Elements of Custom and the Hague Court

Krzysztof Skubiszewski *)

The present article analyses the component elements of custom in the light of the Judgments and Advisory Opinions of the Permanent Court of International Justice [1]) and the International Court of Justice [2]). Account has been taken of the decisions of the latter Court up till 1971.

The article attempts to show the extent to which the jurisprudence of the Court elucidates the elements of custom. The article thus concentrates on the definition of custom in the light of the pronouncements of the Hague Court. It does not deal with the detailed problems of evidence relating to custom. In particular, it is not concerned with the question of treaties that "embody or crystallize any pre-existing or emergent rule of customary law" [3]). The problem of the ways in which treaties serve as

---

*) Dr. iur. (Poznań), Diploma in Higher European Studies (Nancy), LL.M. (Harvard), Dozent (habil.) of International Law at Poznań University, Visiting Professor at Geneva University, Associé of the Institut de Droit International.

[1]) The Reports of the Permanent Court are cited merely giving a reference to the series.

[2]) The Reports of the International Court are cited merely giving a reference to the year.

[3]) *North Sea Continental Shelf* cases, 1969, p. 3, at p. 41, para 69.

evidence of custom has recently attracted the attention of some writers [4]), and the limitations of space would not allow for any more detailed treatment of the subject than was made by them. Nor is the article concerned with the contribution of the Court to what Judge van Eysinga called the "crystallization" of the rules of law, including customary law, by the Court [5]). That subject, as indeed has happened, should be cast in a mould not of a single contribution in a periodical but of a book [6]) or a series of contributions [7]).

Before the substance of our subject is presented, a point of terminology must be clarified.

In current terminology of law and diplomacy the terms international custom and customary rule of international law are used interchangeably. Yet in the strict sense their meaning is not, or at least should not, be identical. Apart from the unavoidable inaccuracies of language in a political subject like international law, the cause of the synonymous employment of the two terms seems to lie in the fact that custom and customary rule are "interdependent and complementary": they are two sides of the same phenomenon, "custom representing the 'is' aspect and the customary rule — the 'ought' aspect" [8]). The present contribution does not attempt to use the two terms in, from the purist's point of view, their distinct meanings, but follows the established, though

---

[4]) Anthony D'Amato, Treaties as a Source of General Rules of International Law, Harvard International Law Club Bulletin vol. 3 (1962), p. 1; Richard R. Baxter, Multilateral Treaties as Evidence of Customary International Law, British Year Book of International Law (B.Y.I.L.) vol. 41 (1965/66), p. 275; Ibrahim F. I. Shihata, The Treaty as a Law-Declaring and Custom-Making Instrument, Revue Egyptienne de droit international vol. 22 (1966), p. 51; Richard R. Baxter, Treaties and Custom, Académie de Droit International, Recueil des Cours (Rec. d. C.) vol. 129 (1970 I), p. 25; Anthony D'Amato, Manifest Intent and the Generation by Treaty of Customary Rules of International Law, American Journal of International Law (A.J.I.L.) vol. 64 (1970), p. 892. The subject is also discussed in the commentaries devoted to the *North Sea Continental Shelf* cases, especially by Lang and Marek, see notes 89 and 107 below. See also Isi Foighel, The North Sea Continental Shelf Case, Judgment by the International Court of Justice of 20 February 1969, Nordisk Tidskrift for International Ret vol. 39 (1969), p. 109.

[5]) A/B No. 76, p. 30, at pp. 34—35.

[6]) H. Lauterpacht, The Development of International Law by the Permanent Court of International Justice (London [etc.] 1934); Sir Hersch Lauterpacht, The Development of International Law by the International Court (London 1958). C. W. Jenks, The Prospects of International Adjudication (London 1964).

[7]) Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, B.Y.I.L. vols. 27 (1950), p. 1; 28 (1951), p. 1; 29 (1952), p. 1; 30 (1953), p. 1; 31 (1954), p. 371; 32 (1955/56), p. 20; 33 (1957), p. 203; 34 (1958), p. 1; 35 (1959), p. 183.

[8]) Karol Wolfke, Custom in Present International Law (Wrocław 1964), p. 18.

no quite correct, pattern of identifying them. Nor does the Hague Court differentiate between them.

Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice mentions "international custom, as evidence of a general practice accepted as law". This formula, which is the result of bad drafting, is faulty in its substance, and should be stated inversely: it is practice accepted as law that constitutes evidence of custom [9]). An international custom, *i. e.* a customary rule of international law, comes into existence when the practice of States matures into usage and this usage is accepted as binding.

1. Practice

The initial element of custom is the practice of States. Practice that leads to the creation of custom is part of the policy followed by the State. It is a truism to state that not all the activities and attitudes that compose the policy of the State are directed at the making of international custom. In fact, only a fraction of the State's political activity can have this effect [10]). Policy encompasses more activity than practice considered in the context of one source of international law, the custom.

The practice of States is built of their actions [11]).In his Dissenting Opinion in the case of *The S. S. Lotus* Judge Nyholm stated that the "different theories" of custom

> "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 States, without which a rule of international law cannot be based on custom" [12]).

More exactly the practice of States is built of their actions and reactions. It is "a process of reciprocal interaction" [13]). This does not mean that the picture of State practice is composed exclusively of actions *sensu stricto*. Words and inaction are also evidence of the conduct of States [14]).

The role of words is best illustrated, in our subject, by the function of

---

[9]) Judge Sir Percy Spender, Dissenting Opinion, *Right of Passage over Indian Territory* (1960), p. 97, at p. 110: "a practice [...] accepted as law by the Parties".

[10]) D. P. O'Connell, International Law (London, New York 1965), vol. 1, p. 9.

[11]) Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 1951—54: General Principles and Sources of Law, B. Y. I. L., vol. 30 (1953), at pp. 67—68.

[12]) A No. 10, p. 59, at p. 60.

[13]) Myres S. McDougal, The Hydrogen Bomb Tests and the International Law of the Sea, A. J. I. L. vol. 49 (1955), p. 356, at p. 357.

[14]) Clive Parry, The Sources and Evidences of International Law (Manchester 1965), p. 63.

protest in defining and establishing the attitude of States. In the act of protest, however, words have an effect that is both clear and immediate. This is not always the case when words are used for other purposes. For example, State A puts forward a claim against other States and enacts a statute to this effect. The addressees of the claim, however, do not comply with it, and State A remains passive, *i. e.* it does not assert its purported right and does not enforce the Statute. The discrepancy between words (statute) and action, actually an absence of the latter, coupled with successful opposition by other States, results in the nonexistence of a practice that could give birth to a rule whereby the claim would be transformed into a legal right.

In his dissenting opinion in the *Fisheries* case Judge Read contrasted words with action [15]):

> "Customary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time.
>
> The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration".

The value of words for the ascertainment of State practice is nonexistent when the State adopts different positions at different moments on the same subject. This is a not infrequent occurrence in diplomatic life, especially during political debates in the organs of the United Nations.

Inaction has also a role in shaping and evidencing the practice and, consequently, the customs of States. Acquiescence, which essentially consists of inaction, fulfils a function in the various stages of the creation of custom [16]). But it is rarely that inaction alone and by itself becomes the makings of a custom. It does so when the emerging rule is one of negative content, *i. e.* it establishes an obligation not to exercise competence or jurisdiction in particular circumstances. If the duty is one of abstention, it might have arisen out of a practice that consisted of inaction. The admission of this possibility follows from the *dictum* on custom in the case of

---

[15]) 1951, p. 186, at p. 191; Fitzmaurice, *op. cit. (supra* note 11).

[16]) I. C. MacGibbon, Customary International Law and Acquiescence, B. Y. I. L. vol. 33 (1957), p. 115.

The S. S. Lotus [17]). The controversial nature of the decision on the merits in this case and its rejection by present maritime law [18]) do not bear on the value of the statement on custom: its correctness should be considered irrespective of what the Court decided in the question of criminal jurisdiction involving collisions at high sea. That doubts existed (though they are not shared by this writer) is shown by the following passage from the Dissenting Opinion by Judge Altamira [19]):

> "It is not without interest to observe here that a custom must by its nature be positive in character and that consequently it is impossible to classify as a custom the fact that in a certain respect there is a total absence of the recurrence of more or less numerous precedents which are generally regarded as necessary to establish a custom. The rule which it is desired to discover must be positively supported by the acts which have occurred, and, of course, as regards international law these acts must also be international in character".

Before the characteristics of the custom-creating practice are considered, two particular questions should be answered; for they also concern, like the problem of words and inaction, the various forms whereby the practice of States expresses itself. The first is the extent to which municipal acts are practice that is relevant for the emergence of custom. The second question touches upon the role of treaties as constituting such a practice.

2. *Municipal Acts as Practice*

Municipal acts, in particular legislation and judicial decisions, if they deal with a problem of international law, are evidence of the views of the organ from which the act emanates on a point of that law. They are not necessarily the view of the State as a member of the international community. For only some organs can speak in the name of the State on the international plane: they are the Head of the State and the Government when it represents the whole of the executive branch. As to the component parts and organs of that branch, only a few of them are empowered to act in the name of the State in international relations.

The difficulty, therefore, in regarding legislation and the decisions of municipal courts as custom-creating practice lies in the fact that they are made for the domestic sphere. If they purport to have, or indeed have, extra-

---

[17]) A No. 10, p. 28.

[18]) Article II of the Geneva Convention on the High Seas of 1958, United Nations Treaty Series vol. 450, p. 82.

[19]) A No. 10, p. 95, at p. 96.

territorial application, their role does not change, though their effect crosses the frontier of the enacting or judging State. Still, their aim remains to influence relations inside the State, albeit this time it is another, *i.e.* a foreign, State. Legislation and decisions of municipal courts are not part of the relations between Governments and their purpose is not to shape these relations. It is another matter that a statute or a municipal judgment may become an element of an international delinquency and, consequently, involve the responsibility of the State.

Two dissenting judges in the case of *The S.S. Lotus* were aware of the difficulty referred to in the preceding paragraph. Judge Nyholm was very explicit: "There must have been acts of State accomplished in the domain of international relations, whilst mere municipal laws are insufficient" [20]). Judge Altamira was more circumstantial [21]):

> "It follows that the municipal legislation of different countries, as it does not by its nature belong to the domain of international law, is not capable of creating an international custom, still less a law. Of course it may touch and in fact does in several respects touch upon legal questions which affect or may affect other States or foreign subjects, and thus it encroaches upon a domain which is practically speaking international. But it cannot simply on this ground be held to possess a character placing it on the same plane as conventions or international customs".

The last phrase seems to be redundant as nobody would seriously suggest that there was an identification, in this context, between municipal legislation and treaties or custom.

The Court has often repeated its *dictum* that "municipal laws are merely facts which express the will and constitute the activities of States" [22]). But this *dictum* does not decide the question whether such "activities" are practice that can contribute to the creation of custom. The answer depends on the circumstances of the case.

It occurs quite often that the opinions on international law held by the organ competent to conduct the foreign affairs of the State do not coincide with those of the legislature or of a municipal court. It is then clear that the statute or the judgment does not evidence the opinion of the State. This deprives them of the evidential value for the purpose of establishing the practice that leads to the formation of a custom. It is with this reservation that one is able to accept Judge Altamira's observations [23]):

[20]) *Ibid.*, pp. 59—60.
[21]) *Ibid.*, p. 96.
[22]) Case concerning *Certain German Interests in Polish Upper Silesia (The Merits)*, A No. 7, p. 19.
[23]) A No. 10, p. 96.

> "It may however be of considerable value in showing what in actual fact is the opinion of States as concerns certain international questions in regard to which States have not yet committed themselves by means of a convention prohibiting them from enacting a municipal law in conflict with the obligation assumed, or in regard to which no custom recognized by States has so far been built up. It is only in this way that it is legitimate to use municipal legislation and to apply it for the purposes of a question like that under consideration. It is of no value for any other purpose in connection with international law — unless it has been duly ascertained that general agreement prevails, — because it only expresses the wish or intention of one State [...]".

In the view of Judge Altamira it is of particular interest to ascertain whether such legislation "has encountered consent or protest on the part of the consensus of opinion in the country affected" [24]). It does not seem very likely that the Court would be willing to inquire into this aspect of municipal legislation.

In the case of *The S. S. Lotus* the parties cited a number of municipal cases relating to the question whether there existed a rule according to which criminal proceedings involving collision at high seas came exclusively within the jurisdiction of the flag State. The Court refused to consider the general problem which was implicit in the discussion of this question by the parties, viz. "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" [25]). In the Court's understanding these judgments "sometimes support one view and sometimes the other" [26]); in the eyes of the Court, this lack of uniformity must have deprived them of any evidential value. Lack of uniform conduct made it pointless to answer the question whether decisions of municipal courts could constitute practice that might lead to the emergence of an international custom. Nevertheless, what the Court said does not exclude the evidential value of the decisions of municipal courts when the Court seeks to establish the existence of a custom-creating practice. In the passage on the role of the *opinio juris*, which is discussed below and which preceded the extracts quoted above on the importance of municipal judgments, the Court admitted that the judicial decisions might "prove in point of fact" the existence of a practice of States [27]). However, the Court did not define under what conditions and circumstances this could happen.

---

[24]) *Ibid.*, p. 97.
[25]) *Ibid.*, p. 28.
[26]) *Ibid.*
[27]) *Ibid.* M. Sørensen, Les sources du droit international (Copenhague 1946).

Legislation, especially when it is introduced on the initiative of the Government, may reflect the attitude of the State and become an element of the State practice. In his Separate Opinion in the *North Sea Continental Shelf* cases Judge Ammoun admitted that the "facts which constitute the custom in question are to be found in a series of acts, internal or international" [28]). As regards legislation, he in particular called attention to the attitude of Belgium [29]):

> "Although it did not sign the Convention on the Continental Shelf, the Belgian Government, in a Note of 15 September 1965 from the Belgian Embassy to the Netherlands Ministry of Foreign Affairs, stated that 'the two countries are in agreement on the principle of equidistance and on its practical application'. Furthermore, the provisions of the Convention on the Continental Shelf were adopted in a bill, accompanied by an *exposé des motifs* which was submitted to the Chamber of Representatives on 23 October 1967. The bill, while totally devoid of legal effect, nevertheless expresses the official point of view of the Government. It constitutes one of those acts within the municipal legal order which can be counted among the precedents to be taken into consideration, where appropriate, for recognizing the existence of a custom. In any event, the attitude of the Belgian Government is expressed without any possible equivocation in the statement contained in the State to State communication of 15 September 1965, to which the character of precedent cannot be denied".

Judge Lachs considered legislation as an element of practice in a specific context: he speaks of legislation which accepts and applies a rule that already figures in a binding convention. Such legislation, when enacted by non-parties to the convention, seems to be highly relevant in ascertaining the application of the standard expressed by that rule [30]). Judge Ammoun's Belgian example shows that he was also aware of the significance of legislative action by non-parties. In the same context Judge Ammoun considered the role of provisions which did not belong strictly either to international or municipal law but placed themselves in what had been termed as transnational law [31]), viz. concessionary agreements [32]):

> "So far as Kuwait is concerned, the representatives of the Federal Republic argued that its agreement with the concessionary company could not be regarded as a precedent, since it was not a convention between States.

[28]) 1969, p. 100, at p. 104.
[29]) *Ibid.*, p. 129.
[30]) *Ibid.*, p. 218, at pp. 228—229.
[31]) Philip C. Jessup, Transnational law (New Haven 1956).
[32]) *Ibid.*, p. 128.

Numerous concessions under public law have given rise to judicial precedents in various questions of international law. Nevertheless, an agreement concerning a concession by a State to a company does not, *per se* or as such, constitute an element of the practice which contributes to the creation of international custom. It is only by a legitimate assimilation of the position taken up by the State granting the concession, to a unilateral act, that the case of Kuwait might be considered".

3. Treaties as Practice

The problem when a treaty or a provision thereof is evidence of custom, and the problem of concurrence of title by treaty with title by custom, are not the subject of this paper. On the other hand, the question may be asked whether the Court regards treaties as constituting practice of States which engenders custom. It may be stated at the outset that the position of the Court on this issue is not clear.

Theoretically speaking, the question should not arise, as treaties are a distinct and autonomous source of rights and duties for States. However, on several occasions the Court referred to treaties in the context of State practice, and its *dicta* call for elucidation.

In the case of *The S. S. Lotus* the Court considered treaties strictly as the source of principles of law[33]), thus implicitly rejecting the possibility of regarding them as evidence of practice by States.

In the Advisory Opinion on the question of the *Free City of Danzig and International Labour Organization* the Court admitted that a practice might develop on the basis of the agreements between the parties. The practice in question concerned the conduct of the foreign relations of the Free City by Poland. The Court said[34]):

"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 auspices of the League".

The Court did not specify whether this practice led to the conclusion of tacit agreements, formulation of authoritative interpretation, or establishment of bilateral custom.

In the *Asylum* case the Court considered the treaties invoked by the plaintiff Government in order to ascertain the existence of a custom[35]). It

[33]) A No. 10, p. 27

[34]) B No. 18, pp. 12—13. Sørensen, *op. cit.* (*supra* note 27), p. 104.

[35]) 1950, p. 266, at p. 277.

is not clear from the Judgment whether the Court regarded treaties as evidence of State practice only, in contradistinction to evidence of *opinio juris*, or evidence of the combined effect of the two, *i. e.* custom. The Court arrived at a negative conclusion, and this was not dictated exclusively by the fact that the defendent Government did not become a party to some of the treaties.

In the case concerning the *Rights of Nationals of the United States of America in Morocco* the Court was confronted with the question whether the consular jurisdiction and other capitulatory rights of the United States in Morocco were founded upon "custom and usage", in addition to their having a treaty basis. There were other States which had no treaty rights and yet they exercised consular jurisdiction in Morocco. When the time came for the abolishment of the capitulatory regime, these States made declarations in which they renounced the consular jurisdiction. The Court limited itself to the following statement: "This is not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage" [36]). It seems to follow that in a bilateral relationship the role of bilateral treaty or treaties — in the formation of practice and the resulting custom — is of limited importance and never decisive. Here the custom must develop according to its own procedures, unaided by the treaty, which even seems to prevent the parallel growth of custom as the relationship is being governed by the treaty alone.

In the *Nottebohm* case (Second Phase) the Court adopted the notion of genuine or effective nationality [37]). To justify its attitude the Court invoked, *inter alia*, the practice of States. The Court referred to the Bancroft Treaties [38]), the Pan-American Convention of 1906 [39]), the "studies" carried on by the League of Nations and the United Nations, and the Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws [40]). The first two instruments were used to illustrate the

---

[36]) 1952, p. 176, at p. 200. The dissenting judges disagreed also on this point, Dissenting opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau, *ibid.*, p. 215, at pp. 219—222.

[37]) 1955, p. 4, at p. 23.

[38]) For references, see Green Haywood Hackworth, Digest of International Law (Washington 1942) vol. 3, pp. 377 and 384.

[39]) British and Foreign State Papers vol. 103, p. 1010.

[40]) League of Nations Treaty Series vol. 179, p. 89. The evidential value of this Convention has been diminished by its Art. 18, para. 2, which provides that the inclusion of the principles and rules on nationality in the Convention "shall in no way be deemed to prejudice the question whether they do or do not already form part of international

practice of "certain States" [41]). The Court did not explain what was the relationship between all these treaties (none of which was in force between the litigants, Liechtenstein and Guatemala) and the supposed rule of general law that, "in order to be capable of being invoked against another State, nationality must correspond with the factual situation" [42]). In particular, the Court did not say whether the treaties were elements of practice that led to the creation of a customary rule or whether they were evidence of a custom already formed [43]). The picture becomes more blurred when one realizes that, to support its position, the Court also invoked arbitral awards, decisions of domestic tribunals, and opinions of writers, and did not specify the weight of the treaties as against these other factors.

The reader thus sees that what he finds in the *Nottebohm* Judgment is not an application of the method which the Court followed less than five years earlier in the *Asylum* case. In the *Nottebohm* case there is no trace of an analysis, rather bare references. But as the Court also invoked the arbitral and judicial decisions and the writings of publicists, the treaties might have constituted for it a secondary and supplementary argument which it did not think worth elaborating. All this is pure guess-work. The relevant *dicta* of the Court, because of their generality, loose much of their convincing force on the merits, and they are not fully satisfactory with regard to the method applied. In his Dissenting Opinion Judge Klaestad said [44]):

> "Having to base oneself on the ground that questions of naturalization are in principle within the exclusive competence of States, 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' (Article 38, para. 1 *(b)* of the Court's Statute)".

In his Dissenting Opinion Judge Read expressed the view that no international custom to this effect had been proved [45]). He examined the treaties invoked and arrived at the conclusion that they were "too few

---

law". Thus to prove the existence of custom it is not sufficient to invoke the Convention as by itself it is not evidence of custom.

[41]) 1955, p. 22.

[42]) *Ibid.*

[43]) The latter alternative is adopted by Baxter, *op. cit. (supra* note 4), B. Y. I. L. vol. 41, p. 276.

[44]) 1955, p. 28, at p. 30. Fitzmaurice, *op. cit.* (*supra* note 7), vol. 35, at p. 230.

[45]) *Ibid.*, p. 34, at p. 40.

and far between to indicate a trend or to show the general consensus on the part of States which is essential to the establishment of a rule of positive international law" [46]). P. Guggenheim, Judge *ad hoc* in the *Nottebohm* case, has shown that the Bancroft Treaties were irrelevant for this case [47]). He also stressed that "a dissociation of nationality from diplomatic protection [was] not supported by any customary rule [...]" [48]).

In fact, it is far from certain that the Court spoke of the rule of general law on nationality in the sense of international custom. The requirement that there be a bond of attachment between the naturalized citizen and his adoptive country might have been regarded by the Court as a general principle of law in the sense of Art. 38, para. 1 (*c*) of the Statute of the Court. The Court is silent on this point: when it discussed the notion of effective nationality and the related question of diplomatic protection, it did not refer either to custom or to the general principles of law. The term custom [49]) does not appear in the relevant part of the Judgment [50]).

In the cases of the *North Sea Continental Shelf* the Court considered the question whether there was a custom according to which, in the absence of agreement, and unless another boundary line was justified by special circumstances, the boundary of the continental shelf adjacent to the territories of two adjacent States should be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. This rule figures in Art.6, para. 2, of the Geneva Convention on the Continental Shelf of 1958 [51]). The Court admitted that a custom of identical content might have come into being since the Convention "partly because of its own impact, partly on the basis of subsequent State practice" [52]). This phrase opposes the "own impact" of the treaty to the practice of States and, therefore, suggests that, for the Court, the treaty and practice are two different things. But the phrase, because of its generality, may also mean that in the Court's opinion there are various categories of State practice, including one that develops under the impact of the treaty and another which is independent of any contractual regulation. However, this writer thinks that the Court distinguishes between the role of treaties and that of State practice. In an earlier passage in the decision in the same

[46]) *Ibid.*, p. 41.
[47]) *Ibid.*, p. 50, at pp. 59—60.
[48]) *Ibid.*, p. 60.
[49]) Except in the citation of Art. 1 of the Hague Convention of 1930, *ibid.*, p. 23.
[50]) *Ibid.*, pp. 20—24.
[51]) United Nations Treaty Series vol. 499, p. 311.
[52]) 1969, p. 41, para. 70.

cases the Court enumerated separately "State practice" and "the influence attributed to the Geneva Convention itself" and spoke of them as "various factors" [53]), though the supposed variety was, rather unexpectedly, related to the element of *opinio juris*, an aspect of the Judgment to be discussed below in Section 10. In still another passage the Court spoke of the possibility of equidistance "having become a rule of positive law through influences such as those of the Geneva Convention and State practice" [54]), the two again appearing separately. But it was in a further passage that the Court was most emphatic in not regarding the conduct dictated by treaty as practice which leads to custom. The Court stated [55]) that over half the States which applied the equidistance principle in delimiting their continental shelf

> "were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle".

There is some reflection of the treaties-State practice dichotomy in the Separate Opinion of Judge Ammoun in the same cases. First he contrasted treaties with the practice of States in a rather dogmatic manner: "Proof of the formation of custom is not to be deduced from statements in the text of a convention: it is in the practice of States that it must be sought" [56]). However, in a further passage, while he maintained the distinction between treaties and State practice, he included the two, together with other factors, into the "group of precedents which contribute [...] to the elaboration of the material element of custom" [57]). Still another passage bears witness to the hesitations of the learned judge and perhaps shows that the whole problem of distinguishing between treaties and State practice might be one of inaccurate terminology [58]):

> "In order to resolve this question, the Court argues that a norm-creating convention has, as such, an influence on the formation of custom. The function of State practice is envisaged, on this line of reasoning, as being appropriate cases to support the potentially norm-creating nature of the convention.

---

[53]) *Ibid.*, p. 28, para. 37.
[54]) *Ibid.*, p. 29, para. 38.
[55]) *Ibid.*, p. 43, para. 76.
[56]) *Ibid.*, p. 104. He makes this distinction also on p. 124.
[57]) *Ibid.*, p. 105.
[58]) *Ibid.*, pp. 127—128.

It appears to me that this reasoning is contrary to both the letter and the spirit of Article 38, paragraph 1 (*b*), of the Court's Statute, which bases custom on State practice. The 1958 Convention, like any other convention, has therefore no other influence on the formation of custom than that which is conferred upon it by the States who have ratified it, or have merely signed it: the deliberate legal act of ratification, and the legal fact of signature, both constitute attitudes which count in the enumeration of the elements of State practice".

The dissenting judges also dealt with the problem, and what they say does not deviate in substance from the position of the Court though they seem to define the problem more explicitly. In the Dissenting Opinion of Judge Tanaka some support seems to have been lent to the view that treaties are part of State practice that leads to the emergence of a custom. For he speaks of certain agreements that indicate "State practice since the Geneva Convention" [59]). But he further states that "the Convention constitutes the starting point of the second stage in the development of law concerning the continental shelf. It has without doubt provided the necessary support and impetus for the growth of law on this matter" [60]). According to Judge Lachs "[e]ven unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, *a fortiori*, capable of producing this effect, a phenomenon not unknown in international relations" [61]). Here the two dissenting judges seem to stand on the same ground as the Court, indeed to supply an interpretation of the Court's *dictum* that the "process" whereby a treaty provision becomes the foundation of, or generates the creation of a customary rule, constitutes "one of the recognized methods" by which such rules may be formed [62]). When the Court speaks of methods it does not admit that one of them is the practice and the other treaties. Nothing in this or any previous Judgment of the Court suggests that the Court feels that there might exist customary rules that came into being by ways other than State practice. Though Judge Sørensen does not speak of treaties as a "point of departure" for the emergence of custom, he uses a formula the sense of which appears to be the same: "The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized rules may crystallize" [63]).

[59]) *Ibid.*, p. 171, at pp. 174—175.
[60]) *Ibid.*, pp. 176—177.
[61]) *Ibid.*, p. 225.
[62]) *Ibid.*, p. 41, para. 70.
[63]) *Ibid.*, p. 241, at p. 244.

4. *Custom-creating Practice*

What are the *signa specifica* of a custom-creating practice? There is one feature which is fundamental to the very process of growth of such a practice: it must be shaped according to a specific pattern, viz. the interaction of claims and responses given thereto[64]). This pattern, and not any other, makes it possible for the practice to develop into rules of conduct that eventually become obligatory. The interplay of claim and response is the fabric of practice that leads to custom. The Court did not express this basic requirement in explicit terms, though there is no doubt that it was aware of it. This may be seen, for instance, in some *dicta* in the *North Sea Continental Shelf* cases where, in the context of treaties that produce custom, the Court spoke of "a fundamentally norm-creating character" of a rule, this character forming "the basis of a general rule of law"[65]). Judge Lachs, in his Dissenting Opinion in the same cases, also referred to this phenomenon when he called attention to "the combined effect of [...] response and interaction in the field concerned". However, he placed this interplay at a later stage, namely one which lies beyond the emergence of concordant practice, and he saw in it the "reciprocity so essential in international legal relations"[66]).

It is probably this interaction of claims and response that made the Court sometimes speak simply of "practice" where in fact it referred to custom and rights or duties that resulted thereof[67]). This was an inaccuracy of language and not an identification of practice with custom, that is to say, not a deviation from the definition of custom (as a phenomenon comprising two elements) that has been given in the cases of *The S.S. Lotus* and the *North Sea Continental Shelf*.

Before it becomes the substratum of custom, this combination of claim and response must mature into a settled practice. To paraphrase a *dictum* of the Court, the conduct of States must be conclusive, and it must be sufficient to bear the weight sought to be put upon it as evidence of such a settled practice, manifested in such circumstances as would justify the inference that the conduct in question, reinforced by the *opinio juris*, amounts to a mandatory rule of customary international law[68]). To put it in negative terms, settled practice is one which is characterized

[64]) McDougal, *op. cit. (supra* note 13), pp. 357—358.
[65]) 1969, p. 42, para. 72.
[66]) *Ibid.*, p. 231.
[67]) *E. g.*, 1960, p. 43: "a practice [...] by virtue of which [a State] had acquired a right"; p. 44: "Such a particular practice must prevail over any general rules".
[68]) 1969, p. 45, para. 79.

by the absence of "uncertainty and contradiction" and in which there is no "fluctuation and discrepancy" [69]). In particular, settled practice is one which meets three requirements. First, there must be uniformity of conduct. Second, the practice must be general in the sense of being extensive. And third, it must be constant. When the practice displays these characteristics it becomes a usage, and the way is then open, through a further process, to its transformation into custom.

An attempt has been made below to treat each of the three requirements separately. The jurisprudence of the Court justifies such an approach only to some extent. Too rigid a separation of one requirement from another would result in a loss of touch with political reality. Uniformity and generality of practice are criteria that stand very close to one another. The same is true of uniformity and constancy of practice.

5. Uniform Practice

To lead to the establishment of a custom the actions of States must be concordant with one another: in a specific type of situation the actions of States A, B, C, etc. are identical. The International Court of Justice often speaks of "uniform" usage [70]). If some States put forward a claim and behave accordingly, and other States tolerate, acquiesce in, or consent to, such conduct, then there is uniformity of practice [71]). Thus, in the 19th century, Norway adopted the method of straight base-lines to delimit her territorial sea. In the *Fisheries* case the Court found that there was the "general toleration of foreign States with regard to the Norwegian practice" [72]). The attitude of these States, in conjunction with various factors of a different nature, justified the conclusion that there was a customary rule of international law permitting the use of the method of straight base-lines [73]).

General international law abounds in rules where, as regards their origin, uniform practice was the starting point for transforming certain habits, doctrines or postulates into usages that successively matured into custom.

---

[69]) 1950, p. 277.

[70]) *E. g., ibid.*, p. 276; 1952, p. 200; 1960, pp. 40—43.

[71]) McDougal, *op. cit.* (*supra* note 13), p. 358.

[72]) 1951, p. 116, at p. 138.

[73]) The Court's formulation is negative: "the attitude of governments bears witness to the fact that they did not consider [the Norwegian method] to be contrary to international law", *ibid.*, p. 139.

Examples may be quoted where the International Court found that the practice of States lacked uniformity.

In the *Asylum* case the *dictum* was very explicit. The case arose out of a dispute between Colombia and Peru following the granting of asylum, in the Colombian Embassy in Lima, Peru, to the Peruvian politician V. R. Haya de la Torre. Colombia maintained that, as the country granting asylum, she was competent to qualify the nature of the offence for the purpose of asylum, *i. e.* to decide in a definitive manner whether the offence was political or not. Colombia based her supposed right on certain treaties (this part of the argument is not relevant here) and on "American international law", *i. e.* on "regional or local custom peculiar to Latin-American States" [74]). The Court reviewed the practice of these States and arrived at the following negative conclusion [75]):

> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence".

In the *North Sea Continental Shelf* cases the Court had to pronounce, *inter alia,* on whether the application of the equidistance method in the delimitation of the continental shelf between adjacent States amounted to a practice that was "virtually uniform" [76]). The Court referred to some fifteen instances of delimitation in which the equidistance principle had been adopted or applied, and made in passing an observation which did not leave any doubt that it treated them as only "a very small proportion" of cases "potentially calling for delimitation in the world as a whole" [77]). The Court did not evaluate this practice because it came to the conclusion that other grounds deprived it of weight as precedent. However, it is clear that in the opinion of the Court no uniform practice can be ascertained on the basis of a fraction of all actions of the States in the field

---

[74]) 1950, at p. 276.

[75]) *Ibid.*, p. 277. Fitzmaurice, *op. cit. (supra* note 11), p. 67.

[76]) 1969, p. 43, para. 74.

[77]) *Ibid.*, para. 75. In his Separate Opinion Judge Padilla Nervo denied that the instances where the equidistance method had been used were numerous, *ibid.*, p. 85, at p. 86.

under consideration. It is not a question of numbers, for it is not to be denied that in particular circumstances a custom "can arise even on the basis of a few precedents" [78]). What is required is the non-existence of activities in which other solutions have been adopted. In other words, the variety of solutions destroys the picture of uniformity. Thus Judge Padilla Nervo, in his Separate Opinion in the same cases, spoke of a practice that showed "a uniform, strict and total application" of the rule involved [79]). What is "strict" and "total" depends on the circumstances accompanying the practice in question. The Court is not dogmatic on this point. In the *Fisheries* case, in considering the Norwegian practice of applying the method of straight base-lines, the Court admitted that certain discrepancies need not destroy the picture of uniformity: "too much importance need not be attached to the few uncertainties or contradictions, real or apparent [...] in the Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812 [...]" [80]).

6. General or Extensive Practice

Article 38, para. 1 (*b*) of the Statute of the Court refers to "general practice". In the *North Sea Continental Shelf* cases the Court spoke of "extensive" practice. While in the requirement of uniformity emphasis is put on the content of the actions, here attention is focused on the actors and thus on the quantity of the conduct.

General or extensive practice is practice which embraces the actions of all those States which are in a position to participate in that practice or have an interest in the subject matter. The nature of that matter and the scope of application of the nascent custom influence the degree of importance to be attached to the attitude of particular States. For instance, in maritime questions the position of sea powers and States that possess developed sea economies and interests will be of primary importance.

In other words, the requirement of generality does not amount to unanimous and universal acceptance of the conduct involved [81]). Beyond this negative conclusion, however, it is difficult to formulate any definition of generality that would cover all instances of State practice which

[78]) Wolfke, *op. cit. (supra* note 8), p. 68.

[79]) 1969, p. 85.

[80]) 1951, p. 138. This *dictum* is referred to by Judge Lachs in his Dissenting Opinion in the *North Sea Continental Shelf* cases, 1969, p. 229.

[81]) See, in particular, Judges Ammoun and Lachs, *ibid.*, pp. 104, 130 and 229. Cf. B No. 6, p. 36: "almost universal [...] practice".

leads to the creation of custom. The Court has never attempted to give such a definition and has limited its answers to the specific situations.

In the Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the Court refused to admit that there existed "a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties" [82]). Among the arguments against the existence of such a rule the Court listed the fact that "the examples of objections made to reservations [appeared] to be too rare in international practice to have given rise to such a rule" and the fact that a "different practice" had developed among the American States [83]).

In the *Fisheries* case the Court had "no difficulty of finding that, for the purpose of measuring the breadth of the territorial sea, it [was] the low-water mark [...] which [had] generally been adopted in the practice of States" [84]). But the parties in this case differed as to the application of the rule. The Court said that there was the "principle that the belt of territorial waters must follow the general direction of the coast" [85]); however, there existed various methods of applying it. The Court did not admit that this principle boiled down to the rule that the base-line of territorial waters should follow the sinuosities of the coast. Exceptions to such a rule in State practice and the diversity of methods applied were behind the Court's view that there was no general practice to support the rule in question [86]).

In the same case the Court considered the question whether there was a rule of general customary law to the effect that a bay constituted part of the internal waters of the coastal State provided the closing line of the indentation was not more than ten sea miles long (the ten-mile rule). In the Court's view [87])

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

---

[82]) 1951, p. 15, at p. 24.
[83]) *Ibid.*, p. 25.
[84]) *Ibid.*, p. 128.
[85]) *Ibid.*, p. 129.
[86]) *Ibid.*, pp. 128—133; Lauterpacht, *op. cit. (supra* note 6, edition of 1958), pp. 369—370.
[87]) 1951, p. 131.

If a State opposes a certain course of practice, then such a practice may nevertheless lead to the creation of a corresponding custom; but the custom will bind only the participants and those who consent to the practice. The opposing State will remain beyond the pale of the rule. "In any event [continues the Court in the *Fisheries* case] the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she always opposed any attempt to apply it to the Norwegian coast" [88]).

In the *North Sea Continental Shelf* cases the Court considered the question whether a provision of the Geneva Convention on the Continental Shelf became a general rule of international law. The provision was Art. 6, para. 2, *i. e.* the application of the equidistance principle in the delimitation of continental shelf. The Court formulated the test of "a very widespread and representative participation in the convention [...], provided it included that of States whose interests were specially affected" [89]). At the moment at which the proceedings in these cases were instituted the Convention was binding on 37 States. The parties differed in the appraisal of this figure. For Federal Germany, it constituted "a minority of the States" [90]). For Denmark and the Netherlands, the number was "decidedly impressive by any standards in the light of the past record of the dilatoriness of States in carrying out the process of acceptance" of multilateral conventions and the figure 37 was a "very solid evidence of the general acceptance of the Geneva Convention [...] by the international community" [91]). The Court realized that to a number of States participation in the Convention was not open, while others had no interest in accepting it (for instance, the land-locked countries). None the less the Court concluded that "the number of ratifications and accessions so far secured [was], though respectable, hardly sufficient" [92]). The explanation for this *dictum* lies in the fact that the figure 37 (or, at the moment at which the judgment was delivered, 39) represented less than half of the States that explore or exploit the continental shelf. It must be added that the insufficient number of ratifications or accessions constituted only one of the premises on which the

[88]) *Ibid.*

[89]) 1969, p. 42, para. 73. As to the requirement of adequate representation, see Judge Lachs, *ibid.*, p. 227. He regards the equidistance method as "a rule of general law", *ibid.*, p. 225. See also Jack Lang, Le Plateau continental de la Mer du Nord, Arrêt de la Cour Internationale de Justice 20 février 1969 (Paris 1970), p. 111.

[90]) Memorial submitted by the Federal Republic of Germany, I. C. J. Pleadings, North Sea Continental Shelf Cases, 1968, vol. I, p. 57.

[91]) Counter Memorials Submitted by Denmark and the Netherlands, *ibid.*, pp. 190 and 343.

[92]) 1969, p. 42, para. 73. For the critical observations on the "statistical method", see Baxter, *op. cit.* (*supra* note 4) Rec. d. C. vol. 129, pp. 64—67.

Court based its negative conclusion regarding the customary nature of Art. 6, para. 2, of the Convention [93]).

In the development of rules governing the activities of States in outer space the practice that counts is that of States which send astronauts or place objects there. Here the number of States involved is very small and yet the characteristic of "generality" or "extensiveness" cannot be denied, because the rules are being created by all those who are in a position to establish and apply them, and to be governed by them. It depends on the nature of the problem what group of States is to act to make the practice general and extensive. In different fields of international relations these groups may be different in size.

7. Regional Practice

The relative size of the group of States which, through their practice, lay the foundations for a custom raises the problem of regional or local practice and, consequently, regional or local custom.

While Art. 38, para. 1 (*a*) of the Court's Statute mentions "international conventions, whether general or particular", subparagraph (*b*) refers to "general" practice only. Does the latter formula exclude the existence of a particular, *i.e.* regional or local custom? The answer is in the negative, and the fact that regional or local custom is less frequent than regional or local treaties is another matter. Generality does not equal universality, and the term "general" is here a relative one. In different fields of State external activities this term encompasses smaller or larger groups of States.

In the case of *The S.S. Lotus* the Court spoke of "usages generally accepted" [94]), which, it appears, did not mean universal acceptance. The adjective "general" seems to have been employed in the same sense by the dissenting judges [95]), though it is probable that Judge Weiss implicitly

---

[93]) A different approach, which reduces the importance of the practice in question, is to be discerned from Judge Morelli's Dissenting Opinion, 1969, p. 197. For him the practice of States which consists in the application of the equidistance criterion is not relevant as "a constitutive element of a custom which creates a rule, but rather as a confirmation of such a rule". The equidistance criterion is nothing more than "a necessary consequence of the apportionment effected by general international law on the basis of contiguity", *ibid.*, p. 202.

[94]) A No. 10, p. 18. Cf. also the Court's view on the bilateral practice between Poland and the Free City of Danzig, B No. 18, pp. 12—13.

[95]) Judge Weiss, A No. 10, p. 40, at p. 45; Lord Finlay, *ibid.*, p. 50; Judge Altamira, *ibid.*, p. 103.

excluded the possibility of regional custom as he emphasized the necessity of "*consensus omnium*" and of the agreement of "all nations constituting the international community" [96]).

In the *Asylum* case the Court admitted the existence of a "regional or local custom peculiar to Latin-American States" [97]). It was another matter that the Court did not find that the plaintiff Government in this case had proved the existence of a specific custom: the Court did not reject the notion of regional or local custom. None of the parties questioned the existence of customs in the American international law, and there was no reason why the Court should discuss the problem of local custom in any general terms. The situation was similar in the case concerning the *Rights of Nationals of the United States in Morocco* where the Court did not deny the possibility of the existence of a local custom but simply found that no custom relating to the exercise of consular jurisdiction became binding on Morocco [98]). On the other hand, the position was different in the case concerning the *Right of Passage over Indian Territory* (Merits) where one party questioned the possibility of the emergence of a specific type of local customary rule, viz. the bilateral custom. The Court, therefore, devoted some attention to the general problem, though it did not do so in any depth. The Court again admitted that there could exist customs of local application and it went to the limit of this possibility by saying that nothing prevented the emergence of a custom the scope of which would be restricted to two States only [99]):

> "With regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. 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".

Such a local custom was a sufficient basis for the Court to decide the question of transit it considered; it was not necessary, the Court said, "to examine whether general international custom" might "lead to the same result" [100]). The Court, in another passage, attributed "decisive effect" to

[96]) *Ibid.*, p. 40, at pp. 43—44.
[97]) 1950, p. 276.
[98]) 1952, pp. 199—200.
[99]) 1960, p. 6, at p. 39.
[100]) *Ibid.*, p. 43.

the practice of two States in their mutual relations and it concluded that "[s]uch a particular practice must prevail over any general rules" [101]).

In the *North Sea Continental Shelf* cases the Court spoke of "customary rules and obligations which, by their very nature, must have equal force for all members of the international community" [102]). This *obiter dictum*, contrary to some doubts expressed in a monograph on this Judgment [103]), does not weaken the Court's position adopted in the *Right of Passage* case. The paragraph of the Judgment from which this phrase has been taken deals not with the existence of regional or local custom but with quite a different matter, viz. the making of reservations to treaty and customary rules. The Court wished to stress the inadmissibility of reservations with respect to the latter category of rules. The emphasis is not on the universal scope of custom ("all members of the international community") but on the fact that a custom has equal force for all concerned, *i. e.* for all those States which come within the ambit of the customary rule — and they may happen to be only a regional group.

Nor does the test of "a very widespread and representative participation" [104]) amount to the rejection of local custom; the Court formulated this test when it spoke of a rule that was supposed to have general, in contradistinction to regional or local, application. Contrary to the monograph [105]) cited above, neither this passage nor the one on *opinio juris* can serve as an argument against local custom.

8. Constant Practice

The Court speaks of "consistent", "constant" or "settled" practice [106]). Thus the practice must be repeated and continued: the situation to which it refers, remains in existence while the practice itself is being carried on [107]).

---

[101]) *Ibid.*, p. 44. It is not particular practice but particular rule that prevails over the general ones. The decision in the *Passage* case evoked some interest in the creation of local, including bilateral practice, see Paul Guggenheim, Lokales Gewohnheitsrecht, Österreichische Zeitschrift für öffentliches Recht vol. 11 (1961), p. 327; G. Cohen-Jonathan, La coutume locale, Annuaire Français de Droit International vol. 7 (1961), p. 119; Christian Dominicé, Coutume bilatérale et droit de passage sur territoire suisse, Annuaire suisse de droit international vol. 19 (1962), p. 71.

[102]) 1969, p. 38, para. 63.

[103]) Lang, *op. cit.* (*supra* note 89), pp. 157 and 159.

[104]) 1969, p. 42, para. 73.

[105]) Lang, *op. cit.* (*supra* note 89), p. 90.

[106]) A No. 1, p. 25; B No. 12, p. 30; 1950, p. 276; 1952, p. 200; 1960, p. 40; 1969, p. 44, para. 77 and p. 45, para. 79. Sørensen, *op. cit.* (*supra* note 27), p. 102.

[107]) Cf. the remark made by Krystyna Marek, Le problème des sources du droit international dans l'arrêt sur le plateau continental de la Mer du Nord, Revue Belge de Droit International vol. 6 (1970), p. 44, at p. 64, note 83 *bis*.

One finds some observations on the nature of constancy of practice in two of the Dissenting Opinions written in the *North Sea Continental Shelf* cases. Thus, Judge T a n a k a [108]) thinks that here one deals with

> "a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances. Nor is the situation the same in different fields of law such as family law, property law, commercial law, constitutional law, etc. It cannot be denied that the question of repetition is a matter of quantity; therefore there is no alternative to denying the formation of customary law on the continental shelf in general and the equidistance principle if this requirement of quantity is not fulfilled. What I want to emphasize is that what is important in the matter at issue is not the number or figure of ratifications of and accessions to the Convention or of examples of subsequent State practice, but the meaning which they would imply in the particular circumstances. We cannot evaluate the ratification of the Convention by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf".

The factor of repetition to which Judge T a n a k a referred, is another side of the question how frequent the acts that constitute State practice should be. Frequency is one of those elements of State practice that evade a hard and fast definition. As Judge L a c h s remarks [109])

> "[f]requency may be invoked only in situations where there are many and successive opportunities to apply a rule. This is not the case with delimitation, which is a one-time act. Furthermore, as it produces lasting consequences, it invariably implies an intention to satisfy the criterion of continuity".

Yet in these cases the Court found that the practice of applying the equidistance method in the delimitation of the continental shelf was not constant [110]).

In Clive P a r r y's view, the Court's formula of constant and uniform practice contains "epithets which somehow suggest practice over a substantial period of time" [111]). Neither the jurisprudence nor the law itself impose any period in terms of years. If there is continued and repeated practice, and it is accepted, or acquiesced in, as obligatory, a new

[108]) 1969, pp. 175—176.
[109]) *Ibid.*, p. 229.
[110]) *Ibid*, p. 45, paras. 79—81.
[111]) P a r r y, *op. cit. (supra* note 14), p. 60.

rule of customary law can be born during a comparatively short time. The principle of sovereignty in the air over State's land and maritime territory has been cited as an example of the rapid emergence of a customary rule [112]).

No specific hint or directive regarding the duration for which practice is to be constant follows from the *dicta* of the Court. But one negative conclusion is certain. The Court does not require that the usage be immemorial. The condition of immemorial practice has been formulated by Judge Negulesco in his Dissenting Opinion in the Advisory Opinion on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*. To justify his point of view he invoked the teachings of publicists and international practice [113]), but it is doubtful whether at least the latter, in his time, insisted on immemorial usage. None the less Judge Negulesco based his conclusion that there was no custom in question *inter alia* on the premise that there was lacking "a continued exercise of a right since time immemorial" [114]). Up till now Judge Negulesco has remained isolated in his view.

In the *Asylum* case the Court did not come to deal with the time aspect of custom [115]). In the *Fisheries* case the Court considered the application of the method of straight base-lines by Norway, in the delimitation of territorial sea, from the beginning of the 19th century. The Court arrived at the conclusion that "the Norwegian authorities applied their system consistently and uninterruptedly from 1869 until the time when the dispute arose" [116]). The latter date was, for the Court, not earlier than 1933. Thus a period of more than sixty years was taken into account. The Court concluded that it was a "sufficiently long practice" [117]). In the case concerning the *Rights of Nationals of the United States of America in Morocco* the Court was prepared to enquire whether there had developed a custom on the basis of practice that lasted during as brief a period as some eleven years; the Court's conclusion regarding the non-existence of the custom in question was based on reasons other than the time element [118]). In the case concerning the *Right of Passage over Indian Territory* the Court dealt with a practice that "continued over a period extending beyond a century

---

[112]) James L. Brierly, I. L. C. Yearbook 1950 vol. 1, p. 5.
[113]) B No. 18, p. 85, at p. 105.
[114]) *Ibid.*, pp. 114—115.
[115]) 1950, pp. 276—278.
[116]) *Ibid.*, 1951, p. 138.
[117]) *Ibid.*, p. 139. Cf. A/B No. 76, p. 36: "a very long time".
[118]) 1952, pp. 200—201.

and a quarter" and found that "that practice was accepted as law by the Parties" [119]). This part of the Judgment does not warrant the conclusion that this specific period was regarded by the Court as a *conditio sine qua non* of the emergence of the custom between the parties. It may, however, be added that in this case the Court emphasized the fact that the practice in question was long, and this fact seems to have influenced the Court's conclusion that the practice has given rise to a custom. Judge Armand-Ugon, in his Dissenting Opinion, formulated the requirement of the "continual repetition of an act over a long period" [120]). But the Court has never accepted such a test as governing all the other cases. On the contrary, in the *North Sea Continental Shelf* cases the Court admitted that "the passage of only a short period of time was not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule[...]" [121]). Again, it does not follow from this statement that if the basis is other than a treaty the time could not be short. The Court laid stress on factors other than the duration of time: "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" [122]).

In fact, there was unanimity among the Judges sitting on the last-mentioned cases that the basic law relating to the sovereignty of the State over the continental shelf emerged very quickly. Judge Ammoun remarked that "the notion of the continental shelf [...] took only a dozen years to become a universally recognized custom" [123]). Judge Tanaka observes that [124])

> "it can be recognized that the speedy tempo of present international life promoted by highly developed communication and transportation had minimized the importance of the time factor and has made possible the acceleration of the formation of customary international law. What required a hundred years in former days now may require less than ten years".

The rapid creation of customs in contemporary international relations has

---

[119]) 1960, p. 40.
[120]) *Ibid.*, p. 76, at p. 82.
[121]) 1969, p. 43, para. 74.
[122]) *Ibid.* There is no contradiction between paras. 73 and 74 of the Judgment. For a contrary view, see Lang, *op. cit. (supra* note 89), p. 111.
[123]) *Ibid.*, pp. 123—124.
[124]) *Ibid.*, p. 177.

been equally emphasized by Judges Lachs and Sørensen. Judge Lachs states[125]):

"With regard to the time factor, the formation of law by State practice has in the past frequently been associated with the passage of a long period of time. There is no doubt that in some cases this may be justified.

However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge : one it must meet, lest it lag even farther behind events than it has been wont to do.

To give a concrete example: the first instruments that man sent into outer space traversed the airspace of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time. Similar developments are affecting, or may affect, other branches of international law".

Speaking of the continental shelf he says that

"under the pressure of events, a new institution has come into being. By traditional standards this was no doubt a speedy development. But then the dimension of time in law, being relative, must be commensurate with the rate of movement of events which require legal regulation. A consequential response is required. And so the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law".

M. Sørensen referred to the *dicta* in the cases regarding *Asylum* and the *Rights of the Nationals of the United States of America in Morocco* and made the following observations[126]):

"The possibility has thus been reserved of recognizing the rapid emergence of a new rule of customary law based on the recent practice of States. This is particularly important in view of the extremely dynamic process of evolution in which the international community is engaged at the present stage of history. Whether the mainspring of this evolution is to be found in the development of ideas, in social and economic factors, or in new technology, it is characteristic of our time that new problems and circumstances incessantly arise and imperatively call for legal regulation. In situations of this nature, a convention adopted as part of the combined process of codification and progressive development of international law may well constitute, or come to constitute the decisive evidence of generally accepted new rules of international

[125]) *Ibid.*, p. 230.
[126]) *Ibid.*, p. 241, at p. 244.

law. The fact that it does not purport simply to be declaratory of existing customary law is immaterial in this context. The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized legal rules may crystallize. The word 'custom', with its traditional time connotation, may not even be an adequate expression for the purpose of describing this particular source of law".

On the other hand, the short period of time seemed to be a problem to Vice President Koretsky, who wrote a dissenting opinion in these cases. In his view Art. 6, para. 2, of the Geneva Convention on Continental Shelf could be considered as "an embodiment of international custom", yet he was "rather inclined to consider" the principles and the rules of that Article "as principles of general international law, seeing that established doctrine [laid] much stress on the time factor as a criterion of whether a given principle [belonged] to customary international law" [127]).

It may be said in conclusion that the Court does not require "the passage of any considerable period of time" [128]) if other elements of custom are present. The time is not, in itself, a precise requirement. One may repeat with Judge Tanaka that the "time factor, namely the duration of custom, is relative" [129]).

9. Transformation of Usage into Law

The uniform, extensive and constant practice constitutes usage. But mere usage is not sufficient, though it is indispensable for the creation of custom. To transform usage into custom (*i.e.*, into a customary rule of international law) States which are participants in the practice must assert that they have a right so to act and other States expressly consent to, acquiesce in, or at least tolerate that state of things: "the practice must be followed on the basis of a claim of right and, in turn, submitted to as a matter of obligation" [130]). These two elements — the right and the submission to it — "are complementary and mutually interdependent" [131]).

In the *Asylum* case the International Court of Justice considered the existence of a custom relating to the definitive and unilateral qualification

[127]) *Ibid.*, p. 154, at p. 156.
[128]) *Ibid.*, p. 42, para. 73.
[129]) *Ibid.*, p. 178.
[130]) MacGibbon, *op. cit.* (*supra* note 16), p. 117.
[131]) Sørensen, *op. cit.* (*supra* note 27), p. 101; MacGibbon, *op. cit.*, p. 119. The quotation is from the latter writer.

of the crime by the State granting diplomatic asylum. The applicant Government, said the Court, "must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State" [132]).

The assertion of a right by one State or States, the toleration or admission by others that the former are entitled to that right, the submission to the obligation — these are phenomena that are evidence of the States' opinion that they have moved from the sphere of facts into the realm of law. For rights and duties here have a strictly and exclusively legal connotation, and not moral, ethical or one dictated by courtesy or convenience.

In the Advisory Opinion on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila* the Court distinguished between a practice that was based on "mere toleration" and the conversion of such a practice "into a legal right" [133]). In the *North Sea Continental Shelf* cases the Court was very explicit on the insufficiency of mere usage [134]):

> "The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty".

The four judges who dissented in the case concerning the *Rights of Nationals of the United States of America in Morocco* drew the distinction between conduct that was due merely to "gracious tolerance" and one which resulted from long-established custom and usage [135]). In his Dissenting Opinion in the case concerning the *Right of Passage over Indian Territory* Mr Chagla, Judge *ad hoc*, emphasized that for the custom to exist a State must claim a certain conduct as a right and another State or States must admit an obligation to grant it. He contrasted this pattern with permissions and authorizations and drew the distinction between granting a request and respecting a right. "Revocable acts of courtesy and accommodation" [136]) were one thing, acts dictated by the law another.

Owing to its uniformity, generality and constancy, the practice of States arrives at shaping a pattern of conduct. States have an option to stop here,

---

[132]) 1950, p. 276.
[133]) B No. 14, pp. 36—37.
[134]) 1969, p. 44, para. 77.
[135]) 1952, p. 221.
[136]) 1960, p. 116, at p. 121.

i. e. they could continue the practice without elevating it to the standard of law. But when they assert rights or accept obligations they proceed further, for they add a new element to their settled practice. The practice itself is not law and thus by itself it can produce no rights and no obligations in the legal sense. Such rights and obligations can exist only under law, *i. e.* a rule or rules of law. But the practice, by establishing a pattern of conduct, a type of action and reaction in a given factual situation, initiates the birth of law, for it produces a rule or rules in the technical though not yet legal sense: the rule exists as a standard of behaviour, but it is not yet binding.

The picture changes when States begin to treat their practice and the rule or rules it engenders as law. What they do now becomes law for them. It is not, contrary to the view of one authority, the "conception that the practice is required by, or consistent with, prevailing international law" [137]). It is not so because, first, the practice, with respect to custom, is a creative element, and not a corroborative one. Second, when custom changes old law, it is by definition based on practice that is neither required nor consistent with "prevailing international law". The rule created by practice acquires a legal nature, not that it is concordant with law, but because the rule is now itself part of the law. It is a law-making activity and therefore the question of acting in conformity with law does not arise: the law remains to be created [138]).

This transformation of practice into a legal rule or rules operates through the conduct of States and is thus also part of their practice. It does not operate through any expression of agreement, for then States would be concluding a treaty, in one form or another. States come to regard the rules formed in their practice as legal rules. This attitude or belief of States may be called *opinio juris sive necessitatis.* It concludes and perfects the formation of a customary rule of international law.

10. Opinio Juris

The Latin formula of *opinio juris sive necessitatis* is an import from the German historical school [139]) and its use may prove confusing if its

[137]) Manley O. Hudson, I. L. C. Yearbook 1950 vol. 2, p. 26.

[138]) L. Kopelmanas, Custom as a Means of the Creation of International Law, B. Y. I. L. vol. 18 (1937), p. 127, gives several examples of customary rules that arose from practice which was not exercised under the impression that it was in conformity with law or enjoined by law. In this respect Kopelmanas' view is shared by MacGibbon, *op. cit. (supra* note 16), pp. 128—129.

[139]) Paul Guggenheim, Contribution à l'histoire des sources du droit des gens,

meaning in international, in contradistinction to domestic, law is not elucidated. It is not psychological in nature, and this is so for the obvious reason that there is no "State psychology" as only a human being possesses mind and soul. The Court described the element of *opinio juris* as "subjective" [140]), probably to contrast it with the "objective" nature of material facts that compose the practice. But the belief as to the legal nature of the rule of behaviour that follows from the practice is not the result of any psychological process. This belief — and it is again an inexact term in the circumstances [141]) — follows from the acceptance of the legal nature of the rule by the States.

On several occasions the Court referred, explicitly or implicitly, to the element of *opinio juris*.

In the case of *The S.S. Lotus* the Court spoke of "usages generally accepted as expressing principles of law" [142]). In this case, the Court considered the question whether there was an international custom that imposed on States the obligation to abstain from exercising criminal jurisdiction over aliens for certain crimes committed on the high seas. The Court examined the practice and concluded that "only if such abstention were based on their [*i.e.* States] being conscious of having a duty to abstain would it be possible to speak of an international custom" [143]). In his Dissenting Opinion in the same case, Judge Nyholm spoke of custom as "a manifestation of *international legal ethics* which [took] place through the continual recurrence of events with an *innate consciousness of their being necessary*" [144]).

Judge Negulesco, dissenting in the case of the *Jurisdiction of the European Commission of the Danube between Galatz and Braila,* spoke of usage "based upon the mutual conviction that the recurrence of these facts [was] the result of a compulsory rule" [145]). He came to the conclusion that the practice considered did not constitute a custom because, *inter alia,* it lacked "a mutual conviction of the lawfulness of the exercise of such a right" [146]).

Rec. d. C. vol. 94 (1958 II), pp. 52—53. Guggenheim discovered that the element of *opinio juris* already appeared in the writings at the end of the 18th century, *ibid.*, p. 53 note I.

[140]) 1969, p. 44, para. 77.

[141]) The term has been used by the Court, *ibid.*

[142]) A No. 10, p. 18.

[143]) *Ibid.*, p. 28.

[144]) *Ibid.*, p. 60.

[145]) B No. 14, p. 105.

[146]) *Ibid.*, p. 115.

In the *Asylum* case the Court required that the usage be the expression of a right and of a duty: usage must be "accepted as law"; only then one can speak of a custom [147]).

In the case concerning the *Right of Passage over Indian Territory* the Court spoke of the "long continued practice between two States accepted by them as regulating their relations". Acceptance of the regulating effect of the practice is nothing else than submission to a duty and availing oneself of the resulting right. In another passage the Court spoke of "a practice clearly established between two States which was accepted by the Parties as governing the relations between them" [148]) — the term "governing" again implying a duty-right relationship. In the same case, speaking of local custom, Mr Chagla, Judge *ad hoc*, emphasized that "local custom under international law" required more than constant and continuous practice [149]):

> "It is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forbearing from doing something, the parties must feel that they are doing or forbearing out of a sense of obligation. They must look upon it as something which has the same force as law. If I might put it that way, there must be an overriding feeling of compulsion — not physical but legal. That is what the jurisprudence on the subject calls the conviction of necessity. I do not wish to go into the subtleties of this jurisprudence. But the language of the Statute of the Court is clear and binding upon the Court. Article 38 (I) (*b*) lays down one of the sources of international law which the Court shall apply in deciding disputes before it. It says: international custom, as evidence of a general practice accepted as law".

According to the learned judge, the element of *opinio juris* is decisive. It permits to distinguish practice that constitutes "revocable acts of courtesy and accommodation" from acts dictated by law [150]).

In the *North Sea Continental Shelf* cases the Court followed the foregoing *dictum* in the *Lotus* case [151]) and elaborated on the function of *opinio juris* [152]):

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief

147) 1950, pp. 276 and 277.
148) 1960, p. 44.
149) *Ibid.*, p. 120.
150) *Ibid.*, p. 121.
151) A No. 10, p. 28; 1969, p. 44, para. 78.
152) *Ibid.*, para. 77.

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

President Bustamante y Rivero referred to the "sufficiently repeated support of the *opinio juris* among States" which backs the principles developed in the practice [153]). Judge Ammoun cited a large number of treaties and unilateral acts on the continental shelf and concluded that "this aggregate body of elements, including the legal positions taken up by the representatives of the majority of countries at the Geneva Conference [...] [amounted] here and now to a general consensus constituting an international custom sanctioning the concept of the continental shelf [...]" [154]). On the other hand, he found, with the majority of the Court, that in the delimitation of the continental shelf "the use of one method or another, not excepting that which employs the median line, does not indicate any *opinio juris* based on the awareness of States of the obligatory nature of the practice employed" [155]).

Nor did the dissenting judges question the necessity of *opinio juris*, though they differed fundamentally with the Court on whether this element accompanied the method of equidistance. Thus Judge Koretsky [156]) considered the various "governmental acts, agreements and scientific works" relating to the continental shelf. In his view,

> "by a kind of coalescence of the principles, a genuine *communis opinio juris* on the matter has come into being. States, even some not having acceded to the Convention, have followed its principles because to do so was for them a recognition of necessity, and have thereby given practical expression to the other part of the well-known formula *opinio juris sive necessitatis*".

For Judge Tanaka, the "second factor of customary law, which can be called its *animus*, constitutes *opinio juris sive necessitatis* by which a simple usage can be transformed into a custom with the binding power. It represents the qualitative factor of customary law" [157]).

[153]) *Ibid.*, p. 57, at p. 63.
[154]) *Ibid.*, p. 106.
[155]) *Ibid.*, p. 127.
[156]) *Ibid.*, p. 158.
[157]) *Ibid.*, p. 175.

In none of its decisions did the Court explore and explain how the existence of the *opinio juris* is to be proved. Some of its *dicta*, particularly in the case concerning the *Right of Passage over Indian Territory*, seem to point to the Court's tendency to discern the second element of custom in certain manifestations of the first one, *i. e.* the practice. When the Court uses the phrase "a practice [...] by virtue of which [a State] had acquired a right" [158]), it does not reduce custom to practice but it finds the element of duty in the practice itself. This apparent identification of the *opinio juris* with the practice is visible in the following passage from the Court's judgment in the foregoing case [159]):

> "The Court is here dealing with a concrete case having special features. Historically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice. Where therefore 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".

In his Separate Opinion in this case Judge Wellington Koo referred to the "evidence of [...] consciousness [...] of an obligation, *opinio juris sive necessitatis*", and yet, in a further passage, he passed over this element when he said that a certain kind of transit "also developed into a customary right in fact, as seen from the uniform and constant practice [...]" [160]). Judge Armand-Ugon finds the element of obligation in the long duration of practice [161]):

> "The continual repetition of an act over a long period [...] strengthens [the usage]; a relationship develops between the act and the will of the States which have authorized it. The recurrence of these acts over so long a period engenders, both in the State which performs them and in the State which suffers them, a belief in the respect due to this long-established practice [...].
>
> A right of passage, like territorial sovereignty, may be acquired on the basis of an effective practice. A fact observed over a long period of years, as in the present instance, acquires binding force and assumes the character of a rule of law".

---

158) 1960, p. 43.
159) *Ibid.*, p. 44.
160) *Ibid.*, p. 54, at p. 64.
161) *Ibid.*, pp. 82—83.

In the *North Sea Continental Shelf* cases some of the dissenting judges devoted their attention to the evidence of *opinio juris*. Judge Tanaka said[162]):

> "Next, so far as the qualitative factor, namely *opinio juris sive necessitatis* is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to internal motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement".

In his view the Geneva Convention and the way in which it was drafted "would not fail to exercise rapidly a positive influence for the formation of *opinio juris sive necessitatis* in the international community"[163]). Judge Lachs rejected any strict approach to the problem of evidence of *opinio juris*[164]):

> "In view of the complexity of this formative process and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every State having applied a given rule did so because it was conscious of an *obligation* to do so. What can be required is that the party relying on an alleged general rule must prove that the rule invoked is part of a general practice accepted as law by the States in question. No further or more rigid form of evidence could or should be required.
>
> In sum, the general practice of States should be recognized as prima facie evidence that it is accepted as law. Such evidence may, of course, be controverted — even on the test of practice itself, if it shows 'much uncertainty and contradiction' (*Asylum, Judgment, I. C. J. Reports 1950*, p. 277). It may also be controverted on the test of *opinio juris* with regard to 'the States in question' or the parties to the case".

In the particular question of whether the equidistance method was binding on the Federal Republic of Germany in the delimitation of the continental shelf in the North Sea, Judge Morelli expressed the view that "by its signature [of the Geneva Convention] the Federal Republic expressed an opinion which [...] [might] be qualified as an *opinio*

---

[162]) 1969, p. 176.
[163]) *Ibid.*, p. 177. Cf. also Judge Koretsky's view at p. 158.
[164]) *Ibid.*, p. 231.

juris". However, he adds: "But it was a mere opinion and not a statement of will, which could only be expressed by ratification". A further restriction of the view that the signature expresses an *opinio juris* follows from the statement that the signature of the Federal Germany shows that she "participated in a technical operation which, to the extent of the Convention's avowed purpose of codification, consisted in the establishment of general international law" [165]). Judge Lachs analyzed the Proclamation of the Federal German Government relating to the Geneva Convention and found that it "emphatically implied that the mere signing of that instrument [...] was evidence of general international law" [166]). In his view the Federal Government recognized that the Convention reflected general international law. The Proclamation "should therefore be viewed as an unequivocal expression of *opinio juris*, with all the consequences flowing therefrom" [167]).

Finally, M. Sørensen, Judge *ad hoc*, was most emphatic in considering the practice of States "as sufficient evidence of the existence of any necessary *opinio juris*" [168]).

11. The Role of Consent in the Making of Custom

It has been said above that the standard of conduct which follows from a settled practice becomes custom when it is accepted as a rule of a legal nature. Art. 38, para. 1 (*b*), of the Court's Statute requires that the practice be "accepted as law". And the problem of acceptance brings to the fore the problem of consent in the making of custom, and particularly in the emergence of the *opinio juris*.

It is to state a truism to say that States which through their actions contribute to the growth of the custom-creating practice consent to the making of the customary law which originates in that practice.

The position of non-participants in the practice is more complicated. Their attitude may adopt various forms, according to the merits of the

[165]) *Ibid.*, p. 197.

[166]) *Ibid.*, p. 235.

[167]) *Ibid.*, pp. 235—236.

[168]) *Ibid.*, p. 247. Cf. the earlier elaboration of this view in his monograph cited in note 27, pp. 88—111. Lauterpacht, *op. cit.* (*supra* note 6) (edition of 1958), p. 380, defends the position that one should regard "all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention". Baxter, *op. cit.* (*supra* note 4) Rec. d. C., p. 68, is also critical of the rigidity of the Court. For the opposite view, see Marek, *op. cit.* (*supra* note 107), pp. 55—56.

specific situation. They may simply tolerate the practice without expressly or tacitly consenting to it. The attitude of mere toleration [169]), *i. e.*, lack of protest linked to lack of express consent or acquiescence, is sufficient when the claims put forward by the participants in the practice do not impose any duties on the non-participants. The latter simply do not interfere with the exercise of the purported right by the former. (There are rights to which no duties correspond, apart from the obligation not to interfere with the exercise of those rights by others; this obligation has its source elsewhere, not in the specific right that it protects). But when a correlative duty follows from the right claimed in the practice, the attitude of non-participants — in order to contribute to the creation of custom — must be of a more explicit nature. That is, it must be either express consent or unequivocal acquiescence.

Thus consent in one form or another is necessary in the formative period of the customary rule: "dissent must be expressed at that stage to confer exemption: otherwise it is too late" [170]). The observation that there is always consent behind a custom [171]) is true, though this truth has its limits. Consent, however expressed, plays a role in the birth of a custom, and this role cannot be eliminated: without consent by States there would be no custom-creating practice and no evolution, through the interplay of claims, rights and duties, into a binding usage. Yet the moment the customary rule of law is born, the role of consent comes to an end. That rule is now part of the law. For consent is not the basis of obligatory force of custom; consent contributes to the making of custom; once custom has been made, it binds States unless in the formative period they voiced their opposition [172]). A customary rule may undergo modification or even cease to be binding. But to achieve this, a new rule, customary or treaty, is necessary. It is not modification or withdrawal of consent, but the making of new law which supersedes the old. The binding force of a customary rule is governed by a different set of principles than the binding force of a treaty. Here the function of consent with respect to custom is different than with respect to treaties.

What importance does the Court attach to consent in the making of cus-

---

[169]) On "general toleration of foreign States" as signifying that such States knew of, and did not contest, the practice involved, see the *Fisheries* case, 1951, at p. 138.

[170]) Fitzmaurice, *op. cit. (supra* note 11), p. 26.

[171]) *Ibid.*, pp. 68—69. On the role of acceptance in the making of custom, see Wolfke, *op. cit. (supra* note 8), pp. 70—71 and 158—164.

[172]) Cf. Norway's opposition to the ten-mile rule and the effect ascribed to it by the Court, 1951, p. 131. Fitzmaurice, *op. cit.*

tom? In the often quoted *dictum* in the case of *The S. S. Lotus* the Court emphasized the role of the will of States in the making of international law. "The rules of law binding upon States [...] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law [...]" [173]). The dissenting judges were quite emphatic on this point. Judge Loder spoke of the "general consensus of opinion" and of "the acceptance by civilized States [...] of [...] customs" [174]). For Judge Weiss, "the only source of international law is the *consensus omnium.* Whenever it appears that all nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law [...]" [175]). He also referred to "the general consent of nations" [176]). Lord Finlay mentioned "general consent" [177]). Judge Nyholm held that "the foundation of a custom must be the united *will* of several and even of many States constituting a *union of wills,* or a general *consensus of opinion* among the countries" [178]), while Judge Altamira very strongly stressed "the necessity for consent" [179]).

It should be observed that the emphasis put by the Court on the "free will" of States in laying down the rules of international law does not amount to equating custom with tacit agreement [180]). The will of States may be, and indeed is, indispensable for the emergence of custom — a customary rule does not come from a source that lies beyond the influence and consent, in one form or another, of the States. But from this consent no agreement, tacit or otherwise, follows: the result of the process, *i. e.* custom, is not governed by the law relating to treaties.

In this context the problem of reservations may be mentioned. In the *North Sea Continental Shelf* cases the Court denied that reservations to

---

[173]) A No. 10, p. 18. In the Advisory Opinion regarding the *Jurisdiction of the European Commission of the Danube between Galatz and Braila,* B No. 14, p. 17, the Court quoted the view of the Special Committee of enquiry appointed by the Advisory and Technical Committee for Communication and Transit of the League of Nations. The report referred to the conditions under which the European Commission exercised its powers. These powers, it said, were determined "by usage [...] applied with the unanimous consent of all the States concerned".

[174]) *Ibid.,* p. 34.

[175]) *Ibid.,* pp. 43—44.

[176]) *Ibid.,* p. 45.

[177]) *Ibid.,* p. 56.

[178]) *Ibid.,* p. 60.

[179]) *Ibid.,* p. 103.

[180]) For a contrary view, see Marek, *op. cit. (supra* note 107), p. 54.

customary rules were admissible [181]). There is nothing novel in this *dictum*: it states the obvious, for it repeats the truism that reservations are part of the law of treaties and are irrelevant with regard to custom. Whether the capacity to make reservations proves that the rule which figures in a treaty cannot be also customary is a debatable question and not one which lies within the scope of the present article. Suffice it to say that if a State makes a reservation to a treaty rule, the reservation affects the rule only *qua* contractual provision but not *qua* custom, if it happens to have also that nature [182]). The fact that there were important law-making or codifying treaties to which reservations had been made and which became general law [183]) is another matter. While reservations to the treaty rule were and are possible, they are excluded with regard to the same rule as a custom. The Court's *dictum* on the inadmissibility of reservations to custom does not give to all custom the status of *jus cogens*. Nor does the Court's brief reference to *jus cogens*, in another passage [184]), result in an identification of *jus cogens* with custom [185]), though one must admit that the Court's remark on *jus cogens* is not quite clear [186]). A great many rules of customary law are not *jus cogens*, yet no reservations are permitted. On the other hand, States may develop local customs that deviate from the general custom or they may conclude treaties to the same effect. When in the *Fisheries* case the Court denied to the ten-mile rule "the authority of a general rule of international law" and recognized the inapplicability of that rule towards Norway [187]), it did not allow for reservations, but limited the scope of the rule to some States only. Opposition to a nascent custom or modification of general custom by local custom which thus becomes a *lex specialis* are phenomena different from reservations.

Opposition eliminates consent and prevents the eventual custom from becoming binding on the State which demonstrated its lack of consent. In the *Fisheries* case the Court said: "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast" [188]).

On the other hand, the dissenting judges in the case concerning the *Rights*

---

[181]) 1969, p. 38, para. 63. Cf. also Judge Padilla Nervo, *ibid.*, pp. 89 and 97, and Judge Ammoun, *ibid.*, p. 130.

[182]) Cf. Judge Morelli, *ibid.*, p. 198; Judge *ad hoc* Sørensen, *ibid.*, p. 248.

[183]) Judge Lachs, *ibid.*, p. 224.

[184]) *Ibid.*, p. 42, para. 72.

[185]) Lang, *op. cit. (supra* note 89), pp. 98 and 105, sees here such an identification.

[186]) Cf. Marek, *op. cit. (supra* note 107), p. 52.

[187]) 1951, p. 131.

[188]) *Ibid.*

of Nationals of the United States of America in Morocco identified custom with agreement. Referring to the system of consular jurisdiction they observe that "the system, being based *inter alia* upon long-established usage, which is only another name for agreement by conduct, can only be terminated in the way in which international agreements can be terminated" [189]). In another passage of their Dissenting Opinion the judges repeat that "usage and sufferance are only different names for agreement by prolonged conduct, which may be no less binding than agreement by the written word" [190]). It may be observed that there is a shade of difference between this statement and the preceding one; here the accent seems to have been laid more on the binding force of the custom, and not so much on identity with treaties. However, to say that the force of custom is no less than that of treaty again amounts to the identification of the two sources. For generally speaking, the obligatory force of custom lasts longer and is more permanent than that of treaties. It is not clear whether, in the case concerning the *Right of Passage over Indian Territory,* Judge Armand-Ugon regarded treaties as tacit agreements when he said that the "legal *status quo*" of Portuguese passage to and from the enclaves had "the force of an agreement" [191]). The Court itself has on no occasion adopted the view to which the Dissenting Opinion in the *Rights [...] in Morocco* case gave expression.

Contrary to some opinions [192]), the Court, in the *North Sea Continental Shelf* cases, dit not deny that consent played a role in the formative process of custom, nor did it pronounce on the matter in any contradictory way. When the Court says that a custom "is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter", it refers to and summarizes the view expressed by Denmark and the Netherlands. The Court's own view is presented in the subsequent parts of the Judgment. Nor can a denial of the role of consent be read into the passage [193]) in which the Court contrasts treaties with customs in regard of the capacity to make reservations [194]). Reservations are a subject other than consent in the making of custom, and the admission or non-admission of reservations is irrelevant for the ascertainment of consent. The exclusion of reservations is the characteristic of custom; such in-

[189]) 1952, p. 218.
[190]) *Ibid.*, p. 220.
[191]) 1960, p. 83.
[192]) Lang, *op. cit. (supra* note 89), p. 90.
[193]) 1969, pp. 38—39, para. 63.
[194]) For a different approach, see Marek, *op. cit. (supra* note 107), pp. 53—54.

deed is the position of the Court. But this special mark of custom does not contribute anything to our knowledge on the role of consent. And there are also treaties which do not allow for the making of reservations.

In the same cases the individual judges have been more outspoken on the role of consent. According to Judge Ammoun, custom "requires the consent, express or tacit, of the generality of States" [195]). In a further passage he explains that, in contradistinction to regional custom, "a general rule of customary law does not require the consent of all States, [...] but at least the consent of those who were aware of this general practice and, being in a position to oppose it, have not done so" [196]). For Judge Tanaka another name of *opinio juris* is *animus* [197]). Judge Lachs views the creation of custom as a "chain-reaction productive of international consensus" [198]).

Perhaps in regional, and particularly, in bilateral custom, the role of consent comes more to the foreground [199]). This is borne out by the *dicta* of the Court on custom in the *Asylum* case [200]) and in the case concerning the *Right of Passage over Indian Territory* [201]). In the *North Sea Continental Shelf* cases Judge Ammoun emphasized that in "the absence of express or tacit consent, a regional custom [could not] be imposed upon a State which refuses to accept it" [202]).

12. The Rationality of Custom

Is rationality the necessary and inherent element of any custom? In the *North Sea Continental Shelf* cases the Court did not tackle this question in a direct or exhaustive way, but some passages of the judgment nevertheless suggest a clearly negative answer. In connection with the contentions advanced on behalf of Denmark and the Netherlands the Court stated that it had never been doubted that the equidistance method of delimitation was "a very convenient one", "a method of being capable of being employed in almost all circumstances" [203]). No other method of delimitation,

---

[195]) 1969, p. 104.
[196]) *Ibid.*, p. 130.
[197]) *Ibid.*, p. 175.
[198]) *Ibid.*, p. 231.
[199]) Georg Schwarzenberger, International Law (3rd ed. London 1957) vol. 1, p. 42, is of the opinion that the Court "admits regional or local custom, but only on the basis of implicit consent".
[200]) 1950, pp. 276—277.
[201]) 1960, pp. 39—44.
[202]) 1969, p. 131.
[203]) *Ibid.*, p. 23, para. 22.

the Court said, had "the same combination of practical convenience and certainty of application" [204]).

> "Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which 'special circumstances' cannot be shown to exist. Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be" [205]).

In the following passage the Court weakened the rational character of the equidistance method as it noted that under certain circumstances the method could produce results that appeared "on the face of them to be extraordinary, unnatural or unreasonable" [206]).

The Court came back to the problem of rationality when it considered what it called the "fundamentalist aspect" of the Danish and Dutch contention that Federal Germany was bound to accept delimitation of the continental shelf on an equidistance-special circumstances basis. The Court explained [207]):

> "In its fundamentalist aspect, the view put forward derives from what might be called the natural law of the continental shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State, and therefore as having an *a priori* character of so to speak juristic inevitability.
>
> [...] if it is correct that the equidistance principle is, as the point was put in the course of the argument, to be regarded as inherent in the whole basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also".

The Court adopted the view according to which "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources" [208]). The right of the coastal State to have sovereignty over the continental shelf is inherent and original. But to say this, the Court concluded, does not amount to "also

---

[204]) *Ibid.*, para. 23.
[205]) *Ibid.*
[206]) *Ibid.*, para. 24.
[207]) *Ibid.*, pp. 28—29, para. 37 and p. 29, para. 38.
[208]) *Ibid.*, p. 22, para. 19.

admitting the existence of some rule by which those areas can be obligatorily delimited". The notion of equidistance is not logically necessary "in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine". "The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights" [209]). However, it follows from the Court's earlier explanations that the rejection of the inherent and logical necessity [210]) of the equidistance method had no bearing on the non-existence of its customary nature.

The non-inclusion of rationality among the elements of custom does not mean that the Court would deny the obvious fact that custom responds to the nascent or existing needs of the community of States. In his Separate Opinion President Bustamante y Rivero made the following observations:

> "The principle of what is *reasonable* applies [...] in all cases, for the recognition as legally proper of these occasional variants of the principles and rules which are the basis of the legal régime of the continental shelf, as contained in its generally accepted definition, which principles have been backed by sufficiently repeated support of the *opinio juris* among States, and by the writings of publicists" [211]).

Judge Ammoun emphasized that the facts which constituted custom showed "an intention to adapt the law of nations to social and economic evolution and to the progress of knowledge" [212]). The "unprecedented scientific progress and the rapid development of the economic and social life of nations" were, according to Judge Ammoun, the "powerful motives", which he distinguished from State practice, that contributed to the birth of the law on continental shelf [213]). But he did not say that the reasonableness of a standard of conduct was one of the factors which were indispensable to its transformation into a custom.

Another aspect of the purported logical necessity of the custom has been touched upon by Judge Koretsky. He referred to the Dissenting Opinion of Judge Loder in the case of *The S.S. Lotus*. Judge Loder said [214]):

> "The fundamental consequence of [the States'] independence and sov-

---

[209]) *Ibid.*, p. 32, para. 46.
[210]) *Ibid.*, p. 35, para. 55 and p. 36, para. 56.
[211]) *Ibid.*, p. 63.
[212]) *Ibid.*, p. 104.
[213]) *Ibid.*, p. 124.
[214]) A No. 10, p. 35.

ereignty is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory.

This fundamental truth, which is not a custom but the direct and inevitable consequence of its premise, is a logical principle of law, and is a postulate upon which the mutual independence of States rests".

For Judge Koretsky the principles on the continental shelf could have been deduced "as 'direct and inevitable consequences' of the premises and considering their binding force to be that of historically developed logical principles of law" [215]). But again, this view does not amount to an assertion that rationality or logical necessity are custom-creating factors.

Conclusions

During the first fifty years of its functioning the Hague Court did not often elaborate on the elements of custom. It did so when the rule in question was in dispute between the parties and the Court itself did not regard the standard invoked as constituting custom. When, on the other hand, the Court was of the opinion that a certain custom existed, it did not disclose all the details of the process whereby it arrived at such a conclusion. It then usually limited itself to a statement of its position.

The practice that creates custom must, according to the Court, have the features of a usage, *i. e.* it must be a settled practice that follows the pattern conducive to the future creation of a rule. In order to become settled the practice should display the characteristics of uniformity, generality (in the sense of extensive practice) and constancy. The Court does not require that a very long or specific period should pass before the custom is born; implicitly, the Court rejects the necessity of time immemorial. It admits customs of different scope of application, including bilateral custom.

While the Court's decisions throw fairly clear light on the practice considered as usage, the second element of custom, viz. the *opinio juris* and the factors connected therewith still contain some obscure points. The jurisprudence of the Court, especially the recent one, leaves no doubt that the *opinio juris* is indispensable. Though the Court was explicit in emphasizing that there were two elements of custom, these have not always been treated as quite distinct from one another. That is, the Court does not seem to have given a fully satisfactory explanation of the way in which the first element — practice — shows the existence of the sec-

[215]) 1969, p. 158.

ond — *opinio juris*. While the Court distinguishes the two elements of custom and gives the distinctive label of subjectiveness to the second element[216]), it also admits that a certain development of the practice permits the ascertainment of the *opinio juris*. When the Court refers to acts by States and says that "they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*"; when it then proceeds to explain that "in order to achieve this result, two conditions must be fulfilled", one being a settled practice, the other the carrying out of the acts "in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"[217]) — the Court reduces the *opinio juris* to a certain aspect of the practice and implicitly denies the subjective nature of the second element of custom. Also, the Court has never explained the nature of this subjectiveness[218]).

The settled practice is, for the Court, a series of acts done by States, and the aggregate of these acts leads to the emergence of a standard of conduct. The practice so developed then continues, and its role becomes complex: it not only maintains and reinforces the standard so created, but now the standard itself, though it has emanated from the practice, shapes the subsequent practice. Thus, what up till now constituted the result and the effect of practice, with the passing of time and for future occasions becomes its cause and driving force. If that moment has been reached, one may say that the practice has produced the *opinio juris*[219]). However, without a certain amount of consent (in whatever form expressed) this would not be possible. Obligation that has its source in custom is not based on consent. Yet, together with other factors, consent brings about the birth of custom. It may be concluded that, from the point of view of the theory of international law, the weak spot in the Court's jurisprudence on custom is perhaps the absence of any fundamental elaboration on the evidences of *opinio juris*[220]).

---

[216]) "a subjective element", *ibid.*, p. 44, para. 77.

[217]) *Ibid.*

[218]) Marek, *op. cit.* (*supra* note 107), p. 55 note 44, thinks that the phrase "these instances of action [...] would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*" is simply a drafting slip *(glissement rédactionnel)*.

[219]) Lang, *op. cit.* (*supra* note 89), p. 119, formulates his view on the subject in the following way: «l'obligation juridique n'est pas préexistante à la pratique des premiers Etats, elle naît progressivement et corrélativement au développement de la pratique».

[220]) This observation does not imply that the Court is under an obligation to require evidence of *opinio juris*. On the absence of such an obligation, see Jenks, *op. cit.* (*supra* note 6), pp. 263—264.