full use of such evidence.

The importance of doctrine is no longer based on certain individual celebrities, but above all upon the concordant opinions of writers representing various legal and social systems.[141] An expression of this trend may be found in Subparagraph 1(d) of Article 38 where "publicists of various nations" are referred to. The Court has never called on the opinion of a single author but always on that of a majority of publicists. Only in the pleadings of the parties and in separate opinions have individual writers been cited, and most frequently precisely to defend an individual view adopted by one party or Judge.

Since the creation of the International Law Commission, one might even speak of a sort of rennaissance of the authority of doctrine, not only as evidence of customary international law, but also as a law-creating factor. This Commission composed of twenty five most highly qualified experts, mainly professors of universities of various countries, has been entrusted with the task of codification and development of international law. The choice of the members is made on a geographical basis, hence they are almost oficially representatives, at least of certain regions and

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[140] See HUBERT, *Prawo*, v. I, p. 208.

[141] GIANNI writes: "Quelques-uns des anciens publicistes comme Grotius, Bynkershoek, etc., ont été suivie comme autorité indiscutable en ce qui concerne la preuve du droit international ... Par contre, aujourd'hui, un consentment d'opinions ou un grand nombre de témoignages concordants sont indispensable pour prouver une règle de droit ou une coutume en vigueur." GIANNI, p. 149.

legal systems.[142] The Commission itself also takes into account the opinions of writers. Sometimes it even uses as a basis projects elaborated by famous scientific institutions and invites the professors directing such reasearch groups to give necessary information on certain problems.[143]

It is hardly possible, then, to overemphasize the correctness of Professor Schwarzenberger's opinion that "to state the law is predominantly a scientific function."[144]

The Problem of Hierarchy and Compensation of Evidence

The absence of any appropriate indication in the Statute of the Court, and the freedom enjoyed by the Court in the choice and evaluation of

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[142] See Articles 1 and 8 of the Statute of the United Nations International Law Commission.

[143] For example, the discussion referred to above was based on the working paper by Hudson, at that time professor at Harvard University. In this paper, he invoked the alleged unanimity of the doctrine, citing in the footnote systems and manuals of fifteen writers from all over the world. *YILC* 1950, v. II, p. 26. See *supra*, p. 43. The Commission repeatedly invited professors from Harvard in order to obtain more detailed explanations as to the draft-schemes of what is known as the "Harvard working group," considered by the Commission. *YILC* 1956, v. I, p. 228, 248; *ibid.*, 1959, v. I, p. 147; *ibid.*, 1961, v. I, p. 195-6. Parenthetically, one should add that the Commission's basing itself upon private draft-scheme proposal by the Harvard Group was objected to by certain members of the Commission on grounds of insufficient consideration having been given also to other views. *Ibid.*, 1957, v. I, p. 165; *ibid.*, 1959, v. I, pp. 147-153.

[144] Schwarzenberger, *Manual*, p. 148. In addition to opinions of writers, reference should be made to the evidence of customs supplied by private persons. Since, as already indicated in Chapter Two, the conduct of individuals may also in certain circumstances contribute to the formation of international customs, there is no ground for excluding the evidence supplied by private persons as evidence, for instance, of international practice, and hence also international customary rules. As an example from the practice of the Court may be cited the Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube*, where the Court based the existence of customary jurisdiction of the Commission on the section of the Danube to Braila upon investigations carried out by a Special Committee of the League of Nations, which in turn took as a basis "the hearings and enquiries on the spot" *PCIJ Series* B 14, pp. 16-17. A concrete example of utilization of such evidence was given by Hudson in the International Law Commission. As director of the Harvard Research Centre, he sent out research workers to interview pearl fishers on the customs existing in the Persian Gulf, since there were no written materials on this subject. *YILC* 1949, p. 233.

evidence of customary law, do not give any ground for admitting any formal hierarchy of the kinds of such evidence. For example, the enumeration of judicial decisions before the opinions of publicists in Subparagraph 1(d) of Article 38, though certainly not accidental, is not sufficient to describe it as an evaluation of means of determination of legal rules.[145]

We may, however, accepting certain criteria, endeavour to arrange the most important kinds of evidence from the point of view of their anticipated probative value. Such an arrangement of evidence according to probative value is very common in legal practice. It is a truism that one kind of evidence for stating a fact is more reliable, "stronger," than another. In the case of international customary law, the evidence deriving from the State, against which the rule ascertained is to be opposed, will certainly be more convincing than evidence of other origin. A decision of an international court will have more authority for both parties than that of a national court of a third State. The consonant opinion of the majority of publicists of various nations has today a much greater probative value than the opinion of the minority in ascertaining a customary rule.

Such estimates of evidential force are, however, only presumptions, which in concrete cases may be abolished by a variety of additional circumstances, for instance, the date of origin of the evidence. It is also very doubtful whether a court or tribunal would rank a decision of an international tribunal composed of arbiters not being experts in international law higher than a decision of a national court enjoying a considerable reputation in international relations.

In the postwar literature, the hierarchy of evidential material—strictly speaking, of "law determining agencies," has been discussed by Professor SCHWARZENBERGER.[146]

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[145] Only Lapradelle in the Advisory Committee of 1920 stressed the superiority of the importance of jurisprudence over that of the doctrine, because, in his opinion, "the judge in pronouncing sentence had a practical end in view." *Committee*, p. 336. Professor Schwarzenberger compared this difference to that between "practicing shooting with dummy ammunition at a wooden target and firing in earnest with live ammunition at a living target." SCHWARZENBERGER, *International Law*, p. 31.

[146] SCHWARZENBERGER, *International Law*, p. 28.

As starting point, he has chosen the situation of a legal adviser to a Foreign Office, charged with the task of drafting a diplomatic note which turns on a controversial issue of international customary law. In the event of the dispute being submitted to arbitration, the evaluation of conflicting evidence arises. Professor Schwarzenberger maintains that the greatest importance should be attached to the criteria of objectivity, international outlook and technical standards.[147]

There is no doubt that these criteria seem at first glance conclusive as regards ascertaining international general customary law in the abstract. They are in fact, however, only secondary from the point of view of persuasive force in respect to the other party in the dispute—and that in practice is most essential. In practice, the criterion of will of the parties will be decisive. For instance, a document showing that the party itself recognized a certain customary rule, or that it refused such recognition will be conclusive. If, then, it is proper to speak at all of a hierarchy of evidence as to customary rules, in a manner similar to the case of arrangement of kinds of rules in Article 38 of the Statute of the Court, the actual criterion is the degree of objectivation of the will of the parties. In fact, the more an evidence testifies the acceptance of a certain rule or practice by the States concerned, the stronger it is. Confirmation of this criterion may be found not only in the practice of the Court in settling concrete cases, but also in ascertaining general international customary rules for codification purposes by the International Law Commission.

In connection with ascertaining international customary rules, there is emerging, it seems, another regularity which might be called compensation of evidence as to elements of custom. This consists in mutual compensation of evidence as to the element of practice and that of its acceptance as expression of law. In other words, strong evidence of the element of practice dispenses with the necessity to provide strong evidence of acceptance of that practice as an expression of law. And *vice versa*, when there is strong evidence showing that the States concerned accepted a certain practice or rule, little evidence of practice will suffice.

This regularity is a logical consequence of the relation which exists between the two elements of international custom.[148] A long and rich

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[147] *Ibid.*, p. 28-30.

[148] See *supra*, Chapter Four.

practice gives sufficient ground for presumption that it has been accepted as an expression of law. Whereas express declarations by States that they recognize a rule or practice diminishes the role of practice.[149]

It is clear that the phenomenon of compensation of evidence of international customary law still requires verification by reference to a greater number of cases. Jurisprudence to date seems to confirm this relation in the sense that the Court has ceased to require evidence of acceptance as law when the evidence of practice has been irrefutable.[150] On the other hand, for instance, Mr. Sandström indicated in the International Law Commission that long practice is unnecessary when *opinio juris* is sufficiently strong.[151]

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[149] Professor SØRENSEN sees a similar relation between the duration of a practice and the number of participating States: "L'envergure et l'ancienneté de la pratique semblent se fondre en une unité, de sorte que la pratique suivie par une grande majorite d'Etats suffit pour la création d'une coutume, même d'origine assez recente: d'un autre côté, une pratique de grande ancienneté n'a peut-être besoin d'autant d'adhérents ' SØRENSEN, *Les sources*, p. 102. See also LUKIN, pp 80-81.

[150] For instance, in the *Right of Passage* case the Court declared: " the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties " *ICJ Reports* 1960, p. 40.

[151] *YILC* 1950, v. I, p. 6; see *supra*, p. 47.

Chapter Six

THE BASIS OF THE BINDING FORCE OF CUSTOMARY RULES OF INTERNATIONAL LAW

Introductory Note

Problems involving the basis of binding force of law in general do not belong to the doctrine of international law *sensu stricto*, but to what is called its philosophy.[1] One question however requires always clear answer: What is the criterion of belonging to law, or, in other words, where is the dividing line between law and non-law?

The foregoing considerations based on highly representative source material lead to the conclusion that in the case of international customary law this criterion boils down to presumed acceptance of a practice as an expression of law. Among customary rules of international law can be reckoned only those rules as regard which, taking into account factual circumstances, it may be presumed that they have been accepted by the States concerned. The criterion of belonging to customary law consists, then, in the presumption of the will of the subjects to be bound by the rule of law.

It is not within the scope of the present study to deal with the doctrinal problems of what is called the essence of international law, its relation to casual reality, and far less, with the old dispute between positivists and naturalists of various schools. We therefore propose to limit ourselves to mentioning a few arguments which in our opinion are most convincing as to the criterion of presumed acceptance as being a criterion of belonging to international customary law, and to the criticism of most frequent objections raised against that criterion.

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[1] See S. Heilborn, "Les sources du droit international," *RCADI*, v. 11 (1926-I), p. 12; Kopelmanas, *Essai*, p. 102; Brierly, *The Law*, p. 55; Kunz, *The Nature*, p. 663.

Some Arguments in Favour of Presumed Acceptance

In seeking convincing arguments in favour of the criterion of presumed acceptance it suffices to indicate what may be called the whole international reality of today, the core of which consists in the co-existence of more than one hundred and ten States equal before the law, considering themselves bound exclusively by their own sovereign will [2] The whole mechanism of modern international life is based principally on treaties, hence on the active will of the States concerned Almost everything possible to be achieved for the progress and development of collaboration of States has in the course of the last hundred years been based, at least formally upon free accession of the members of the international society Finally whatever opinion might be held as regards the principle of sovereignty, it is indisputable, that, so far, there are no serious indications that any State is really inclined to renounce its exclusive right to take decisions on its own fate, hence, also upon the rules which are to bind it The voluntary creation of common agencies and the joining of them by States in their own interest in no way weakens the above assertion, but, on the contrary, confirms it [3] The degree in which the Governments of States great and small, old and new are reluctant to make any concessions from their formally unlimited will, may be seen in the notorious difficulties encountered by the codification of international law and the unwillingness to submit to international adjudication [4] Further, the very codification the success of which depends primarily on the consent of States concerned is a confirmation of the criterion based on the will of States For, there are no reasons to admit that customary rules, whose binding force is the same as that of conventional rules, could bind States without at least their presumed consent [5]

In such a situation, to reject presumed acceptance as a criterion of the fact that a rule belongs to international customary law would equal de-

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[2] See e g Ehrlich *Prawo*, p 6

[3] See Schwarzenberger, *Manual*, p 13

[4] If we confront the objections sometimes raised against the principle of sovereignty with the actual practice of States, it is hardly possible to resist the impression that the representatives of such opinions have only the sovereignty of other States in mind — that is, with the exception of their own country

[5] See *e g* Gould, pp 154-155

parture from reality and, consequently, would do harm to the authority of the doctrine of international law and to that of law itself. Attempts consisting in acceptance of wishes or abstract constructions as real facts, or in introducing criteria which are unverifiable and unacceptable on a world scale, in place of the well tried criterion of presumed assent is precisely one of the reasons for the decline in popularity of the doctrine in international law.[6]

Writers who completely reject the criterion of will in the theory of international customary law, are, however, few. As Professor MacGIBBON has pointed out, not only courts, but also many authors attribute greater and greater value to the criterion of consent, acquiescence or recognition—hence will [7] Moreover, here also, in the discussion on the bases of the

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[6] Recently, the situation in this respect has been expressively characterized by Kerley " we must recognize that efforts to secure for international law a role beyond that which the world community is willing to accord it weakens, rather than strengthens, the over-all impact of international law on world affairs If our efforts are not related to a realistic appraisal of what the rest of the world community is willing to accept from us, the international lawyers of the world may become a group of old men, sitting at the sidelines of world events, telling heroic stories to each other " Ernest L KERLEY, "United Nations Contribution to Developing International Law," *Proceedings* 1962, p 105 See also Julius STONE, *Legal Controls of International Conflicts*, London 1954, p VIII, Josef KUNZ, "La crise et les transformations du droit des gens," *RCADI*, v 88 (1955-II), pp 40-41, *ibid*, "The Changing Science of International Law," *AJIL*, v 56 (1962), pp 488, 493, Michel VIRALLY, "Le droit international en question," *Archives de Philosophie du Droit* No 8 (1963), pp 147, 163 *Cf* BENTZ, p 85

[7] "Not only municipal and international tribunals, but many writers also have eschewed an elaborate approach in their search for the legal basis of the customary rules which they were called upon to apply to approve In the place of sophisticated analysis there may be found more often than not a decided tendency to attribute the greatest weight to consent in one form or another as a determinant Attention may be drawn to some of the instances in which publicists and tribunals have been satisfied of the existence of an international custom almost wholly by reference to the test of consent, express or in form of acquiescence MacGIBBON, *Customary International Law*, p 138 The tendency to push the criterion of will forward to the first place in the theory of international custom is a consequence of the new structure of international society and of the influence of Soviet writers COHEN-JONATHAN, p 123 For example, Professor TUNKIN defines international law as follows "We define the contemporary general international law as a system of norms created by agreement (express or tacit) of States, regulating relations between them in the process of collaboration and com-

binding force of customary international law, the term "source of law" used in various meanings constitutes the most serious source of misconceptions, in particular, the confounding of the criterion of belonging to law—that is, the delimitation of law and non-law—with the fact as a result of which the law arises To accept presumed will as a criterion of the fact that a rule belongs to customary law by no means implies that the will of States creates that law [8] This is the case only in conventional law To accept the criterion of presumed acceptance means only that in the event of a dispute concerning the binding force of a customary rule the existence (or non-existence) of presumed consent of the States concerned to a rule will be decisive

Arguments supporting the criterion of presumed acceptance include another one of particular importance in the present structure of international society, which is characterized by co-existence of States of essentially different social and economic systems, and whose peoples have different traditions and creeds This argument is the fact that the criterion of presumed acceptance is relatively clear, comprehensible in every corner of the world, truly democratic, verifiable, and therefore acquiring the confidence of the governments of all States Thus this criterion seems to give the biggest, if not unique, chance of functioning of international customary law in an ideologically divided world [9]

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petition with the aim of ensuring peaceful co-existence, expressing wills of the ruling classes of States (relation of this will to the will of the people being conditioned by the class nature of each particular State), enforcement of these norms being ensured by measures undertaken by States individually or collectively" Grigory I TUNKIN, "The Role of International Law in International Relations, *Volkerrecht und rechtliches Weltbild, Festschrift fur Alfred Verdross*," Wien 1960, p 301

[8] Professor SCHWARZENBERGER speaking in favour of the consensual interpretation of international law to the exclusion of natural law, international morality, etc, as formal means of law-creating, rightly stressed that 'This view of the matter does not mean denying the formative influence of any of these agencies as metalegal factors which have assisted in shaping international law and, in more than one way, continue to exercise a considerable influence" SCHWARZENBERGER, *International Law*, p 5

[9] Professor TUNKIN writes "As to difference of ideologies, such difference has always existed True, this difference at present is profound But when States agree on recognition of this or that norm as a norm of international law they do not agree on problems of ideology They do not try and should not try to agree on such problems, for instance, as what is international law, what is its social foundation, its sources, what

Criticism of Most Frequent Objections Against Presumed Acceptance

Among the most frequent objections raised against the conception of international law as being based upon the presumed acceptance hence will of States, reference should be made to the charge of its being fictive.

Criticism of this kind, if it refers to the equation of customary law with tacit convention, seems to be justifiable. For international customary law differs essentially from conventional law. While in treaty law, in general, the active will of States aims at changing the reality, the essence of customary law lies in certain factual uniformity in international relations which is ratified only by means of acquiescence. To argue, then, that a customary rule binds because States have concluded a tacit convention is a fiction, except when true tacit conventions are at stake—that is, conventions differing from ordinary treaties only in form, for instance, by replacement of words by signs.[10]

In other cases, the charge of being fictive is, it seems, a misconception or at least a marked exaggeration. The misconception consists in that the charge concerns the motive for which States obey customary law and not the criterion of the fact that a rule belongs to international customary law. To state that only those rules are rules of international customary law which have been tacitly recognized as such, does not mean that States follow those rules simply because they have agreed to those rules. The motives of such adherance may be various—for example, fear for reciprocity or other considerations having little in common with law. But, in the event of a dispute on the question as to whether a certain rule binds a certain State as a legal rule, nobody's conviction, subjective interest, or other, more or less high-brow criteria will be decisive, but precisely the existence (or absence) of presumed acquiescence in the rule.

The alleged fictional nature of the conception of international customary law as being based upon presumed acceptance lies, in the opinion

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are the main characteristics of a norm of this law, etc. They do agree on rules of conduct." Tunkin, *The Role*, p. 296; see Tunkin., *Voprosy*, p. 7. Otherwise a similar idea has been presented by Professor Wright: "The world is so small and war is so destructive that if international law is to function at all in giving security it must rest on principles which all accept." Wright, *The Strengthening*, p. 52.

[10] See Strupp, p. 303.

of some authors, above all in the fact that customary rules are said to bind automatically also those States which neither participated in their creation nor accepted them.[11] This argument also can easily be refuted.

To endorse the criterion of presumed acceptance does not mean that all States which are bound by a given customary rule must participate in the whole process of formation of the custom. It suffices that they engage in the already ripe practice. This is the case when a newly emerged State begins to participate in international life, or when an old State enters into a new situation. An example here is when as a result of territorial changes, a State obtains access to the sea and by its conduct creates a presumption of acceptance of already existing customary rules of maritime law. Such an interpretation of the binding force of customary rules is not, as Professor Kelsen holds, a fiction,[12] but corresponds entirely to reality. The misunderstanding, it seems, lies in that *ex definitione* the presumption of acceptance of practice as an expression of law does not require any express declaration. In the latter case, it would be rather a sort of treaty or formal (and not customary) accession. The presumption of acceptance results simply from acting as do other States, already bound by valid customary rules. The presumption of acceptance of existing rules arises immediately from every action undertaken by the government of a State. Already the sending off or receiving of the first diplomatic envoy, hoisting a flag on a small boat, or fastening of a buoy on the territorial sea, all such acts constitute a visible and univocal evidence of presumed acceptance of the existing customary rules of international law.

Similarly as with the case of a State applying for recognition, it is not difficult to see here even an express recognition of the existing law *en bloc*. It is a generally accepted condition of recognition of a newly emerged State that it must demonstrate its intention to conform to the existing international law.[13] Article 4 of the United Nations Charter in this respect

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[11] See, for instance, BASDEVANT, *Règles*, p. 515; KELSEN, *Principles*, p. 311; BRIERLY *The Law*, p. 53; Sir Gerald FITZMAURICE, "The General Principles of International Law Considered from the Standpoint of Rule of Law," *RCADI*, v. 92 (1957-II), pp. 16, 17, 40, 46; *ibid., Some Problems, p.* 157.

[12] KELSEN, *Principles*, pp. 312-313.

[13] "As a rule, States are recognized only when there is no doubt as to ... their willingness to subordination to general international law." EHRLICH, *Prawo*, p. 143.

reflects only existing views and practice. In general, newly emerged States —strictly speaking their governments—do their utmost to convince the other States of their sincere intention to conform to the established rules of co-existence; otherwise they have serious difficulties in gaining admission to international community.[14]

In this factual necessity of submission to existing customary rules one might, of course, see a system of rules which bind irrespective of the will of States. It would, however, be much closer to the reality to assert that States simply want to conform to existing law out of pure convenience, although sometimes perhaps *à contre-coeur*. This relates, in fact, not only to customary law but also to multilateral conventions. Since no one would deny that the latter do not bind automatically and that newly emerged States may, formally speaking, refuse accession to them. In practice, however, such a possibility is often illusory. For example, it is impossible, on account of extra-legal reasons to refuse *à la longue* accession to the Universal Postal Union or to the International Telecommunication Union.

If the recent revolutionary changes in the structure of the society of States have not yet brought about essential changes in the existing customary law, that is only because of the relative political and economic weakness of the new States. The situation is, however, changing rapidly. New States no longer confine themselves to tacit approval of the legal *status quo*, but more and more urgently insist on active participation in the creation and revision of international law. It is even conceivable that

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[14] Sir Gerald FITZMAURICE, justifying the automatic binding force of customary international law in relation to newly emerged States, compared their legal status to that of a new borne child in municipal law. FITZMAURICE, *The General Principles*, p. 46. This comparison is not a very happy one. The present international society, even approximately, cannot be compared to a State. But, even admitting such an analogy, the situation of a new-borne infant and of a new State is entirely different. A new State emerges to some degree of its "own initiative" at once having full rights as an "adult" subject of international law. On the other hand, an adult citizen in a democratic country is co-administrator and co-legislator; in other words, it depends also on his will, what law is to bind him. Even more important is the difference consisting in the fact that a new-borne child becomes national *de jure*, whereas a new State must apply for recognition. If then a comparison is sought, the status of a newly emerged State resembles rather that of an adult individual applying for citizenship.

such a newly recognized State or group of States might refuse recognition of a customary rule which they consider unjust, and that such reservation would be expressly or tacitly accepted by other States.[15]

Certainly, as long as the functioning of international law depends formally and factually on the consent of States—hence, as long as that law is international law in the traditional meaning—it is hardly possible to speak of its automatic validity.[16]

The most serious objection—at least so it seems—against the criterion of presumed acceptance is a logical one. It maintains that this criterion leads to a vicious circle, since, it is said, it must be based also upon the will of States.[17] This is no place for detailed analysis of objections of this kind. Suffice it to indicate that similar objections might be raised against other criteria. The acceptance of a hypothetical rule, the idea of justice, feeling of a duty, conviction of conformity with law, etc., do not safeguard against a vicious circle or other logical flaw. On the other hand, acceptance of such criteria involves departure from the reality which law must serve.

Paraphrasing the classic statement by Judge Holmes, it might be said that law is based not on logic but on experience.[18] The criterion of belonging to law does not itself belong to law, and hence does not neces-

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[15] "... the authority of the existing customary international law has been strained, particularly since the greater part of the evidence of accepted custom habitually relied upon by international lawyers relates to the customary practice of the original members of the international community whose authority in every sphere the new an newly influential members of the international community are inclined to challange." JENKS, *The Common Law*, p. 29; see *ibid.*, pp. 65, 74, 79, 84. See CASTAÑEDA, *The Underdeveloped Countries*, pp. 40-41; ANAND, *Role*, p. 387; EHRLICH, *Suwerenność a morze w prawie międzynarodowym*, Warszawa 1961, p. 9. See also the pronouncement by Professor Ago in the United Nations International Law Commission. *YILC* 1961, v. I, p. 249.

[16] "If an undevoidable excessive reliance upon consent, and in consequence, upon good will and good faith, exposes international law to the will of the least law-abiding of the governed to a greater degree than municipal law, the situation is one which statesmen and idealists must contend as long as the international law remains a community of sovereignties." GOULD, p. 155.

[17] See SØRENSEN, *Les sources*, pp. 14-17; BRIERLY, *The Law*, p. 54.

[18] "The life of the law has not been logic; it has been experience." See Benjamin N. CARDOZO, *The Nature of the Judicial Process*, New Haven 1955, p. 33; see also WRIGHT, *The Strengthening*, p. 287; VISSCHER, *Théorie*, pp. 9-10, 88.

sarily depend on anybody's will. It is simply a fact ascertained in the mechanism of international relations, originating in the totality of conditions which constitute what is called international reality.[19]

Further, modern writers condemn legal positivism as a whole—hence, also the conception of international customary law based on the presumed will of States—to the effect that it is allegedly indifferent to moral values, reactionary, formalistic and static, and as such holding up progress in international relations.[20] This criticism seems also to be exaggerated. Anyhow, the requirement that customary law should be based on presumed acceptance by no means implies indifference to moral values. It only prevents formal forcing of moral criteria upon others. The charge of holding up progress is here a typical symptom of naiveté, common even with the most eminent scholars. It amounts to blaming effects instead of causes, and leads to the conviction that in this case it would suffice to change the effects, the conception of international customary law, to change the international reality. It is obvious that it is not this or that conception of law which is to be blamed for unsatisfactory progress in international relations. And a change of such conception cannot by itself improve these relations. There is, on the other hand, no doubt that by accepting criteria and postulates excessively detached from actual conditions would bring about effects which would be the opposite of progress—namely, complete neglect of law (and judicial organs), which would become the proverbial dead letter.[21]

International law, if it is to be a factor of true progress in interstate relations, must be based upon better and better learning, and universal understanding of the mechanism of international life, especially of the rapidly growing interdependence of peoples. Such learning and understanding would contribute most effectively to voluntary creation of and obedience to rules of collaboration by the States for their individual and at the same time the common, good.

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[19] *Cf.* GIHL, pp. 62, 81-83; AGO, *Science*, p. 942.

[20] See criticism of positivism by Professor VISSCHER (*Théorie*, pp. 9-10, 71-73).

[21] The history of recent decades provides adequate confirmation of this fact.

CONCLUSIONS

The investigations here undertaken have shown that it is difficult to speak yet of the existence of a full, generally accepted conception of custom in international law. We may at most state a more or less pronounced convergence of views on a few fundamental problems of international custom and customary rules.

Such convergence of views is emerging now, for example, as regards the key problem of elements of international custom. Generally binding conventional rules, the jurisprudence of the World Court and writers agree that the existence of international custom requires the existence of two elements: an appropriate practice and its acceptance by the States concerned.

The element of practice consists mainly in a certain uniformity in the conduct of States, which cannot however, be described in advance *in abstracto*. Clearly, it must be such a practice as gives rise to presumption that it has been accepted by the States concerned as a binding conduct.

The requirement of acceptance of practice, still frequently defined by writers by means of the term "*opinio juris sive necessitatis*," increasingly amounts to tacit toleration of the practice.

Subparagraph 1(b) of Article 38 of the Statute of the Court, which has been without amendment since 1920, does not fully correspond to prevailing views and practice. In addition faulty wording—since not customary rule (wrongly called here "custom") is evidence of customary rule—there is no ground for limiting practice to "general practice" since the Court itself has recognized particular customary rules.

Information available concerning the process of the arising of international custom is still meager. It seems certain, however, that it is a complex, continuous and spontaneous process. Very generally speaking, it

consists in mutual claims being raised by States in the form of accomplished facts of conduct, and in the attitude to such claims demonstrated by their toleration or rejection. Toleration of accomplished facts may lead, with the passage of time, to the formation of customs and hence to binding customary rules. It might be said briefly that international custom arises from collaboration and competition between States. It is impossible, however, to lay down rigid conditions as to the formation of custom. For instance, the opinion prevailing until recently to the effect that this process is slow has lost its validity. Along with the rapid acceleration and enrichment of international intercourse, there is taking place an acceleration of the formation of international custom. Among factors which nowadays play an especially important role in the process of formation of customs should be included the activities of the World Court, of the International Law Commission, and of numerous international organizations.

Among conclusions referring directly to customary rules of international law, reference should be made to the final acceptance in practice and doctrine of particular customary rules of such law binding even only two States. Universal practice is not a condition of the universal binding force of a rule. Practice by a part of States suffices if it is presumptively accepted by other States. It also seems useful to distinguish special customary rules which constitute a right of one or several States against the whole of international society (for example, historic bays). The same concerns the distinguishing of customary rules regulating a certain section of international life for the first time from those which amend or abrogate old rules.

As to the relation of customary rules to conventional rules of international law, it must be stated that they differ essentially. While conventional rules are created by the active, distinctly manifested will to regulate a certain section of international relations, the customary rule is based upon a section of those relations actually regulated by practice.

The dividing line between customary and conventional rules of international law, however, is not sharp. There are more and more rules of international law to the validity of which elements both customary and conventional contribute. It is, therefore, appropriate to discern rules of yet a third kind in international law which might be called intermediate rules.

There are no grounds for opposing what are called the "general principles of law recognized by civilized nations" to customary rules, since the former, as rules of law to be applied by the Court, must fulfil (and actually do fulfil) the conditions of customary rules.

The relation of customary rules to decisions of international organizations depends on factors to which such decisions owe their binding force. For instance, decisions binding by virtue of the statute of the organization, from the point of view of their relation to customary rules, are equivalent to conventional rules. While not binding resolutions (recommendations) which have been performed in the practice without formal ratification by the member States may be reckoned as typical intermediate rules.

For the administration of international law, the ascertaining of customary rules is particularly important. It embraces such functions as ascertaining the fulfilment of individual elements of custom and the content and range of validity of the corresponding customary rule. It is indisputable now that there are no restrictions whatsoever in the choice of means of ascertaining (hence, of evidence) customary rules. It is also impossible to give a full enumeration of facts which may have any significance for such ascertaining a rule as evidence of individual elements of custom as a result of which the rule binds. In view of the fact that the proof of the element of presumed acceptance is very difficult, the Court has most frequently resigned from it altogether, accepting the fulfilment of that element by virtue of investigation of the practice itself and the ascertainment of absence of protest against it.

The growing necessity of peaceful collaboration between all nations, in spite of the differences dividing them, has pushed somewhat to the background, it seems, the endless doctrinal disputes concerning the basis of international law. The jurisprudence of the Court, the activity of the International Law Commission and, in general, the whole international reality, which consists in co-existence of more than a hundred and ten States, formally independent and equal before the law, which still consider themselves bound "exclusively by their own sovereign will," indicates that the only truly universally accepted criterion of the appurtenance of a customary rule to international law is the presumed acceptance of the rule by the States concerned.

Certainly, this criterion presents theoretical difficulties. Difficulties involved in other criteria are no less, however. Whereas the criterion of appurtenance to international customary rules based on presumed acceptance of States, being truly democratic and comprehensible in every corner of the globe, arouses the confidence of all peoples.

In the present international community, only practice which is acquiesced in by the States concerned may give rise to customary rules of international law.

APPENDIX

Drafts of Subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice

Proposal by Baron Descamps (Committee, p. 306)

... la coutume internationale comme attestation d'une pratique commune des nations, acceptée par elles comme loi.	... international custom, being practice between nations accepted by them as law.

Amended Text Submitted by Mr. Root (Ibid., p. 344)

see supra	see supra

Proposals Presented by the President (Baron Descamps) and Lord Phillimore, as Amended by Mr. Ricci-Busatti (Ibid., p. 351)

... la coutume internationale, comme attestation d'une pratique commune des dits Etats, acceptée par eux comme loi.	... international custom as evidence of common practice among said States, accepted by them as law.

Root-Phillimore Plan (Ibid., p. 548)

La coutume internationale comme attestation d'une pratique commune des nations acceptée par elles comme loi.	International custom, as evidence of a common practice in use between nations and accepted by them as law.

Text Proposed by the Drafting Committee, of a Draft Scheme for the Establishment of a Permanent Court of International Justice (Ibid., p. 567)

... la coutume internationale, attestation d'une pratique commune, acceptée comme loi.	... international custom, as evidence of a general practice, which is accepted as law.

Text Adopted in First Reading (Ibid , 666)

see supra	International custom, being the recognition of a general practice accepted as law

Draft Scheme (Ibid , p 678)

see supra	international custom, as evidence of a general practice, which is accepted as law

Final Text Adopted by the Committee (Ibid , p 730)

see supra	see supra

Present Text of Subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice

see supra	see supra

Meždunarodnyi obyčai, kak dokazatelstvo vseobščei praktiki, priznanoi v kačestve pravovoi normy

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ABBREVIATIONS

AJIL — *American Journal of International Law*
Annuaire Français — *Annuaire français de droit international*
AV — *Archiv für Völkerrecht*
BYIL — *British Yearbook of International Law*
Committee — *Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee*, June 16th-July 24th 1920 with annexes, The Hague 1920
Dictionnaire — *Dictionnaire de la terminologie du droit international*, Paris 1960
Grundprobleme — *Grundprobleme des internationalen Rechts, Festschrift für Jean Spiropoulos*, Bonn 1957
ICJ Reports — *International Court of Justice, Reports of Judgments, Advisory Opinions and Orders*
NZIR — *Niemeyers Zeitschrift für Internationales Recht*
ŐZŐR — *Österreichische Zeitschrift für öffentliches Recht*
PCIJ — *Publications of the Permanent Court of International Justice*
Proceedings — *Proceedings of the American Society of International Law*
RCADI — *Recueil des Cours de l'Académie de droit international*
RDILC — *Revue de droit international et de législation comparée*
Recueil Gény — *Recueil d'études sur les sources du droit en l'honneur de François Gény*
RGDIP — *Révue générale de droit international public*
RITD — *Revue internationale de la théorie du droit*
Rivista — *Rivista di diritto internazionale*
SJIR — *Schweizerisches Jahrbuch für internationales Recht*
Symbolae — *Symbolae Verzijl*, Présentées au professeur J. H. W. Verzijl à l'occasion de son LXXième anniversaire, La Haye 1958

YILC — Yearbook of the International Law Commission
Zarys — Zarys prawa międzynarodowego publicznego, opracowanie zbiorowe pod redakcją M. Muszkata, Warszawa 1955
Zeszyty — Zeszyty Naukowe Uniwersytetu Wrocławskiego

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