

Costumary International Law in a Global Community: Tailor Made?

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The growing trend to consider as customary law rules devised to support preferences and arguments, that cannot otherwise qualify as law, is leading to serious doubts about the real meaning of international law. This article examines the reasons behind this phenomenon and reflects on means for strengthening the traditional requirements of customary international law so as to ensure that proper law is made. It notes that customary international law cannot depend on the advancement of instrumental goals some times in contradiction with the requirements of a stable legal system. The article examines in particular the meaning of States' practice and opinio juris, the traditional elements for the formation of customary rules. It argues in conclusion that the efforts at reengineering customary law have actually revived its role to an unexpected extent, to the point that the reaction against its manipulation is gradually bringing back international law to its normal balance.

CUSTOMIZING YOUR OWN NEEDS

Among the many incisive remarks made by Sir Robert Jennings, there is one that stands up for its accuracy and reflection of current realities: “[m]ost of what we perversely persist in calling customary law is not only *not* cus-

tomary law; it does not even faintly resemble a customary law”¹. Yet, every passing day more and more purported rules are labelled customary law if this helps to support an argument that cannot otherwise be sustained under the law. What is most disquieting about this phenomenon is not that authors and govern-

¹ Robert Y. Jennings: “The Identification of International Law”, in Bin Cheng (ed.), *International Law: Teaching and Practice*, 1982, 3-9, at 5, and discussion by Martti Koskenniemi: “The Politics of International Law”, *European Journal of International Law*, Vol. 1, 1990, 4-32, at 27; and David P. Fidler: “Challenging the Classic Concept of Custom: Perspectives on the Future of Customary International Law”, *German Yearbook of International Law*, Vol. 39, 1996, 198-248, at 225.

ments tend to rely on such an approach, but that judges and practitioners have embarked in such an exercise too, prompting doubts about the very basis of international law.

Idealism needs to find a rule of law even where there is none.

Bad as this situation tends to be with respect to general issues of international law, it turns only worse in certain fields where idealism, and occasionally political interest, needs to find a rule of law even where there is none, or reach an interpretation of a rule that does not even remotely allow for such a development. A desired outcome is then substituted for the strict rule of law.

Fidler has put together an impressive account of authors who have warned about, or explained, this trend². With respect to human rights, Simma and Alston,

for example, have noted an “identity crisis in customary law” because of the search for customary law wherever is needed³; Henkin has remarked that most of human rights law cannot be identified with customary law since it does not derive from State practice or consent⁴; and Sohn has also explained that States not even make the law on human rights as it emerges from people, scholars and law journals⁵. The situation is not very different in connection with international environmental law⁶ or, more recently, as a tool for justifying the use of force in international affairs⁷.

Why is this process gaining ground and how should the traditional requirements of customary international law be strengthened in order to ensure that proper law is made, are the main concerns that will be discussed in this contribution.

A first aspect that must be noted is that which an author has described as the “evaporation of law from international law”⁸. The concerns relating to the exag-

² Fidler, *supra* note 1, at 224-226.

³ Bruno Simma and Philip Alston: “The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles”, *Australian Yearbook of International Law*, Vol. 12, 1992, at 88, 107, and discussion and citation by Fidler, *supra* note 1, at 225.

⁴ Louis Henkin: “Human Rights and State ‘Sovereignty’”, *Georgia Journal of International and Comparative Law*, Vol. 25, 1995, 31, at 38, and discussion and citation by Fidler, *supra* note 1, at 225.

⁵ Louis B. Sohn: “Sources of International Law”, *Georgia Journal of International and Comparative Law*, Vol. 25, 1995, 339, at 399, and discussion and citation by Fidler, *supra* note 1, at 225.

⁶ Daniel M. Bodansky: “Customary (and not so Customary) International Environmental Law”, *Indiana Journal of Global Legal Studies*, Vol. 3, 1995, 105, and discussion and citation by Fidler, *supra* note 1, at 199-200, 224-225.

⁷ The doctrine of Just War and that of preventive self-defense, for example, have been invoked as justifying both the Gulf War in 1991 and that concerning Iraq in 2003. On the international law implications of these events see Vaughan Lowe: “The Iraq Crisis: What Now?”, *International and Comparative Law Quarterly*, Vol. 52, 2003, 859-871; and Gilbert Guillaume: “Terrorism and International Law”, *International and Comparative Law Quarterly*, Vol. 53, 2004, 537-548.

⁸ Outi Korhonen: “Liberalism and International Law: A Centre Projecting a Periphery”, *Nordic Journal of International Law*, Vol. 65, 1996, 481-532, at 481-484.

gerated use of “soft law”, package dealing, bargaining, settlement-type outcomes and other that author identifies, are not alien to this particular development⁹. Customary international law could not escape from a frame where regimes matter more than the law, international relations side-up with advocacy and at the very end what matters is to accomplish instrumental goals rather than count on a stable legal framework¹⁰.

The politics underlying the different approaches to the sources of international law have also been well explained by Koskenniemi¹¹. The increasing criticism of consensualism to justify the departure from State consent to ascertain the existence of a rule, explained by some concept of social necessity or by the resort to some form of tacit or presumed consent, even if wholly artificial, means that non-consensualism becomes the desired outcome¹². Again, customary law cannot escape from a setting where consent and State practice are not considered relevant for the determination of the legal norm,

particularly when the identification of a rule of customary law is always surrounded by some degree of difficulty.

Customary law cannot escape from a setting where consent and State practice are not considered relevant for determining the legal norm.

A NOT SO MYSTERIOUS MYSTERY

It is quite true that customary international law is surrounded by mystery¹³. It has even been remarked that the drafters of the Statute of the International Court of Justice and its predecessor did not have a clear idea about what custom was¹⁴.

One such mystery is, of course, how can a rule of law develop on more than one occasion from the violation of a pre-existing rule of law¹⁵. In turn, the perception of what is the law on that particular matter

⁹ Korhonen, *supra* note 8, at 482.

¹⁰ Korhonen, *supra* note 8, at 484-485, with particular reference to Slaughter: “Liberal International Relations Theory and International Economic Law”, *American University Journal of International Law and Policy*, explaining that the international legal system is “seeking to accomplish instrumental goals”, Vol. 10, 1995, 717, at 729.

¹¹ See generally Koskenniemi, *supra* note 1, and by the same author: *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, 2001.

¹² Koskenniemi, *supra* note 1, at 21-22.

¹³ Prosper Weil: “Le Droit International en Quête de son Identité”, *Cours Général de Droit International Public*, Académie de Droit International, Vol. 237, 1992-VI, 161-164, and George Abi-Saab: “La coutume dans tous ses états, ou: Le dilemme du droit international général dans un monde éclaté”, *Le Droit International à l’heure de sa codification, Etudes en l’honneur de Roberto Ago*, 1987, Vol. 1, 55, at 58 et seq.

¹⁴ Karol Wolfke: *Custom in Present International Law*, 1993, 5-6, and discussion and citation by Fidler, *supra* note 1, at 200.

¹⁵ Weil, *supra* note 13, at 162.

might not be entirely shared. Indeed, the enactment of a 200-mile area of maritime jurisdiction, for example, was perceived by some as a violation of a rule on a restricted territorial sea and contiguous zone, but not by others who believed that resource-related jurisdiction was previously unknown under international law and hence there was no specific rule governing the matter in a way not dissimilar to what had happened with respect to continental shelf jurisdiction¹⁶. The end result, however, is that one way or the other the new rule became accepted and proclaimed as customary international law, thus superseding whatever there was or there was not earlier.

MICROWAVING CUSTOMARY LAW

A second area of mystery surrounding customary law is that concerning the basis of its binding character. Barberis has rightly pointed out that the traditional explanation of the *Grundnorm* as the ultimate source of such binding obligation is in itself a contradiction¹⁷. Indeed, to justify the binding nature of custom on the existence of another customary rule that so says is a rather circular argument. Yet,

the very foundation of international law in Kelsen's theory of law is related to the ultimate existence of *pacta sunt servanda* as a rule of customary law¹⁸.

The various theories that have been advanced to explain the nature of customary law reflect mostly a self-interested doctrinal approach that purports to justify a given view of the process, rather than to seek a real scientific answer to this difficult subject. The theory of *pactum tacitum*, while reflecting the need for State consent to be bound by a rule of customary law, takes this safeguard of sovereignty to the length that there would be no binding rule if such consent is not established directly or indirectly¹⁹; it will seem that this is not actually the reality of customary law because that binding effect is in some aspects independent from the process of consent and admits exceptions thereto, albeit limited and legally precise.

In some aspects, the binding effect of a rule of customary law is independent from the process of consent.

Still less convincing is Ago's theory of customary law as "spontaneous law"²⁰,

¹⁶ Francisco Orrego Vicuña: *The Exclusive Economic Zone. Regime and Legal Nature under International Law*, 1989, at 3-15.

¹⁷ Julio A. Barberis: "Reflexions sur la coutume internationale", *Annuaire Français de Droit International*, Vol. XXXVI, 1990, 9-46, at 15-17.

¹⁸ Hans Kelsen: *General Theory of Law and State*, 1945, at 110 et seq. and discussion by Barberis, *supra* note 17, at 14-15.

¹⁹ Rudolf Bernhardt: "Customary International Law: New and Old Problems", *Thesaurus Acroasium*, Vol. XIX, 1992, 202-221, at 208; Maurice Mendelson: "The Subjective Element in Customary International Law", *The British Year Book of International Law* 1995, 1996, 177-208, at 178.

²⁰ Roberto Ago: "Diritto positivo e diritto internazionale", *Scritti di Diritto internazionale in onore di Tomaso Perassi*, 1957, Vol. 1, 1, at 44, and discussion by Mendelson, *supra* note 19, at 179.

and hence different from the elaborate nature of treaty law, as it has been rightly pointed out that customary law is far from spontaneous and relies on a careful calculation by States through the process²¹. Neither does Bin Cheng's view of an "instant" customary law help to explain the nature of custom, but does of course have a connection with the discussion about the interrelationship between treaties and custom that will be examined below²².

Customary law seldom needs consensus to come into being.

Consensus has been another favoured theory (Suy, en Bern. P. 208, n. 6)²³, but this approach neither reflects the reality of how customary law is formed and applied. Seldom does customary law need consensus to come into being, although consensus might be achieved at a later point in the process, particularly in the context of a codification conference.

The role of natural law in explaining customary law does not lack interest²⁴, but

this relates either to historical elements influencing the formation of the international legal system or to the identification of rules that are fundamental for the international community, as opposed to ordinary rules. This in turn is the basis for the distinction between rules of constitutional international law and other rules that do not have such importance²⁵. The significance of international constitutional law is gaining in importance as the global society evolves into a more structured community, and many such fundamental principles may be indeed embodied in customary law²⁶.

In this respect it should be noted that the International Court of Justice has not followed a consistent approach in dealing with customary law. During the period of the Permanent Court of International Justice and the early years of the present Court, consent or acceptance played an important role regarding the identification of customary rules. Thus, in the *Lotus* case emphasis was placed on the free will of States expressing principles of law though generally accepted conventions or usages²⁷. In *Asylum* there was a ques-

²¹ Mendelson, supra note 19, at 179.

²² Bin Cheng: "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", *Indian Journal of International Law*, Vol. 5, 1965, at 23, and discussion by Bernhardt, supra note 19, at 215. On the discussion about instant customary law and the role of treaties see Maurice H. Mendelson: "The Formation of Customary International Law", *Recueil des Cours de l'Académie de Droit International*, Vol. 272, 1999, 368-382.

²³ Eric Suy: "Rôle et signification du consensus dans l'élaboration du droit international", *Le Droit International à l'heure de sa codification, Etudes en l'honneur de Roberto Ago*, 1987, Vol. 1, at 521.

²⁴ Bernhardt, supra note 19, at 208.

²⁵ Bernhardt, supra note 19, at 210; Abi Saab, supra note 13, at 64; Weil, supra note 13, at 193-194.

²⁶ Christian Tomuschat: "Obligations Arising for States Without or Against their Will", *Recueil des Cours de l'Académie de Droit International*, Vol. 241, 1993-IV, at 292-309; Francisco Orrego Vicuña: *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accesibility, Privatization*, 2004.

²⁷ *The SS Lotus*, PCIJ, Series A, No. 10, 1927, 4, at 18, and discussion by Mendelson, supra note 19, at 181.

tion of lack of proof of a given practice having been accepted²⁸, while in *Fisheries* the absence of protest was also influential in the outcome²⁹. Acceptance also appears to have inspired the *Right of Passage*³⁰ and general opinion appears to underlie *Wimbledon*³¹.

The ICJ has not followed a consistent approach in dealing with customary law.

In more recent times, however, it would seem that far from adhering to a given theory the Court has found a customary rule whenever and wherever it has deemed it necessary or convenient to identify such a rule or to go beyond treaty rules. It has been noted that in *Nottebohm*³² and *Barcelona Traction* general rules seemed to have been enough, independently from acceptance³³. More generally, *opinio juris* has been at the heart of many decisions, including the *North Sea Continental Shelf*, the *Libya- Malta*, and *Nicaragua*³⁴, not understood as an indication of consent but in a rather loose

manner that heavily departs from the practice of States. This last decision will be discussed further below.

This state of flux in the theory and practice concerning customary law lends itself to many possible interpretations. However, some of these interpretations will be made within the framework of law and its reasonable evolution and change and some other will be outside such bounds. The need to draw the line between one and the other then becomes essential for the stability of the legal system.

CONVENIENTLY PRACTICAL PRACTICE

It is an accepted element of customary law that it must be based on practice. But how much practice, how long, and how consistent it needs to be is a matter open to discussion. That is quite a legitimate discussion, but the problem is that it has ranged from those requiring just a handful of States to develop a practice serving as the basis for a customary rule, to those that require overarching majorities to this effect.

²⁸ *Asylum Case*, ICJ Reports, 1950, 266, at 276-278, and discussion by Mendelson, *supra* note 19, at 181.

²⁹ *Fisheries Case*, ICJ Reports, 1951, 116, at 136-139, and discussion by Mendelson, *supra* note 19, at 181-182.

³⁰ *Right of Passage Case*, ICJ Reports, 1960, 6, at 39-40, and discussion by Mendelson, *supra* note 19, at 182.

³¹ *The SS Wimbledon Case*, PCIJ, Series A, No. 1, 15, at 26-28, and discussion by Mendelson, *supra* note 19, at 182.

³² Mendelson, *supra* note 19, at 182, with reference to the *Nottebohm Case*, ICJ Reports, 1955, 4, at 12-26.

³³ Mendelson, *supra* note 19, at 182, with reference to the *Barcelona Traction (Second Phase) Case*, ICJ Reports, 1970, 3.

³⁴ *North Sea Continental Shelf Cases*, ICJ Reports, 1969, 3, at 44; *Continental Shelf (Libya v. Malta) Case*, ICJ Reports, 1985, 13, at 29-30; *Nicaragua (Merits) Case*, ICJ Reports, 1986, 14, at 97-101; and discussion of these cases by Mendelson, *supra* note 19, at 182-183.

It is beyond doubt that the participation of particularly interested States will be an essential requirement of the practice considered, as it has been rightly identified by the International Court of Justice³⁵. The practice of these States will greatly influence the formation of a customary rule, but of course normally it will not be enough, as the participation of a relevant number of States will be required if that practice aims to reflect some degree of universality. How many is the relevant number is again open to discussion in the light of the specific matter concerned, but it cannot be as small as to result in a practice that is either unilateral, or the outcome of a very limited group of States, unless it is a case of particular or regional customary law. The sense of common direction in the international community is again the relevant factor, more than numbers themselves.

The number of States adhering to a certain practice will influence the information of a customary rule.

On the other hand, for some authors the discussion becomes a question of majorities versus minorities³⁶. While the practice of States representing broad economic, political and legal systems might be desirable, it is by no means a require-

ment of the process. In this connection, the practice of fewer States might be relevant if it meets the conditions of density, significance and sense of direction noted above, even if a number of other States have either not participated formally or even might be interested in establishing a practice to the contrary. This was the situation underlying the dispute about new States being bound by rules of customary law in the formation of which they had not participated³⁷. Although this particular dispute is no longer active, as it responded to a given moment of unsettled legal principles at the time of decolonization, it evidences the underlying dangers of uncertainty in the state of customary law.

It must also be noted that on occasions it is just the practice of one State that triggers the development of a process that will end up in the formation of a customary rule. This was the case, for example, of the United States in connection with continental shelf jurisdiction and of Chile in connection with the 200-mile maritime jurisdiction. How many States need to be added is a question not of majority but of sufficient strength as to make the practice viable in legal terms. In the case of the continental shelf, overwhelming support was achieved in a span of only few years. In that of the exclusive economic zone, the process gained strength

³⁵ *North Sea Continental Shelf Cases*, ICJ Reports, 1969, 3, at 43, and discussion by Weil, *supra* note 13, at 166-167. See also generally Maurice H. Mendelson: "The Formation of Customary International Law", *Recueil des Cours de l'Académie de Droit International*, Vol. 272, 1999, 155-410.

³⁶ Dissident Opinion of M. Lachs in the *North Sea Continental Shelf Cases*, ICJ Reports, 1969, 3, at 227, as commented by Weil *supra* note 13, at 167.

³⁷ Bernhardt, *supra* note 19, at 218-219.

as a gathering storm, beginning with a few States in South America and extending to numbers in other continents; it could be ascertained that the practice had turned into customary law much earlier than a majority could be counted in, and in spite of the contrary practice and legal belief still maintained by a handful of other significant States, which in turn evolved gradually into the acceptance of the new practice or rule.

On occasions, the practice of one State triggers a process that leads to the formation of a customary rule.

Neither is there a need that practice be identical in every detail and expression³⁸, yet it is necessary that there is a sense of common direction between participating States and entities. This is what Weil refers to as a practice sufficiently dense³⁹. The fact that a State conduct to the contrary might be eventually present does not mean either that the conditions for the formation of a customary rule are not met⁴⁰.

Moreover, time might be a relative factor if it is evident that during the relevant period that practice has gathered sufficient strength. While custom concerning the laws of war took centuries to materialize that concerning the continental shelf took as noted just a few years. Historical accel-

eration is making the process faster, but in any event the essence of the question is that practice be real and meaningful.

ALL ABOARD

What is considered to be State practice is another issue related to this discussion. All types of evidence are occasionally taken into account, including treaties, legislation, resolutions of international organizations and many other diplomatic acts. Yet only some of these can be considered hard evidence, other are just a sort of soft evidence and still some are not evidence at all as there is no intention to follow such practice in any persistent manner. Resolutions of international organizations and conferences are some times riddled with this kind of problem, as will be discussed below. On the other hand, as noted by Barberis, it is not excluded that customary law may be based on the negative practice of States or their abstention, as opposed to positive or affirmative practice, thus compounding the range of choices as to what practice might be considered relevant in a given situation⁴¹.

Even if a practice does not gather sufficient strength so as to become universally binding international law or give birth to a general rule of law, it might still qualify as custom binding on a group of States or even on two States or give place to a particular

³⁸ *Nicaragua (Merits) Case*, ICJ Reports, 1986, 14, at 97-101, and discussion by Weil, *supra* note 13, at 165.

³⁹ Weil, *supra* note 13, at 164-168.

⁴⁰ Barberis, *supra* note 17, at 25.

⁴¹ Barberis, *supra* note 17, at 22.

rule⁴². However, this is also a question of how far the process has evolved at a given time. As rightly commented by Elias and Lim, the practice of Latin American States concerning asylum could well be a practice influencing the formation of a general rule of customary law but when examined by the International Court of Justice had not yet gathered momentum to that effect⁴³.

Moreover, although many States might not recognize a practice as developing into a given legal concept they might at the same time recognize other types of practice inspired in the same values. This is what happened specifically in respect of diplomatic asylum, not recognized many times beyond Latin America, but where many of those States not so recognizing accept and engage in practice giving protection to the same humanitarian values, albeit labelled differently. The end effect of the practice is then the same.

The mystery surrounding customary law can be solved within the framework of legal reasoning.

However great the mystery surrounding customary international law might be it is still possible to solve it within the framework of legal reasoning. The problem becomes a serious one when the reasoning lies beyond that framework and

pursues objectives other than the correct identification of a rule of law. That is no longer a legal exercise associated to the work of sources of international law.

A NON-OPINIONATED *OPINIO JURIS*

If practice is difficult enough to assess, the second element governing the formation of a rule of customary international law, namely *opinio juris*, has become still more unassailable. This is not the result of a particular legal difficulty, as it is quite evident that not any expression of practice can lead to the formation of a legal rule but this process requires the conviction that such a practice must be observed as a legal right or obligation in the belief that it is indeed an established legal rule. The difficulty found today is rather one associated with the interplay of the two basic elements.

A number of authors have been right in pointing out the contradiction that *opinio juris* entails as if this element is a requirement for the formation of a rule of law it is not quite easy to reconcile it with the need to believe that it is already a binding rule of law⁴⁴. As explained by Kelsen in an early work, it is not possible to believe in the existence of a legal rule embodied in practice that in reality does not exist because *opinio juris* has not yet produced its effects⁴⁵. But this apparent contradic-

⁴² *Asylum*, supra note 28; *Right of Passage*, supra note 30.

⁴³ O. A. Elias and C. L. Lim: *The Paradox of Consensualism in International Law*, 1998, at 120.

⁴⁴ Barberis, supra note 17, at 27-28; Anthony A. D'Amato: *The Concept of Custom in International Law*, 1971, at 66, and discussion by Fidler, supra note 1, at 204-205.

⁴⁵ Barberis, supra note 17, at 27, with reference to Kelsen: "Théorie du droit international coutumier", *Revue Internationale*, 1939, at 263-264.

tion can be explained in terms that customary law involves a process of interaction along time, during which practice gradually acquires a legal effect that *opinio juris* recognizes and at some point consolidates into a new legal rule.

There has been scepticism as to the actual need of *opinio juris* for the formation of a rule of customary law.

The evidence required to establish that the psychological element characterizing *opinio juris* is present or has been completed is indeed difficult if not quite impossible to attain. It is on this basis that many authors have been sceptical about the need for this element⁴⁶ or in any event for the need to prove it⁴⁷. However, as aptly discussed by Barberis, there are in fact two types of practice that intervene in the formation of customary law⁴⁸. The first is conforming to a practice believed positive by the community, while the second is that such a community can also react adversely to a practice that does not conform to their sense of legal commitment. Both types taken together do indeed provide a clear answer as to when and how *opinio juris* has intervened and per-

formed its function in the formation of the customary rule. True as it is that it is difficult to know what States believe⁴⁹, there is nonetheless a sense of legal attachment that allows to understand when a practice is devoid of legal effects and when it is the basis of a legal rule⁵⁰.

What cannot be explained is the view that as *opinio juris* is the expression of recognition of a pre-existing legal element embodied in practice, it suffices with practice for the formation of the rule and the role of *opinio juris* becomes unnecessary. The consequence of this approach is doubly negative. First, it allows to consider that just any practice can give rise to a new rule of law without a further filtering of its legal effects. Next, and worse, it allows to pick and choose what practice will be taken into account to reach a legal conclusion⁵¹, even if such a practice does not really reflect the consent of States or other subjects to engage in it with any legal conviction.

The practical result of this negative outcome is that treaties are occasionally taken to reflect customary law not only when they have been amply ratified and are fully in force but also when they have remained unratified or are still in the process of negotiation⁵². As many kinds of

⁴⁶ For a discussion of doctrinal developments in this respect, see Barberis, *supra* note 17, at 28-30.

⁴⁷ Mendelson, *supra* note 19, at 204-206.

⁴⁸ Barberis, *supra* note 17, at 30.

⁴⁹ M. Virally: "The Sources of International Law", in M. Sorensen (ed.): *Manual of Public International Law*, 1968, 116, at 133-134, and Anthony A. D'Amato, *supra* note 44, at 35-39, both as discussed by Mendelson, *supra* note 19, at 195-196.

⁵⁰ Mendelson, *supra* note 19, at 197.

⁵¹ Fidler, *supra* note 1, at 202.

⁵² Weil, *supra* note 13, at 175.

State acts can indeed constitute practice, there is the added danger that any such practice might be taken to reflect customary law. Would this be the meaning of the acts of any State organ, including internal organs, or would it still be necessary to identify an extended and broadly accepted practice confirmed by the intervention of *opinio juris*?

The difficulty is of course compounded when also the acts of international organizations are taken into account as the expression of practice transformed into customary law⁵³. There can be no doubt that the practice developed under international organizations can lead to the formation of a customary rule, but this is only when the participating States have had the specific intention of assigning to such a practice a legal effect, that is when *opinio juris* has intervened.

Professor Bernhardt has rightly explained that while there are no insurmountable dogmatic difficulties hindering the recognition of resolutions as elements in the formation of customary international law, a careful approach is necessary. To this effect the “context of the resolution, the surrounding circumstances, the number of positive votes, the absence of opposition and additional factors must be considered”, including whether “the actual

State practice outside the organization is in conformity with the resolution or at least does not exhibit a quite different picture”⁵⁴. Even more caution is recommended in respect of the resolutions passed by international conferences⁵⁵.

This again is not just a question of majorities but of the intention surrounding the expression of that majority. There is indeed a number of situations in which the evident intent of the participating States and the majority vote is not to undertake a legal commitment by means of the adoption of resolutions, as happens with most of the resolutions adopted by the United Nations General Assembly. To extrapolate this phenomenon into customary law, and even include therein abstentions, will distort the process of genuine formation of a customary rule to the extreme⁵⁶.

**To proclaim the existence of a
customary rule where there
is none leads to confusion.**

This is a position that not only States occasionally adopt in pursuance of given interests, however transitory they might be, but in which occasionally international and domestic courts and tribunals become themselves involved⁵⁷. To proclaim the

⁵³ *Nicaragua* case, supra note 38, at 100-103; *The Rainbow Warrior* case (cite), pars. 76 et seq., both as discussed by Weil, supra note 13, at 175-176.

⁵⁴ Bernhardt, supra note 19, at 216.

⁵⁵ Bernhardt, supra note 19, at 216.

⁵⁶ Weil, supra note 13, at 175-177.

⁵⁷ Weil, supra note 13, at 176-177, with particular reference to the *Burkina Faso/Mali* case, ICJ Reports, 1986, par. 565 et seq. and the extension of the doctrine of *uti possidetis* to the African continent even in the absence of practice and *opinio juris*.

existence of a customary rule when there is none, or where practice is only remotely connected to the formation of such rule, is perhaps tempting so as to justify a decision in a given dispute, but in legal terms only greater confusion will ensue. The heavy reliance of the International Court of Justice on United Nations resolutions in *Nicaragua* is yet again a manifestation of this anomaly⁵⁸ and as such it has been the matter of heavy criticism⁵⁹.

A related consequence is of course that the stringent requirement of time in connection to the relevance of the practice in question will be significantly weakened⁶⁰. Historical acceleration requiring a less prolonged period of time is perfectly real, as evidenced in the examples given above of the continental shelf and exclusive economic zone, but different is the omission of the relevant time altogether. The concept of instant or spontaneous custom noted above is inserted into this last situation⁶¹, as is the strong reaction that this approach has generated⁶². The famous expression of René-Jean Dupuy on “coutume sage et coutume sauvage” does indeed reflect the terms of the problem with due justice⁶³.

PACTA SUNT NON SERVANDA

Once the logical sequence of events leading to the formation of a customary rule is altered, several other anomalies are to follow. One such contemporary anomaly is the relationship between custom and treaties. For long it has been acknowledged that treaties can embody and give written expression to rules of customary law either partially or in the broader context of the codification of customary rules⁶⁴. In fact, the interrelationship between treaties and custom has been historically very strong, to the point that the very binding force of treaties depends on a rule of customary law, *pacta sunt servanda*, which as noted above has even been invoked as the ultimate justification of the whole legal system, both international and domestic⁶⁵.

The interrelationship between treaties and custom has been historically very strong.

⁵⁸ *Nicaragua*, supra note 38, and discussion of the case by J. Verhoeven: “Le droit, le juge et la violence. Les arrêts Nicaragua c. Etats-Unis”, *Revue Générale de Droit International Public*, 1987, 1204, at 1206-1208.

⁵⁹ Anthony D’Amato: “Trashing Customary International Law”, *American Journal of International Law*, Vol. 81, 1987, at 101-102; Jonathan Charney: “International Agreements and the Development of Customary International Law”, *Washington Law Review*, Vol. 61, 1971, at 995; both as discussed and cited by Fidler, supra note 1, at 206-207, 226.

⁶⁰ Weil, supra note 13, at 177-178.

⁶¹ Supra notes 20, 22.

⁶² Weil, supra note 13, at 178-179 with discussion of critic literature.

⁶³ René-Jean Dupuy: “Coutume sage et coutume sauvage”, *La communauté internationale. Mélanges offerts à Charles Rousseau*, 1974, at 75 et seq., and discussion by Weil, supra note 13, at 178.

⁶⁴ Tomuschat, supra note 26, at 257-259.

⁶⁵ Kelsen, supra note 18.

The problem lies, however, as noted by Weil⁶⁶, in that expressions of jurisprudence⁶⁷ and the writing of authors⁶⁸ have supported the conclusion that beyond codification or the recognition of existing rules of customary law treaties can generate customary rules by a combination of practice and *opinio juris* which is largely self-contained in the treaty or else can crystallize rules that are in the process of formation. True as it is that the line separating a treaty rule from a customary rule is often very fine, nonetheless one or the other can only be identified as law when the consent of States or other subjects has been properly given or at the very least the formative process has been completed.

It follows that if States have not expressed their consent to a customary rule by means of practice and *opinio juris* it cannot be held that such a rule exists as custom, even if a later treaty could have so proclaimed. The theory of the persistent objector that will be examined below rests in part on this premise. The view that consent can be de-linked from obligations arising at a later stage, particularly if majority interpretation intervenes, has not evidenced much support⁶⁹.

The process of formation of customary

law cannot be governed by treaty, not even by Article 38 of the Statute of the International Court of Justice⁷⁰, as it is only practice and *opinio juris* properly expressed that can give birth to the customary rule. The role of the treaty will be either to ascertain that this process has indeed been completed or else that the relevant practice is also embodied in that particular treaty.

Not even Article 38 of the Statute of the ICJ can govern the process of formation customary law.

Precisely because consent is absent from unratified treaties or from treaties under negotiation is that these kinds of instruments cannot be taken to crystallize a rule of customary law, even less so to give birth to a new one. Moreover, treaties not yet in force pose a particular danger in that different States will invoke different provisions or their interpretation as customary law and no institutions or dispute settlement procedures will be available to settle the issue⁷¹. Again here, as explained by Bernhardt, the treaty rules will have to be scrutinized carefully in the light of actual State practice so as to find out what the law in force really is⁷².

⁶⁶ Weil, *supra* note 13, at 180-183.

⁶⁷ *North Sea*, *supra* note 34; *Libya-Malta*, *supra* note 34; *Nicaragua*, *supra* note 38; *Tunisia Libyan Arab Jamahiriya*, ICJ Reports, 1982, 18, at 23; and *Gulf of Maine*, ICJ Reports, 1984, 246, at 294; all as discussed by Tomuschat, *supra* note 26, at 257-259.

⁶⁸ Eduardo Jiménez de Aréchaga: "International Law in the Past Third of a Century", *Cours Général*, *Recueil des Cours de l'Académie de Droit International*, Vol. 159, 1978-I, at 14 et seq, and discussion by Weil, *supra* note 13, at 180.

⁶⁹ Tomuschat, *supra* note 26, at 261-262.

⁷⁰ Barberis, *supra* note 17, at 37-38.

⁷¹ Bernhardt, *supra* note 19, at 217-218.

⁷² Bernhardt, *supra* note 19, at 218.

In the light of this discussion it can only be concluded that it was not appropriate for the International Court of Justice to heavily bring into play and rely on a rule of customary law as an alternative to treaty arrangements in the *Nicaragua* case⁷³. Politically convenient this approach might have been, but it reflects a profound alteration of the reasonable legal interaction between treaties and custom, so much so that two sources that have traditionally been considered hierarchical identical become subordinate one to the other⁷⁴. One thing is to accept the simultaneous validity of a customary rule and a treaty rule⁷⁵ and quite a different thing is to have a customary rule overriding a treaty arrangement.

To accept the simultaneous validity of a customary rule and a treaty rule does not imply accepting that the former can override the latter.

There is still another difficulty emerging from these alterations that must be considered. Just as custom becomes blurred in the light of treaty arrangements that do not necessarily reflect a customary rule or does not so with the same meaning and extent, also treaty rules suffer from the same confusion as it will not

be clear what is properly conventional law and what is customary law. The end result is that treaties lose the precision that supposedly is their advantage over customary law⁷⁶. Then the interpretation and application of these various sources lose their rigor and allow for all sort of interests to take charge of a process that was until now governed by a scientific-legal method.

This is even more delicate in the light of the fact that the interpretation and application of customary law and conventional law do not follow the same methods and standards, as explained by the International Court of Justice in the very *Nicaragua* case⁷⁷. The very essence of international law thus becomes uncertain and subject to manipulation by different interests⁷⁸.

NON PERSISTENT OBJECTORS

Another consequence engendered by the alteration of the elements of customary law relates to the situation of third States in both the formation and the application of a rule of customary law. As mentioned further above, not all States are required to participate in the formation of a new rule by means of their practice and *opinio juris*. However, once the rule is

⁷³ Weil, *supra* note 13, at 180-181.

⁷⁴ See the discussion of this relationship in Barberis, *supra* note 17, at 40.

⁷⁵ K. Wolfke: "Some Persistent Controversies Regarding Customary International Law", *Netherlands Yearbook of International Law*, Vol. XXIV, 1993, 1-16, at 10.

⁷⁶ Weil, *supra* note 13, at 182-186.

⁷⁷ Weil, *supra* note 13, at 185.

⁷⁸ Weil, *supra* note 13, at 189.

born it will normally be applicable to all States, irrespective of their participation or even of the fact whether they were in existence at the time the process of formation took place⁷⁹. Provided the process is sufficiently representative of the legal sense of the community, individual participation is not a relevant factor for the determination of the existence of the rule. Customary rules thus become rules of general application or part of general international law.

**Once the customary rule is
born, it will normally be applicable
to all States.**

While the situation described might be the most common or usual, there are a number of important exceptions. There is first the exception of rules which are not general in character but involve a particular custom, such as rules of regional or bilateral customary law, where the participation of the States concerned and the evidence thereof will of course be a more stringent requirement for the proper for-

mation of the rule in question⁸⁰. Although it is debated whether consent and participation are different in respect of general and particular customary law⁸¹, the fact of the matter is that the more narrow the rule is the more close the connection with concerned States will need to be. The paramount requirement of consent in all respects was of course embodied in the Soviet theory of international law at the time of bitter East-West confrontation⁸², today not more than a historic reminiscence.

The second major exception is that concerning the persistent objector and the right to “opt-out” of an emerging customary rule. A State that has persistently opposed the formation of a rule of customary law since its inception will normally be beyond the reach of such rule however general its nature may be⁸³. However, here again important alterations have intervened. A process that was supposed to be general in respect of the formation of the rule is now being turned into a process where the binding effects of the rule are also supposed to be general, thereby meaning that no exception could be ad-

⁷⁹ Barberis, *supra* note 17, at 38-39.

⁸⁰ For a discussion on the differences and similarities concerning general and particular customary law, see generally Elias and Lim, *supra* note 43, at 121-127, with critical reference to D’Amato’s views arguing for a stronger showing of consent where particular law is concerned, at 125-126.

⁸¹ Elias and Lim, *supra* note 43, at 126-127, with particular reference to Thirlway’s views arguing that there is no difference in this respect between general and particular law, at 126-127.

⁸² Grigory Tunkin: *Theory of International Law*, 1974, at 124, and discussion of the Soviet theory in Tomuschat, *supra* note 26, at 283-284.

⁸³ Barberis, *supra* note 17, at 38-39, with particular reference to Ted L. Stein: “The Approach of the Different Drummer: the Principle of the Persistent Objector in International Law”, *Harvard International Law Journal*, 1985, at 457; Bernhardt, *supra* note 19, at 220; Tomuschat, *supra* note 26, at 284-290, with particular reference to the literature in support and opposition to the concept of persistent objector.

missible and thus leading to the predominance of the “plus puissants ou des plus nombreux”⁸⁴.

The narrower the rule, the closer will need to be connection with concerned States.

In spite that scholarly criticism of this theory continues until this day⁸⁵, in practice things have been different from theory. First, seldom has a State invoked the concept of persistent objector to escape the binding effect of a rule of customary law; it suffices to argue that the rule in question is not supported by sufficient practice or *opinio juris* and when things turn for the worse a State has normally rallied behind the new rule but purporting to influence a meaning and extent different from that which was originally envisaged⁸⁶.

Dupuy has rightly commented that “[e]n pratique, on a dû également constater que l’objection persistante est une arme que le temps, à lui seul, suffit à émousser, lorsqu’elle se heurte à la position déterminée de la majorité des Etats existants”⁸⁷. The converse reality, how-

ever, is also true in that a persistent objection will many times be powerful enough to determine a change in the rule as originally envisaged and lead to a process of accommodation in which both the individual and the majority interests will attain a balance. This influence has not been deprived of success as many rules of customary law are today different from what they were or could have been at their inception and earlier State practice, as the case of the Exclusive Economic Zone and to some extent that of deep seabed mining show⁸⁸.

A second important difference between practice and theory concerns the question of *jus cogens*. It has been rightly held that no objection, however persistent, can have any effect if it affects the non derogation that characterizes a rule of peremptory international law⁸⁹. There is of course a logical support for this view. If a rule is not subject to derogation, derogation cannot be permitted by the way of an exception.

The real question, however, is different. The rules of *jus cogens* that are fundamental to the international community and can be thus compared to rules of a constitutional hierarchy, have for long been incorporated as rules of customary law⁹⁰.

⁸⁴ Weil, *supra* note 13, at 187-189, citation at 189.

⁸⁵ Pierre-Marie Dupuy: “L’Unité de l’Ordre Juridique International”, *Cours Général, Académie de Droit International*, Vol. 297, 2002, at 174-176.

⁸⁶ Weil, *supra* note 13, at 191-193, with particular reference to the *Asylum* case, *supra* note 28, and the *Fisheries* case, *supra* note 29.

⁸⁷ Dupuy, *supra* note 85, at 176.

⁸⁸ Orrego Vicuña, *supra* note 16, Chapter 8 on “The Exclusive Economic Zone in Customary International Law”.

⁸⁹ Barberis, *supra* note 17, at 39.

⁹⁰ Weil, *supra* note 13, at 200.

Therefore, the question of a persistent objection to such rules does not arise. What happens is that there is a concerted effort to identify as rules of *jus cogens* propositions that have been hardly tested as to their acceptability and that are thus not peremptory or customary. But this is part of a different debate.

Customary law has been subject to a judicial and scholarly challenge of unprecedented proportions.

A NEW AUTHORITARIANISM THROUGH
THE NON RULE OF LAW

The discussion examined reveals quite powerfully that customary law has been subject to a judicial and scholarly challenge of unprecedented proportions, certainly beyond what would be the normal evolution of international law in the light of the changing international society to which it applies. The reasons behind this challenge correspond in part to very legitimate intellectual concerns but also in part to considerations that are related to the instrumental use of international law to attain desired social and political ends. Weil has explained this phenomenon in a straightforward manner:

“...*la fonction stratégique de la cou-*

tume se trouve radicalement modifiée...à la coutume conservatrice et traditionaliste, fondée sur la stabilité et la consolidation, a succédé la coutume innovatrice et révolutionnaire, levier de changement de l'ordre international”⁹¹.

The issue at the heart of this controversy is not different from that which has surrounded international law generally and the role of treaties in particular, that is the struggle between “volontarisme” and “objectivisme”, the first rooted in the consent of sovereign States and the second in the powers of occasional majorities and other expressions⁹².

In fact, it is not difficult to realize that the views supporting the liberalization of practice, the diminished influence of *opinio juris* or its disqualification, the role of custom as a source of general rules of international law, the non-recognition of persistent objections or the redefined connection with treaties, as opposed to those that require the strict application of the legal standards governing customary law and its interplay with other sources of international law, are all related to one or other of those broad options separating consent from majority rule.

Yet, it must be noted that it is apparent that customary law has not been equated in contemporary international law with a purely voluntarist approach strictly requiring consent in respect of the identification or application of all rules of customary law. In particular, *opinio juris* has not meant unanimity⁹³. But neither does

⁹¹ Weil, supra note 13, at 178; see also Fidler, supra note 1, at 224-225.

⁹² Dupuy, supra note 85, at 162-164.

⁹³ Mendelson, supra note 19, at 184-192.

this mean that State participation can be dispensed with or that occasional majorities can substitute for the required degree of support for practice and *opinio juris* that will be in any event needed to give rise to a new customary rule. As is many times the case with international law, a sense of balance is the one that finally prevails.

The implications of the debate, however, are not merely theoretical. The troublesome question is not so much the existence of different approaches to the role of sources of international law, with particular reference to customary law, as it is the underlying premise that the will of the subjects of international law does not really matter. Only the view of those who “know better” can be justified as law. Koskenniemi concludes with a note of warning that must be taken very seriously. First, if rules of law are based on pure political acceptability and not on legal certainty, nothing will prevent “their use as apologies for tyranny”⁹⁴. And next:

“But even if it were possible to ‘know better’, such an argument is not really defensible within the premises of the Rule of Law. It contains the unpleasant implication that we could no longer rely on the expressed will of the legal subject. It would lose the principal justification behind democratic legislation and justify the establishment of a Leviathan – the one who knows best what everyone ‘really’ wills. It is a strategy

*for introducing authoritarian opinions in democratic disguise”*⁹⁵.

The end result of this confrontation is rather paradoxical. At one point it was believed that customary law would be superseded by treaty law as a consequence of major codification conferences and that the new law would of course express the right approach to each subject. Codification achieved this result only in part and mostly in respect of technical, non-political matters. It was soon discovered that if customary law could be taken to mean something different from what it had traditionally meant, this was a much easier way to attain the desired goals.

The frantic process of reengineering customary law was thus launched. As a result, the role of customary law has revived to an unexpected extent. As written by Bernhardt it is “hardly correct” to believe that customary law is no longer of great importance.⁹⁶ But to the extent that the process has gone beyond reasonableness and incurred in inevitable exaggeration, and even threatened to get out of control, the reaction of governments, scholars and judges has prompted a redress of the situation, which is thus gradually being brought back into the normal balance of international law.

Customary law is here to stay and, as has always been the case, it is a source of international law that will only mean what practice and *opinio juris* has intended it to mean.

⁹⁴ Koskenniemi, *supra* note 1, at 32.

⁹⁵ Koskenniemi, *supra* note 1, at 22.

⁹⁶ Bernhardt, *supra* note 19, at 203-204.