

# Customary International Law and the Nicaragua Case

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## Introduction

Custom<sup>1</sup> is an increasingly controversial source of law in the late twentieth century. Although it is ritually included in all accounts of the sources of international law, both the method of its formation and its relationship with other accepted sources of international law are debated vigorously. It has been described as a mysterious phenomenon<sup>2</sup> and the determination of its existence as "delicate and difficult".<sup>3</sup> Some writers have suggested that custom as a category of international law has lost its utility and should be abandoned or at least radically redefined.<sup>4</sup>

The judgment on the merits by the World Court in the *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*<sup>5</sup> has added new fuel to the debates about the formation and role of custom in international law. The aim of this article is to assess its contribution to the jurisprudence of customary international law. I propose first to describe the traditional international jurisprudence with respect to customary international law and discuss some current controversies about custom as a source of law. I then examine the account of customary international law offered in the *Nicaragua* case and its implications. I argue that the *Nicaragua* treatment of custom reflects the tension between the old and new orders in international law.

## The Traditional View of Custom in International Law

International custom is traditionally accepted as one of the major sources of

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\* The author thanks Christine Chinkin of Sydney Law School for her helpful comments on an earlier draft of this article.

1 The terms "customary international law" and "custom" are used interchangeably in this article, although as Professor Skubiszewski points out "in the strict sense their meaning is not, or at least should not be, identical". Skubiszewski, "Elements of Custom and the Hague Court", (1971) 31 Z Aus Of R V 810 at 811.

2 Panel on the Revised Draft Restatement on the Foreign Relations Law of the United States and Customary International Law, (1985) Proc ASIL 73 (remarks of Professor Schachter, Chairman).

3 *North Sea Continental Shelf* cases (FRG v Den, FRG v Neth), ICJ Rep 1969, p 3 at 175 (Judge Tanaka diss op). Professor Tunkin also refers to the formation of customary international law as the "most difficult of all the problems of international law": Tunkin, "Coexistence and International Law", (1958) 95 HR 9 quoted in Erickson, "Soviet Theory of the Legal Nature of Customary International Law", (1975) 7 Case Western J Int L 148 at 152.

4 Eg Dunbar, "The Myth of Customary International Law", (1983) 8 Aust YBIL 1; Jennings, "The Identification of International Law" in Cheng B (ed), *International Law: Teaching and Practice* (1982), p 3 at 4-6. See also Cassese's description of the "present crises of custom": Cassese A, *International Law in a Divided World* (1986), p 181.

5 ICJ Rep 1986, p 14 (hereinafter referred to as *Nicaragua*).

international law. Article 38 of the Statute of the International Court of Justice,<sup>6</sup> regarded by most jurists as an authoritative statement of the sources of international law, allows the World Court to apply "international custom, as evidence of a general practice accepted as law"<sup>7</sup> along with international conventions, general principles of law recognised by civilised nations and, as a subsidiary means, judicial decisions and the writings of the most highly qualified publicists.<sup>8</sup>

The traditional explanations of the two main sources of law, treaties and custom, reflect the preoccupation of the international community with the preservation of state sovereignty. As Cassese notes, both sources "responded to the basic need of not imposing duties on such states as did not want to be bound by them. No outside 'legislator' was tolerated: law was brought into being by the very states which were to be bound by it. Consequently there was complete coincidence of law-makers and law-addressees".<sup>9</sup>

Traditional theories of the nature of obligation in international law are, then, positivist and individualistic: states are bound by international law only insofar as they consent to its rules. These theories are one aspect of what Cassese terms the "old" or "Westphalian" pattern of international law.<sup>10</sup> The expansion of the international community to include a great number of states and international organisations, and recognition of the applicability of international law to individuals and groups within states, has allowed the purely voluntarist account of international law to be challenged by one based on communal interests,

6 This Article was taken unamended from the Statute of the Permanent Court of International Justice.

7 The wording of Article 38.1(b) is rather confusing. It is generally accepted as meaning "international practice as evidence of a general custom accepted as law". See Greig DW, *International Law*, 2nd ed (1976), p 17; Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", (1965) 5 *Indian J Int L* 23 at 36; Skubiszewski, above note 1 at 812.

8 Jurists have debated whether Article 38 creates or recognises a hierarchy between the various sources of law. See Akehurst, "Hierarchy of Sources of International Law", (1974-75) 47 *BYIL* 273; Bos, "The Hierarchy among the Recognised Manifestations 'Sources' of International Law", (1978) 3 *Neth ILR* 334; Sorensen M, *Les Sources du Droit International* (1946), pp 242-251; Villiger ME, *Customary International Law and Treaties* (1985), pp 34-36; Cassese, above note 4 at 169. On the Soviet view of treaties as superior to custom see Erickson above note 3 at 149.

9 Cassese, above note 4 at 169.

10 *Id* at 30-32. Other writers have used similar terms. In particular see Falk, "The Interplay of Westphalia and Charter Conceptions of International Legal Order" in Black C and Falk R (eds), *The Future of the International Order* (1969), p 33. This pattern includes, according to Cassese, "force as the primary source of legitimation; the extreme decentralization of the legal function; unfettered freedom of States; the unrestricted right to resort to armed violence, either to enforce rights or to protect interests". Cassese, above note 4 at 31. The "old" pattern is not simply the preserve of western nations. As Cassese points out, the socialist nations' positivist view of international law places great emphasis on state sovereignty and on a consensual basis for international law. *Id* at 110. An emphasis on state sovereignty is also a feature of many developing nations' view of international law. *Id* at 119.

solidarity and idealism.<sup>11</sup> On this “new” view international law binds because it is necessary for stability and communication in the international community.<sup>12</sup> Despite this challenge, the traditional, consent-based, theories of international law continue to have considerable influence and imaginative power.<sup>13</sup>

Treaty law binds only those states which have accepted its obligations. By contrast, most theorists accept that customary international law binds states generally<sup>14</sup> whether or not they have formally consented to its rules.<sup>15</sup> This aspect of custom is typically reconciled with a consensual theory of international law by the device of the “persistent objector” principle which allows a state to opt out of a particular customary norm in the process of formation.<sup>16</sup> Unless a state persistently objects to a rule of custom in its formative phase, it is assumed to have tacitly accepted the rule.<sup>17</sup> Objection to a rule subsequent to its formation cannot prevent a state being bound by it.<sup>18</sup> The

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- 11 Some jurists term this the “Charter model”. See Falk, above note 10. Cassese describes the major features of this model as including the prominent role of international organisations, recognition of individuals and groups as subject of international law and the limitation of the use of force as a legitimising criterion in international relations. Cassese, above note 4 at 398.
- 12 See *id* at 30-32, 396-407; Kelsen H, *Principles of International Law* (1952), p 307; Fitzmaurice, “The General Principles of International Law Considered from the Standpoint of the Rule of Law”, (1957) 92 HR 1 at 39-40. Charney uses the term “societal context” to explain the source of obligation to conform to international law rules: Charney, “The Persistent Objector Rule and the Development of Customary International Law”, (1986) 56 BYIL 1 at 18. Compare Skubiszewski, above note 1 at 846-7 (arguing that consent plays a limited role in the evolution of custom, but that at “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”).
- 13 *The Restatement of the Foreign Relations Law of the United States (Third)* (1987), for example, firmly bases the binding nature of modern international law on acceptance by states. See “Introductory Note to Part 1” at 17-18. See also Weil, “Towards Relative Normativity in International Law?”, (1983) 77 AJIL 413 at 420.
- 14 Unless of course it is a rule of local or regional custom. See below note 38.
- 15 Akehurst, “Custom as a Source of International Law”, (1974-75) 47 BYIL 1,23.
- 16 The classic authority for the principle is the *Anglo-Norwegian Fisheries* case (UK v Nor), ICJ Rep 1951, p 116 at 131, 138-9. See also *Nuclear Tests* cases (Aust v Fr; NZ v Fr), ICJ Rep 1974, p 253 at 286-93 (Judge Gros sep op); *Asylum* case (Col v Peru), ICJ Rep 1950, p 266 at 277-8. Some jurists who dispute the applicability of a theory of voluntarism to customary international law nevertheless accept the persistent objector principle. Eg Thirlway HWA, *International Customary Law and Codification* (1972), pp 74-5, 109-110. Charney has pointed out the logical problems in this approach: Charney, above note 12 at 16-18.
- 17 Brownlie I, *Principles of Public International Law*, 3rd ed (1979), pp 10-11; *Restatement (Third)*, above note 13 sec 102 Comment d; Villiger, above note 8 at 17.
- 18 Thirlway, above note 16 at 110; Villiger, above note 8 at 117; *Restatement (Third)*, above note 13 sec 102 Comment d. New states are usually regarded as in the position of subsequent objectors with respect to established rules of custom. See *id* at sec 102 Comment d Reports’ Note 2 at 32; D’Amato A A, *The Concept*

persistent objector principle is usually assigned very limited scope<sup>19</sup> and is generally regarded as inapplicable to norms of *jus cogens*.<sup>20</sup> Moreover, its function as anything more than a negotiating tool between states has been forcefully questioned.<sup>21</sup> Recently, however, attempts have been made to breathe new life into the principle, particularly by United States jurists who are concerned with the reduction in Western influence over the development of international law.<sup>22</sup>

Since the late nineteenth century, international legal scholars have adopted from domestic jurisprudence the belief that legally recognisable, as opposed to merely social, custom is composed of two distinct elements, one material and objective, the other psychological and subjective.<sup>23</sup> The first element is usage or practice of the custom, the second is *opinio juris sive necessitas*, the belief that the usage is a legal right.<sup>24</sup> This apparently neat formula, described as "axiomatic" by the International Court in its decision in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*,<sup>25</sup> has provoked great controversy both as to the manner of its satisfaction and as to the relationship between its two elements. Three issues constantly reappear in the juridical and scholarly debates: what acts or abstentions of states constitute "practice" and how much

*of Custom in International Law* (1971), pp 191, 192; Akehurst, above note 15 at 27-28. Compare Tunkin, "Remarks on the Juridical Nature of Customary International Law", (1961) 49 Calif LR 419 at 428. If a substantial number of states dissent from a rule of customary international law this may result in the formation of a new rule. Brownlie, above note 17 at 11.

- 19 See Villiger, above note 8 at 16 (arguing that "meticulous compliance" with two conditions is necessary: the objection must begin before the formation of the rule and continue after its formation; and the objection must be maintained consistently). See also Thirlway, above note 16 at 110; Brownlie, above note 17 at 9; D'Amato, above note 18 at 187-195, 261; Cassese, above note 4 at 185.
- 20 Thirlway, above note 16 at 110; *Restatement (Third)*, above note 13 sec 102 Comment k. Compare Cassese, above note 4 at 178 ("peremptory norms bind states to the extent only that the latter have not staunchly and explicitly opposed them at the moment of their emergence". Cassese goes on to note that in political and diplomatic fact it is very difficult for states other than Great Britain to resist the formation of a norm of *jus cogens* and that no legally significant dissent has yet been made to any rule of *jus cogens*: id at 179.
- 21 Charney, above note 12 at 18, 22-23.
- 22 Eg Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law", (1985) 26 Harv Int LJ 457; *Restatement (Third)*, above note 13 sec 102 Comments b & d. See also Charney, above note 12 at 4-5.
- 23 The search for the basis of obligation in positive law led writers such as Puchta, Savigny and Austin to consider the formation of custom. D'Amato identifies the French jurist Francois Geny as the first proponent of the view that legal custom involved both practice and a belief that the practice had a legal basis. D'Amato above note 18 at 47-49.
- 24 See Brierly J. *The Law of Nations*, 6th ed (1963), p 59; O'Connell DP, *International Law*, 2nd ed (1970), Vol 1, p 15; *Restatement (Third)*, above note 13 sec 102 (2) (customary international law results from "a general and consistent practice of states followed by them from a sense of legal obligation.")
- 25 ICJ Rep 1985, p 13 at 20.

practice is necessary to satisfy the first requirement of custom?; how can the belief in which a particular international actor practices a particular custom be ascertained to fulfil the *opinio juris* requirement?; and what role do international conventions have in the formation of custom?

*i. State practice*

The activities of states take myriad forms. Some state actions have immediate and tangible manifestations (such as the invasion of another state, or the shooting down of another nation's aircraft), some are characterised by abstention (for example, nonretaliation for the shooting down of an airliner), some are statements or claims that do not have direct physical consequences (such as voting for a resolution in an international forum or demanding compensation for a wrong) and others are commitments to a particular course of action (for example entering into a treaty). Which of the various complex and often subtle forms of activity by states are relevant to the generation of custom?

All international jurists accept that conscious acts or abstentions with direct or physical consequences qualify as state practice. Most jurists also agree that entry into binding agreements to take action similarly constitutes state practice.<sup>26</sup> Thus in the *North Sea Continental Shelf* cases both majority and dissenting Judges assumed that entry into the Geneva Convention on the Continental Shelf of 1958<sup>27</sup> as well as the conclusion of continental shelf delimitation agreements qualified as usage for the purposes of formation of custom.<sup>28</sup>

Controversy surrounds the extension of the category of state practice to less tangible forms of activity such as claims and statements of position. D'Amato, for example, confines state practice to acts which have physical consequences (his examples include testing nuclear weapons, levying customs duties and expelling aliens) and he rejects claims or statements because of their poor predictive power as to what states will actually do.<sup>29</sup> Without this quantitative or concrete element, he reasons, "one could not tell which of the numerous and often contradictory articulated norms were actually embodied in customary law".<sup>30</sup> This element also offers a certainty unavailable when relying on claims alone:

Many contradictory rules may be articulated, but a state can only act in one way at one time. The act is concrete and usually unambiguous. Once the act takes place, the previously articulated rules contrary to it remain in the realm of speculation. The state's act is visible, real and significant; it crystallizes

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26 Eg Brownlie, above note 17 at 5-6; Baxter, "Treaties and Custom", (1970) 129 HR 24 at 43; *Restatement (Third)*, above note 13 sec 102 Comment i. Goldklang in his remarks to the Panel on the Revised Draft Restatement, above note 2 at 78, argues that treaties do not in themselves constitute sufficient state practice for the generation of a rule of customary international law.

27 499 UNTS 311.

28 Above note 3.

29 D'Amato, above note 18 at 89-90. See also *Anglo-Norwegian Fisheries* case, above note 16 at 191 (Judge Read diss op).

30 D'Amato, above note 18 at 87.

policy and demonstrates which of the many possible rules of law the acting state has decided to manifest.<sup>31</sup>

Resolutions of the General Assembly cannot, on D'Amato's analysis, constitute state practice because they are not formally binding. At best they can provide the "element of articulation" of a rule of custom, the concept D'Amato uses to replace *opinio juris*.<sup>32</sup>

D'Amato's attempt to confine state practice to quasi-physical activity (or deliberate inactivity) is challenged by other writers. Akehurst, for example, points out that physical acts by states do not necessarily produce more consistency than claims or statements do and that in certain international contexts (such as recognition) distinguishing between actions and statements is artificial.<sup>33</sup> He also argues that giving treaty commitments the status of acts does not fit logically with denying that status to claims and statements.<sup>34</sup> Akehurst, and others such as Brownlie and Greig who are not in direct debate with D'Amato, support a wider notion of state practice, one that would encompass any act or statement by a state, made in a concrete or abstract context, from which its attitude towards a particular customary law can be inferred.<sup>35</sup> General Assembly resolutions can thus qualify as state practice if they purport to state a rule of *lex lata* rather than *lex ferenda*.<sup>36</sup> The probative force of such statements will be affected by the voting figures, the reasons given by states for their votes and whether the resolution is later confirmed by practice.<sup>37</sup>

31 Id at 88.

32 Id at 78-79. Compare MacGibbon, "General Assembly Resolutions: Custom, Practice and Mistaken Identity" in Cheng B (ed), *International Law: Teaching and Practice* (1982), p 10 at 19-23 (arguing that General Assembly resolutions cannot, by their very nature, constitute either state practice or *opinio juris*).

33 Akehurst, above note 15 at 3.

34 Id.

35 Brownlie, above note 17 at 5, includes in his list of the material sources of custom "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions...executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission...the practice of international organs and resolutions relating to legal questions in the United Nations General Assembly". Greig, above note 7 at 18-25. The *Restatement (Third)*, above note 13 sec. 101 Comment b includes "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states..." as acts of state practice. See also Higgins R, *The Development of International Law Through the Political Organs of the United Nations* (1963), p 2; Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", (1987) 58 BYIL 39 at 72-74.

36 Akehurst, above note 15 at 5-6. Brownlie simply refers to General Assembly "resolutions relating to legal questions". Brownlie, above note 17 at 5. Compare Thirlway, above note 16 at 58 (arguing that claims and statements can constitute state practice if they are made in a concrete situation and are not asserted in abstract).

37 The first two criteria are endorsed in Akehurst, above note 15 at 6-7. The third is included in the *Restatement (Third)*, above note 13 sec 102 Reporters' Note 2. See also id sec 103 Comment c Reporters' Note 2.

How widely accepted must a practice be to qualify as a norm of general customary international law?<sup>38</sup> The International Court has never provided detailed guidance on this issue but has referred simply to “general acceptance”<sup>39</sup> or “extensive”<sup>40</sup> state practice as necessary.<sup>41</sup> The implications of states’ inaction in relation to a particular practice are ambiguous: inaction or silence may mean acquiescence to, disinterest in or rejection of a rule of custom.

A related issue raised in the definition of state practice for the purpose of the formation of custom is the duration and consistency of the practice. Most jurists accept as a general rule that duration has an inverse relationship to consistency: the shorter the duration of a practice, the more consistent it must have been.<sup>42</sup> In principle, then, customary law can develop in a very short space of time.<sup>43</sup> In the *North Sea Continental Shelf* cases the International Court of Justice spoke of the need for “virtually uniform” state practice.<sup>44</sup> This strict formula may have been employed in the *North Sea Continental Shelf* cases because the equidistance rule argued for by the Netherlands and Denmark involved the transformation into custom of a treaty provision which altered existing customary international law and because of the short period in which it was asserted that the principle had been generated.<sup>45</sup> However, other decisions of the International Court have also stressed the importance of consistency. In the *Anglo-Norwegian Fisheries* case “substantial uniformity” was demanded of state practice and an asserted “ten mile rule” for the measurement of territorial sea baselines across bays not accepted on this basis.<sup>46</sup> In the *Asylum* case a regional customary law allowing a host state to qualify political offences for the purposes of diplomatic asylum was not found established because of the inconsistencies in practice:

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

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38 The possibility of local or regional customs, involving as few as two states, has been accepted by the International Court: *Asylum* case, above note 16 at 276; *Rights of Passage* case (Port v India), ICJ Rep 1960, p 6 at 39.

39 *Fisheries Jurisdiction* case (UK v Ice), ICJ Rep 1974, p 3 at 23-36.

40 *North Sea Continental Shelf* cases, above note 3 at 43 para 74.

41 See generally Skubiszewski, above note 1 at 827-830. The *Restatement (Third)*, above note 13 sec 102 Comment b states “[a] practice can be general even if it is not universally followed...but it should reflect wide acceptance among the states particularly involved in the relevant activity”. D’Amato asserts that a single act or commitment can provide the requisite state practice for a rule of custom: D’Amato, above note 18 at 91. For a criticism of this view see Thirlway, above note 16 at 50-51.

42 Eg Villiger, above note 8 at 25; Skubiszewski, above note 1 at 832-837; Akehurst, above note 15 at 12; *Restatement (Third)*, above note 13 para 102 Comment b.

43 *North Sea Continental Shelf* cases, above note 3 at 43 para 74.

44 *Id* at 43 para 74.

45 The Geneva Convention on the Continental Shelf had entered into force in June 1964, less than three years before the proceedings before the International Court were initiated and less than five years before the date of the judgment.

46 *Anglo-Norwegian Fisheries* case, above note 16 at 131.

conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it has not been possible to discern in all this any constant and uniform usage, accepted as law....<sup>47</sup>

Thus significant consistency is required of state practice, but this need not be complete. In some contexts the International Court has countenanced a level of inconsistency. In the *Anglo-Norwegian Fisheries* case the Court said of the Norwegian method of straight base line measurement: "too much importance need not be attached to the few uncertainties or contradictions, real or apparent which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812".<sup>48</sup>

## ii. *Opinio Juris*

*Opinio juris*, as the psychological element of custom, is by definition more elusive than state practice.<sup>49</sup> Indeed some writers have denied that it has significance in the formation of custom.<sup>50</sup> Its absence is considerably easier to establish than its presence as the two occasions it has been considered in the context of general customary law rules by the World Court demonstrate.

In 1927, the Permanent Court of International Justice discussed the components of custom in the *Lotus* case, a dispute between France and Turkey over Turkey's assertion of criminal jurisdiction over a French naval officer responsible for the watch on a French ship at the time of its collision with a Turkish vessel.<sup>51</sup> France argued for a principle of customary international law according the flag state jurisdiction over everything occurring on board a ship on the high seas. To establish this custom it relied on the writings of publicists, decisions of municipal and international tribunals, the existence of conventions reserving jurisdiction over merchant ships on the high seas to the flag state and on the rarity of disputes over jurisdiction in criminal cases concerning collisions.

The Permanent Court did not accept that the asserted rule of customary law had been established. It found the writings of publicists equivocal, the decisions of tribunals distinguishable, and the conventional law specialised and not necessarily applicable to the type of circumstances involved in the *Lotus* case. State practice in the form of abstention from criminal prosecution in collision

47 *Asylum* case, above note 16 at 277.

48 *Anglo-Norwegian Fisheries* case, above note 16 at 138. This passage is referred to by Judge Lachs in his dissenting opinion in the *North Sea Continental Shelf* cases, above note 3 at 229.

49 Thirlway refers to it as "the philosophers' stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules". Thirlway, above note 16 at 47.

50 Eg Kelsen, "Théorie du droit international coutumier", (1959) 1 *Revue Internationale de la Théorie du Droit* 253; Guggenheim, *Traité de droit international public* (1953), pp 46-48 (both cited in D'Amato, above note 18 at 51-52, and Brownlie, above note 17 at 8 note 5).

51 (1927) PCIJ Ser A, No 10.



cases was relied on by France. The fact that few issues of jurisdiction had arisen in criminal collision cases was regarded as inconclusive by the Court for "only if such abstention were based on [states] being conscious of having a duty to abstain would it be possible to speak of an international custom".<sup>52</sup> Indeed the Court referred to two previous cases in which the French and German governments did not protest against the exercise of criminal jurisdiction against their citizens by other nations to underline the lack of *opinio juris* in the non-assertion of jurisdiction in collision cases.

In the *North Sea Continental Shelf* cases the instances of state usage of the equidistance principle relied on by Denmark and the Netherlands were rejected by the International Court not only as numerically insignificant, but also as ambiguous with respect to the existence of the requisite *opinio juris*, the feeling by states "that they are conforming to what amounts to a legal obligation."<sup>53</sup> The Court said:<sup>54</sup>

over half the States concerned, whether acting unilaterally or conjointly, 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. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and...there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

A logical dilemma is created by the World Court's insistence in both the *Lotus* and *North Sea Continental Shelf* cases that states are required to believe that something is already law before it can become law. As D'Amato points out, "if custom *creates* law, how can a component of custom require that the creative acts be in accordance with some *prior* right or obligation in international law? If the prior law exists, would not custom therefore be... 'superfluous' as a creative element?"<sup>55</sup> This paradox of the traditional theory of customary international law has never been persuasively resolved.<sup>56</sup>

52 Id at 28.

53 Above note 3 at 44 para 77.

54 Id at 43-44 para 76. On *opinio juris* in the context of local or regional custom see *Asylum* case, above note 16 at 277; *Rights of US Nationals in Morocco* (Fr v US), ICJ Rep 1952, p 176 at 199-200.

55 D'Amato, above note 18 at 53. See also *North Sea Continental Shelf* cases, above note 3 at 176 (Judge Tanaka diss op), 231 (Judge Lachs diss op); Kunz, "The Nature of Customary International Law", (1952) 47 AJIL 66 at 667.

56 See *Restatement (Third)*, above note 13 sec 102 Reporters' Note 2 ("perhaps the sense of legal obligation came originally from principles of natural law or common morality...; practice built on that sense of obligation then matured into

The World Court's jurisprudence with respect to *opinio juris*, then, suggests that it involves unequivocal evidence of a consciousness of legal obligation. The type of evidence required is not made clear. Occasionally the Court seems to have identified *opinio juris* in state practice itself.<sup>57</sup> The *Lotus* and *North Sea Continental Shelf* cases imply, however, that evidence of *opinio juris* is to be found mainly in explicit statements made by states about the reasons for their actions or abstentions. Jurists have accorded an evidentiary role in this respect to resolutions of the General Assembly adopted by a representative majority of members including those states most directly concerned, if there is separate evidence of state practice.<sup>58</sup>

The practical problems of establishing *opinio juris* separately from state practice have often been noted. In dissent in the *North Sea Continental Shelf* cases, Judge Tanaka pointed to the difficulties of gathering proof of psychological motivation behind state action and suggested that *opinio juris* should be presumed from "the fact of the external existence of a certain custom and its necessity felt in the international community".<sup>59</sup> Ad Hoc Judge Sorensen also noted the practical impossibility of producing conclusive evidence of governmental motives and cited with approval Sir Hersch Lauterpacht's view<sup>60</sup> that a presumption should operate that all uniform conduct of governments evidenced an *opinio juris* unless the contrary was proved.<sup>61</sup> This is effectively to subsume the two elements of custom into one: to imply the existence of a psychological element from state practice unless there is some form of explicit disclaimer.<sup>62</sup> A similar tactic is to reduce *opinio juris* to acquiescence or lack of protest.<sup>63</sup>

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customary international law."). Compare Cassese, above note 4 at 180-181 ("usually, a practice evolves among certain States under the impulse of economic, political, or military demands. If it does not encounter the strong and consistent opposition of other States but is increasingly accepted, or acquiesced in, it is gradually attended by the view that it is dictated by international law..."). Tunkin regards the paradox as a consequence of an a historical analysis of custom: Tunkin, above note 18 at 424.

- 57 *Eg Rights of Passage* case, above note 38 at 44. See Skubiszewski, above note 1 at 843. See also *Restatement (Third)*, above note 13 sec 102 Comment c.
- 58 Thirlway, above note 16 at 66-67; Villiger, above note 8 at 26, 28. See also *Restatement (Third)*, above note 13 sec 102 Comment b Reporters' Note 2 at 31. Compare Sloan, above note 35 at 74-76.
- 59 *North Sea Continental Shelf* cases, above note 3 at 176.
- 60 Lauterpacht H, *The Development of International Law by the International Court* (1958), p 380.
- 61 Above note 3 at 246-247. See also *id* at 231 (Judge Lachs diss op).
- 62 See also Sorensen, above note 8 at 108 where it is argued that *opinio juris* simply operates to place the burden of proof upon the party affirming the existence of customary law. Baxter, above note 26 at 69; Brownlie, above note 17 at 8 ("The proponent of a custom has to establish a general practice and, having done this in a field which is governed by legal categories, the tribunal can be expected to presume the existence of an *opinio juris*. In other words, the opponent on the issue has a burden of proving its absence.")
- 63 MacGibbon, "Customary International Law and Acquiescence", (1957) 33 BYIL 115.

An opposite, but equally reductionist, approach is taken by those commentators who play down the significance of widespread and uniform state practice and who emphasise the importance of *opinio juris*. These jurists typically stress that the binding nature of international law depends completely on the consent of states. Thus custom has legal force only insofar as states have explicitly or implicitly consented to it.<sup>64</sup> On this view, *opinio juris*, the acceptance that a practice is legally binding, is of far greater significance than repeated practice which is regarded as of relatively modest evidentiary value.<sup>65</sup>

In some contexts the possibility of "instant" customary law has been recognised, created through evidence of exceptionally strong *opinio juris* alone. Bin Cheng, for example, argues that a unanimously accepted General Assembly resolution which explicitly adopts particular principles as international law can be conclusive evidence of customary international law. *Opinio juris* as to the legal effect of the principles must have existed before the resolution was adopted and the language of the resolution must "unequivocally express" this *opinio juris*.<sup>66</sup> Thus the legal force of the principles arises not from the resolution itself, but from the fact of the unanimous agreement that they are part of international law.<sup>67</sup> This analysis, however, does not explain how *opinio juris* in less clear-cut cases can be determined.

D'Amato's solution to the issue of the relationship between practice and *opinio juris* is to preserve the dualism of the traditional definition of custom but to reduce the *opinio juris* requirement to an apparently objective one. He argues that the psychological element of custom is met if "an objective claim of international legality [is] articulated in advance of, or concurrently with, the act [or abstention] which will constitute the quantitative elements of custom".<sup>68</sup> The articulation, it seems, may be made by an international tribunal or organisation or by an individual states official or responsible jurist as long as it is reasonably likely to come to the attention of states.<sup>69</sup> Statements by single writers or states, however, cannot affect an already established consensus of the international community.<sup>70</sup> D'Amato argues that an important advantage of this analysis is

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64 See Cheng, above note 7 at 36 (referring to *opinio juris* as the "one constitutive element" of customary international law). See also Corbett, "The Consent of States and the Sources of the Law of Nations", (1925) 6 BYIL 20; and Strupp, "Les règles générales du droit de la paix", (1934) 47 HR 263. The views of the latter two writers are summarised by D'Amato, above note 8 at 49-51.

65 Cheng, above note 7 at 37. For criticism of this view see Thirlway, above note 16 at 73-76.

66 Cheng, above note 7 at 39. See also Cheng, "Custom: The Future of General State Practice in a Divided World" in Macdonald R St J and Johnston D M (eds), *The Structure and Process of International Law* (1986), p 513 at 520.

67 Cheng, above note 7 at 38. Cheng argues that the General Assembly's resolution 96(I) of 11 December 1946 affirming that genocide was a crime under international law is such an expression of *opinio juris* (id at 39). Various unanimous resolutions on the legal principles governing outer space do not have the same significance because they do not "unequivocally express" an *opinio juris communis* (id at 40-45).

68 D'Amato, above note 18 at 74.

69 Id at 76-84.

70 Id at 76-77.

that it preserves the "voluntaristic" quality of international law:

The articulation of a rule of international law...in advance of or concurrently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications....[G]iven such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law.<sup>71</sup>

D'Amato would apparently accept as valid an articulation of a rule of custom made by a state at the time it took action it wanted to claim formed part of international law.<sup>72</sup> As long as no contrary international consensus existed, this would allow the articulation to be totally self-serving and subjective.

Akehurst, too, argues that the traditional view of *opinio juris* as an independent element of custom needs only modest revision. For Akehurst this is because "the judicial support for the traditional view is so strong that the traditional view ought not to be modified except to the minimum degree necessary to meet these objections".<sup>73</sup> Akehurst agrees with D'Amato that statements not beliefs are crucial. While the traditional view implies that *opinio juris* consists of the genuine beliefs of states, Akehurst accepts as evidence of *opinio juris* statements of belief by states "even if the State does not believe in the truth of the statement".<sup>74</sup> Both D'Amato and Akehurst, then, reduce the requirement of *opinio juris* to a notional one: the logic of their position is that *opinio juris* has little independent role to play in the formation of custom.

### *iii. Custom and international conventions*

A third controversial theme in the jurisprudence of customary international law concerns the relationship between custom and international conventions. How does entry into a convention contribute to the formation of customary norms?

Some aspects of the relationship between treaty and custom appear settled. First, entry into a treaty is certainly a form of state practice for the purposes of custom. As we have seen, even D'Amato's narrow view of state practice encompasses treaty participation. Of itself, it does not, however, automatically provide the necessary *opinio juris* for the formation of a customary rule.<sup>75</sup> Second, treaties codifying customary rules, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on the Law of Treaties, have a special status and many of their rules are binding on non-parties as custom.<sup>76</sup>

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71 *Id.* at 75.

72 D'Amato states that "[t]here is no need for the acting state itself, through its officials, to have articulated the legal rule" implying that articulation by the acting state is sufficient (but not necessary). *Id.* at 85.

73 Akehurst, above note 15 at 37.

74 *Id.*

75 See above notes 53-54 and accompanying text. See also Thirlway, above note 16 at 85-6. Villiger, above note 8 at 11-12; Compare D'Amato, above note 18 at 160 ("the qualitative element [of custom] is if anything more evident in treaties than in ordinary acts of States").

76 Baxter points out that most codifying treaties also include elements of progressive development of the law. He proposes three methods of ascertaining the relationship between a treaty and customary norms: reference to *travaux préparatoires*, the text of the treaty referring directly to custom, and a comparison

Less clear is the generation of customary rules from the fact of states' participation in treaties alone.<sup>77</sup> This question was raised directly in the *North Sea Continental Shelf* cases which concerned the law applicable to the delimitation of the continental shelves between adjacent states (Denmark, the Netherlands and the Federal Republic of Germany) in the North Sea. Denmark and the Netherlands argued that the rule contained in Article 6.2 of the Geneva Convention on the Continental Shelf, which made an equidistance principle applicable in the absence of agreement between the parties or special circumstances justifying another boundary line, governed the delimitation even though West Germany was not a party to the Convention. The Dutch and Danish argument was that the rule contained in the Convention either had been a rule of customary international law at the time of the adoption of the Convention or had subsequently become such a rule.

The International Court acknowledged that a rule originating in a treaty could become generally binding as part of customary international law, although it argued that such an outcome "is not lightly to be regarded as having been attained".<sup>78</sup> The Court stated various conditions for the transformation of contractual, treaty rules binding only the parties to an agreement into customary law binding non-parties. The provision in question must be in its content, structure and expression of "a fundamentally norm-creating character",<sup>79</sup> the instrument in which the rule is contained must have attracted "a very widespread and representative participation...[including] that of States whose interests were specially affected"<sup>80</sup> and subsequent practice of states, especially those not parties to the treaty, should have been consistent with it.<sup>81</sup> The Court accepted that customary norms could be developed within a short period of time on the basis of a conventional rule but implied that the briefer the time of development, the more extensive and uniform the evidence of state practice must be.<sup>82</sup> On the facts before it in the *North Sea Continental Shelf* cases, the International Court rejected the proposition that the "equidistance-special circumstances" principle formed part of customary international law in 1958 when the Continental Shelf Convention was adopted. It also declined to

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of the text with customary norms. Baxter, above note 26 at 38-42.

77 The possibility of generation of custom from treaties is recognised in Article 38 of the Vienna Convention on the Law of Treaties 1969: "Nothing in [previous Articles] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such".

78 *North Sea Continental Shelf* cases, above note 3 at 41 para 71.

79 *Id* at 42 para 72. The International Court relied, *inter alia*, on the fact that reservations could be made to Article 6 of the Geneva Convention as evidence that it did not have a norm-creating character. This analysis has been criticised. See eg Brownlie, above note 17 at 13; Baxter, above note 26 at 50-51.

80 *North Sea Continental Shelf* cases, above note 3 at 42 para 73.

81 *Id* at 43-45, paras 76-78. See also Baxter, "Multilateral Treaties as Evidence of Customary International Law", (1965-66) 41 BYIL 275 at 296-7. Compare *Restatement (Third)*, above note 13 sec 102 Comment i (a multilateral agreement may come to be law for non-parties that do not actively dissent if "a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states".)

82 *North Sea Continental Shelf* cases, above note 3 at 43 para 75.

recognise the principle as having since developed into a legal custom.

The dissenting judgments in the *North Sea Continental Shelf* cases took issue with the Court's opinion on the generation of custom from convention, suggesting that its conditions were too strict. Judge Lachs criticised the Court's rejection of the significance of the number of states that had become parties to the Continental Shelf Convention, arguing for a qualitative rather than quantitative analysis of treaty participation. Thus, as most states which were actively engaged in the exploration of their continental shelves were parties to the Convention and as the states observing the equidistance principle were representative of different political, economic and legal systems, Judge Lachs could deem evidence of "a practice widespread enough to satisfy the criteria for a general rule of law" to have been produced.<sup>83</sup>

Refinements of the International Court's theory have been proposed. Baxter argues that for treaty law to become part of customary international law, there must be evidence that the treaty norms have been accepted and applied in the behaviour of states. This evidentiary burden can be discharged by showing that the norm has been accepted by non-parties or that customary international law independent of the treaty is the same as the treaty.<sup>84</sup> Charney suggests more detailed criteria: the translation of conventional obligations into custom depends on the nature of the subject matter (the more generalised the concern, the more likely it is to create new law), the nature of the negotiations (the more general the compromises made in the negotiation of an instrument, the less likely a particular provision will attain customary force), the nature of the obligation (the more discrete the conventional obligation, the more likely it is to produce a rule of custom) and the nature of the rule (the more technical the method of implementation, the less likely for the rule to achieve customary status).<sup>85</sup>

Other jurists have argued for an expanded possibility of custom creation from treaty provisions. D'Amato suggests that if a multilateral treaty provision can be generalised, it can give rise to a parallel customary rule without more.<sup>86</sup> In its decision in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the World Court regarded the Law of the Sea Convention as crystallising norms of customary international law, even though it had not even come into force.<sup>87</sup> Louis Sohn goes even further, proposing that it is not necessary for a treaty to be concluded for it to create binding customary international law: the treaty drafting process in itself can give rise to customary rules. "[O]nce a principle is

83 Id at 229. See also id at 246 (Judge Sorensen diss op).

84 Baxter, above note 81 at 296-7.

85 Charney, "International Agreements and the Development of Customary International Law", (1986) 61 Wash LR 971 at 983. Compare *Restatement (Third)*, above note 13 sec 102(3): "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted".

86 D'Amato, above note 18 at 107.

87 ICJ Rep 1982, p 3 at 38, 48-49. See also *Continental Shelf (Libya/Malta)* case, above note 25 at 31-32 paras 29-30; *Maritime Boundary in the Gulf of Maine Area* case (Can/US), ICJ Rep 1984, p 246 at paras 94-96.

generally accepted at an international conference, usually through consensus," writes Sohn, "a rule of customary international law can emerge without having to wait for signature of the convention".<sup>88</sup> Attributing this new significance to international treaty drafting conferences, Sohn reasons, provides a more manageable method for finding and defining custom than attempting to discern patterns of state practice and *opinio juris* from the mass of actions and information generated by states.<sup>89</sup>

This tendency to elide the treaty process and the creation of customary international law has been strongly challenged. Prosper Weil has criticised the destruction of the boundary between conventional and customary norms through the transformation of treaty principles into custom without any other evidence of state practice.<sup>90</sup> This "artificial enhancement" of customary international law and "ever decreasing fastidiousness"<sup>91</sup> about the degree of generality demanded of state practice devalues conventional law and prejudices the rights of non-parties to treaties. Allowing conventional provisions to stand in for general practice, he argues, destroys the "delicate balance on which the classic theory of custom is based".<sup>92</sup>

### Critiques of the Notion of Custom

Quite apart from the jurisprudential controversy over the method of formation of customary international law, there has been much recent debate over whether customary international law as a category has continuing utility. Sir Robert Jennings, for example, insists that all the orthodox categories of international law set out in the International Court's statute are in need of revision and that there is "a strong element of absurdity" in relying on Article 38 to analyse and explain the modern elements of law.<sup>93</sup> The tests of practice and *opinio juris* for the creation of custom, Jennings argues, are outmoded: they do not take account of the evidentiary problems of establishing practice, issues of the legality of unilateral action, the possibility of regional variations and the fact that the passage of a long period of time implied by the notion of custom is not necessarily appropriate in the modern world.<sup>94</sup> Jennings suggests that the concept of custom fetters the creation of new international law.<sup>95</sup>

One response to this type of criticism is Sohn's redefinition of custom to encompass international consensus manifested in non-binding form.<sup>96</sup> Such a development is a radical departure from traditional jurisprudence, although its

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88 Sohn, "'Generally Accepted' International Rules", (1986) 61 Wash L R 1073 at 1077. See also *Fisheries Jurisdiction* case, above note 39 at 26; Cassese, above note 4 at 183-185. Compare Charney, above note 85 at 991-994.

89 Compare Sinclair, "The Impact of Unratified Codification Conventions" in *Realism in International Law Making: Essays in International Law in Honour of W. Riphagen* (1986), p 2-3.

90 Weil, above note 13 at 433-438.

91 *Id* at 434.

92 *Id* at 438.

93 Jennings, above note 4 at 9.

94 *Id* at 4-6.

95 *Id* at 6.

96 Sohn, above note 88.

proponents assert that Article 38.1(b) of the Court's Statute is flexible enough to accommodate this redefinition.

A different form of resistance to reliance on custom as a source of law in the modern international community is based on the argument that it allows formal international legislation to be circumvented. Michael Reisman terms the increasing dependence on custom in international legal discourse "a great leap backward" because it allows states to "use custom to get the international law they want without having to undergo the 'give' part of the 'give and take' legislative process".<sup>97</sup> Thus the United States could play down the significance of its non-signature of the Law of the Sea Convention on the ground that everything contained in the Convention, with the exception of the deep seabed resources regime, formed part of customary international law and thus bound the United States in any event.<sup>98</sup> Reisman predicts that custom may therefore become a type of weasel word to mask the "privatisation" of international law, the shift away from international legislation made in general international fora, such as the United Nations, to law making in limited regional fora from which many of the newer members of the international community are excluded.<sup>99</sup> Reisman also questions the adequacy of customary international law to deal with complex issues such as international debt or the suppression of terrorism.<sup>100</sup>

Jurists from socialist and developing nations too have expressed reservations about reliance on custom as a source of international law. They have questioned the content of many traditional principles of customary international law as too western in orientation and socialist scholars in particular have pointed to the insecurity of the method of formation of custom.<sup>101</sup> Customary international law is seen as essentially conservative and lagging behind social and political development. Mohammed Bedjaoui encourages developing nations to focus on the creation of international law through resolutions of international organisations: resolutions offer flexibility, rapidity and security to the Third World as its numbers enable it to control the technique.<sup>102</sup>

### **The Nicaragua Case and Customary International Law**

The issue of customary law loomed particularly large in the *Nicaragua* case

97 Reisman, "The Cult of Custom in the Late Twentieth Century", (1987) 17 Cal WILJ 133 at 134, 135.

98 Id at 133-134.

99 Id at 135.

100 Id at 142-143.

101 See eg Erickson, above note 3 at 150-151; Tunkin, above note 18 at 427; Cassese, above note 4 at 181; Bedjaoui, "The Poverty of the International Legal Order" in Falk R, Kratochwil F and Mendlovitz S H (eds), *International Law: A Contemporary Perspective* (1985), p 152 (Bedjaoui indeed criticises all the traditional sources of law).

102 Id at 157-158. See also Tieya, "The Third World and International Law" in Macdonald R St J and Johnston D M (eds), *The Structure and Process of International Law* (1986), p 955 at 964-965. For an account of the attempt in the early 1960s by developing nations to give legislative powers to the United Nations General Assembly, see Cassese, above note 4 at 174-175.



because of the United States' multilateral treaty reservation to its acceptance of the compulsory jurisdiction of the Court under Article 36.2 of the Court's Statute. The "Vandenberg" reservation, made in 1946, provided that the Court's compulsory jurisdiction over the United States would not extend to disputes arising under a multilateral treaty unless either all the parties to the treaty affected by the decision were also parties to the case before the Court or the United States specially agreed to jurisdiction.<sup>103</sup> It was invoked by the United States to resist the International Court's jurisdiction in *Nicaragua* because Nicaragua's application for relief to the Court relied in part on four multilateral treaties to which both countries were parties: the United Nations Charter, the Charter of the Organisation of American States, the Montevideo Convention on the Rights and Duties of States of 1933 and the Havana Convention on Rights and Duties of States in the Event of Civil Strife of 1928. The United States argued that Nicaragua's three Central American neighbours, Honduras, Costa Rica and El Salvador, who were not parties to the case, would be affected by any decision by the Court.<sup>104</sup>

A majority<sup>105</sup> of the International Court accepted that the Vandenberg reservation applied to preclude its jurisdiction with respect to the four treaties in the circumstances.<sup>106</sup> Nicaragua had, however, also formulated parallel claims under customary international law and a different majority<sup>107</sup> of the Court was prepared to decide on this basis. In its judgment, the Court dealt with many of the controversial aspects of customary international law outlined above and entered, without satisfactorily resolving, the debate over the definition and place of this source of law in the modern international community.<sup>108</sup>

In *Nicaragua* the International Court apparently endorsed the orthodox method for establishing customary rules. It quoted its 1985 decision in *Continental Shelf (Libya/Malta)*:

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.<sup>109</sup>

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103 The full text of the reservation is set out in *Nicaragua*, above note 5 at 31 para 42.

104 El Salvador's application to intervene in the jurisdiction phase of the case was rejected on the grounds that the Court was not then dealing with the merits of the case: ICJ Rep 1984, p 215. El Salvador did not make a further application to intervene at the merits phase of the proceedings.

105 Eleven votes (President Singh, Vice-President de Lacharriere, Judges Lachs, Oda, Ago, Schwebel, Jennings, Mbaye, Bedjaoui, Evensen and Judge ad hoc Colliard) to four (Judges Ruda, Elias, Sette-Camara and Ni).

106 *Nicaragua*, above note 5 at 31-38 paras 42-56.

107 Twelve votes (President Singh, Vice-President de Lacharriere, Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni, Evensen and Judge ad hoc Colliard) to three (Judges Oda, Schwebel and Jennings).

108 Seven of the judges who accepted much of the substance of Nicaragua's case wrote separate opinions (President Singh, Judges Lachs, Ruda, Elias, Ago, Sette-Camara and Ni). Only Judge Ago took issue with the majority judgment on its analysis of customary international law.

109 Above note 25 at 29-30 para 27, quoted in *Nicaragua*, above note 5 at 97 para 183.

Despite the invocation of this traditional language, the Court proceeded to redefine both the accepted elements of custom and to offer a new account of their relationship.

*i. State Practice*

Generally, in *Nicaragua*, the Court appears to expand the category of activities that can constitute state practice. Its analysis is not easy to follow for the discussion of state practice and *opinio juris* is often elided and it is sometimes uncertain whether the Court regards a particular action as state practice, *opinio juris*, or as doing service as both.

The Court relies on acceptance of treaty obligations as state practice. While this is a generally accepted source of state practice,<sup>110</sup> the Court places special emphasis on the fact that both Nicaragua and the United States have accepted particular treaty obligations as evidence that they at least are firmly bound by such norms.<sup>111</sup>

Unlike jurists such as D'Amato, who regard only actions which have physical consequences as state practice,<sup>112</sup> the Court accepts General Assembly resolutions and resolutions of other international organisations, particularly those in which Nicaragua and the United States participated, as forms of state practice.<sup>113</sup> This approach accords with that of many jurists.<sup>114</sup> The Court, however, does not appear to discriminate between international fora, nor does it discriminate between resolutions based on *lex lata* and *lex ferenda*. The Court places considerable reliance on the Declaration on Friendly Relations which is couched in legislative language.<sup>115</sup> But it also relies on other resolutions and agreements whose language is not mandatory.<sup>116</sup>

The Court seems to accord the status of state practice to statements made by the International Law Commission<sup>117</sup> and decisions of the International Court itself.<sup>118</sup> As members of these two bodies are not state representatives, the characterisation of their statements as the practice of states is a considerable extension of this notion. It implies that customary international law is based on more than simply the consent of states and that the activities of international groups made up of independent individuals can contribute to it.

A constant theme in the *Nicaragua* treatment of state practice is that words are often more significant than physical actions. The content of the customary

110 See above notes 26-28 and accompanying text.

111 *Nicaragua*, above note 5 at 98 para 185: "the Court, while exercising its jurisdiction only in respect of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law". See also paras 188, 196-198.

112 See above notes 29-31 and accompanying text.

113 Eg *Nicaragua*, above note 5 paras 193, 202, 203, 204, 205.

114 See above notes 36-37 and accompanying text.

115 GA Res 2625 (XXV) of 1970.

116 Eg the Helsinki Accords. See *Nicaragua*, above note 5 at 107 para 204.

117 *Id* at 100 para 190.

118 *Id* at 106-107 para 202 (citing the *Corfu Channel* case (UK v Alb), ICJ Rep 1949, p 34).

rules relating to the use of force in international relations is confirmed as parallel to the relevant provisions of the United Nations Charter without any reference to actual instances of state practice refraining from the use of force. The Court points instead to "various instances of [the Parties] having expressed recognition of the validity [of the rules relating to the use of force] as customary international law in other ways".<sup>119</sup> The Court relies significantly on submissions made by the United States in the jurisdiction phase, and not disputed in principle by Nicaragua, that Article 2.4 of the Charter is identical with customary international law.<sup>120</sup> Although this argument was designed by the United States to establish that the multilateral treaty reservation applied equally to preclude consideration of the rules of custom, the Court seems to use it to avoid considering whether or not actual confirming state practice exists.

A similar technique is used by the Court with respect to the content of customary rules of self-defence, although it does not refer explicitly to requirements of either state practice or *opinio juris*. It bypasses an examination of state practice by noting that the right of self-defence is referred to in Article 51 of the Charter as an "inherent" right and "[t]hus the Charter itself testifies to the existence of the right...in customary international law".<sup>121</sup> The Court determines the specific conditions for the exercise of the right of self-defence without reference to any particular state practice. It refers to "general agreement" on what acts constitute an "armed attack" which triggers the right to self-defence,<sup>122</sup> noting in support only the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX). On the issue of whether a condition of the lawful exercise of the right of collective self-defence by a third state is a request by the attacked state to that state, the Court looks simply to the provisions of two regional treaties.<sup>123</sup>

The Court's consideration of the principle of non-intervention at customary international law also follows this pattern. The Court has to explain considerable state practice of intervention in another state's affairs in order to justify its conclusion that the principle of non-intervention is "part and parcel of customary international law".<sup>124</sup> The Court seems most concerned with the theoretical basis for the principle: respect for territorial sovereignty and as a corollary of the principle of sovereign equality of states.<sup>125</sup> Initial emphasis is placed on the existence of *opinio juris* supporting a rule of non-interference, although this is referred to in the most general terms - "[e]xpressions of [such] an *opinio juris*...are numerous and not difficult to find".<sup>126</sup>

While noting the need for state practice to be in conformity with *opinio*

119 *Nicaragua*, above note 5 at 98 para 185.

120 *Id* at 98-100 paras 187-188.

121 *Id* at 102-103 para 193.

122 *Id* at 103-104 para 195.

123 *Id* at 104-105 paras 196-198.

124 *Id* at 106 para 202.

125 *Id*.

126 *Id*. Later the Court refers, apparently as evidence of *opinio juris*, to declarations condemning intervention made by international organisations and conferences in which the United States and Nicaragua participated.

*juris*,<sup>127</sup> the Court avoids any discussion of actual state practice. The Court argues that the psychological element of custom is "backed by established and substantial practice"<sup>128</sup> but offers no examples of it. It acknowledges, in a general way, state practice contrary to the asserted norm of non-intervention: "in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State".<sup>129</sup> When the Court turns to examine state practice and has to confront the phenomena of constant foreign intervention in nations, apparently constituting state practice of intervention contrary to the asserted rule, it immediately abandons its analysis of a possible norm of non-intervention. The Court instead reverses direction and examines whether there exists a norm *allowing* foreign intervention. Thus paragraph 206 of the Court's decision begins with the assertion 'before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it.' By the end of the paragraph, without any reference to confirming state practice, the Court is prepared to assert the existence of a "customary law principle of non-intervention". It warns that any right of intervention to support internal opposition within a state would fundamentally modify this rule of custom. The troubling issue of contrary state practice is avoided by the Court's claim that it has "no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute".<sup>130</sup> While this statement is of course correct, it is not a satisfactory rationale for failure to examine the behaviour of states which were not parties to the dispute before the Court. Absence of jurisdiction over particular state action does not preclude its assessment as state practice for the purposes of a general rule of customary international law.

In *Nicaragua*, therefore, the World Court offers little guidance on the important problem of cases where significant *opinio juris* is unsupported by state practice. In order to establish a customary norm of non-intervention, the Court locates *opinio juris* to support it, but finds only contrary state practice. The Court dismisses this evidence of state practice by noting that it is not accompanied by the requisite *opinio juris* to form a norm allowing foreign intervention. From this the Court deduces the existence of the norm of non-intervention. The paucity of actual state practice to support a norm of non-intervention is thus bypassed.

Another technique used by the Court to avoid confronting the troubling issue of state practice especially in relation to the principle of non-intervention is to reaffirm the *North Sea* dictum that customary law is formed from settled practice and *opinio juris*<sup>131</sup> but then to focus its scrutiny entirely upon the latter

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127 *Id* at 107-109 paras 205, 206, 207.

128 *Id*. In his separate opinion, Judge Ago notes that he is "somewhat surprised" at the assurance. *Id* at 186 note 1. More trenchantly, Judge Schwebel in dissent stated: "There is hardly sign of custom - of the practice of States - which suggests, still less demonstrates, a practice accepted as law which equates with the standards of non-intervention prescribed by the OAS Charter". *Id* at 305 para 98.

129 *Id* at 108 para 206.

130 *Id* at 108-109 para 207.

131 *Id*.

requirement, glossing over the absence of confirming state practice:

The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.

...In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances.<sup>132</sup>

The analysis of state practice presented in the *Nicaragua* case attaches great weight to the rhetoric of a state apparently transgressing a norm of customary international law rather than to the response of the international community. It indicates a static view of custom, for it is very rare that a state will clearly acknowledge that it is relying on a new international right as justification for a particular action. Much more common is invocation of exceptions to international rules and the *Nicaragua* Court contemplates acceptance of these claims at face value. For example, rights to anticipatory self-defence and humanitarian intervention are often used to justify apparent violations of the prohibition of the use of force.<sup>133</sup> On the *Nicaragua* analysis these claims apparently confirm the customary rule. Giving such prominence to the self-serving statements of an apparent transgressor means a great reduction in the contribution of state practice, in the sense of actions having physical consequences, to a norm of customary international law.

In *Nicaragua*, the Court acknowledges the "essential role played by general practice" in the generation of rules of custom.<sup>134</sup> But the issue of how widespread a practice must be in order to generate a norm of customary international law is dealt with obliquely by the International Court. As noted above, part of its analysis fits with a view of customary law based entirely on the behaviour of particular states and other parts fit with a broader view. Certainly the major focus of the Court's investigation is the actions of Nicaragua and the United States and the behaviour of other states is either alluded to in the most general way or dismissed as irrelevant to the issues before the Court.

The requirement of consistency of state practice is also significantly qualified in *Nicaragua*. Earlier cases had stressed the importance of uniformity and consistency in state actions and had pointed to inconsistency as one basis

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132 *Id* at 109 paras 207-208.

133 For a survey of such justifications see Cassese A, *Violence and Law in the Modern Age* (1988), pp 35-39.

134 *Nicaragua*, above note 5 at 98 para 184.

for rejecting an asserted rule as custom.<sup>135</sup> The precise level of consistency, however, had never been spelled out.

In *Nicaragua* the Court finds that:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.<sup>136</sup>

The force of this passage relies on its contrast between a standard of perfect consistency of state practice and a more reasonable alternative. In fact "absolutely rigorous conformity" of state practice has never been demanded in international law, and the Court's reasoning appears more as a polemical device to allow the Court to propose a considerably lesser standard in contrast. Thus the Court goes on to state that in the deduction of customary rules it is sufficient that:

...the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.<sup>137</sup>

This treatment of inconsistent action redefines the state practice element in custom. Evidence of inconsistent actions by states has generally been treated as a threat to the formation of custom, however the inconsistency was justified. In *Nicaragua* the Court is prepared to rely on the subjective interpretation of inconsistent action offered by the state actor itself to determine its weight in the custom-making progress. Given the unlikelihood of a state's acknowledgment that its actions violate a rule of international law, the *Nicaragua* formula would in practice cover all activities of states whether they were in accordance with or went against an asserted customary rule: the pool of actions which could constitute state practice becomes totally undifferentiated.

## ii. *Opinio Juris*

As we have seen in *Nicaragua*, the Court emphasises the importance of the "subjective" or psychological factor in the creation of custom and implies that it is of greater significance than state practice. Its requirement of *opinio juris*, however, is satisfied by relatively slight evidence of the motivation of states in the traditional sense. There is also considerable overlap in the actions considered as evidence of state practice and those considered evidence of *opinio juris*.

Sources of *opinio juris* approved by the *Nicaragua* Court which come within the traditional parameters include references by state representatives to

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135 See above notes 42-48 and accompanying text.

136 *Nicaragua*, above note 5 at 98 para 186.

137 *Id.*

principles as “fundamental or cardinal” rules of customary international law.<sup>138</sup> The Court points to statements in the Nicaraguan Memorial on the Merits and the United States’ Counter Memorial on Jurisdiction and Admissibility referring to the prohibition on the use of force as a norm of *jus cogens*.<sup>139</sup> As with state practice, however, the Court confines its search for *opinio juris* to the activities of the two states in dispute before it with two exceptions: the Court attributes significance for *opinio juris* to its own decisions and to the International Law Commission’s Commentary to Article 50 of its draft Articles on the Law of Treaties giving the prohibition on the use of force as a “conspicuous example” of a rule of *jus cogens*.<sup>140</sup>

The *Nicaragua* Court also extends the traditionally accepted sources of *opinio juris* in taking a single example of an abstention as constituting the subjective element of custom. Unlike the cautious approach to abstention shown in the *Lotus* case,<sup>141</sup> the non-assertion by the United States in the jurisdiction phase of the *Nicaragua* case of any right to collective armed response to acts not constituting an armed attack is taken by the International Court as *opinio juris* that no such right exists in customary international law.<sup>142</sup>

The role of resolutions of international organisations as evidence of *opinio juris* is endorsed in *Nicaragua*. In the context of the customary prohibition on the use of force it argues that *opinio juris* may be deduced “with all due caution” (a phrase given no further definition) from the attitudes of the Parties and other states towards certain General Assembly resolutions, particularly the Declaration on Friendly Relations.<sup>143</sup> This Declaration also appears to furnish the requisite *opinio juris* for the customary principles relating to self-defence.<sup>144</sup> The Court is explicit that consent to the text of such resolutions has a significance greater than a mere reiteration or elucidation of the principles of the United Nations Charter: they amount to “an acceptance of the validity of the rule or set of rules declared by the resolutions themselves”.<sup>145</sup> Resolutions of other fora are also significant: for example, the United States’ support for a resolution condemning aggression at the Sixth International Conference of American States held in 1928 contributes to *opinio juris* for the prohibition on the use of force<sup>146</sup> as do the texts of declarations of international organisations and conferences in which the United States and Nicaragua took part in the context of the norm of non-intervention.<sup>147</sup> The Court draws no distinction

138 *Id* at 100-101 para 190.

139 *Id*.

140 *Id*. As noted above, these materials are also regarded as evidence of state practice by the Court.

141 See above notes 51-52 and accompanying text.

142 *Nicaragua*, above note 5 at 110-111 para 211.

143 *Id* at 99-100 para 188.

144 *Id* at 102-103 para 193. Friendly Relations is also proffered as supplying the requisite *opinio juris* for the purposes of the customary international law rule relating to the use of force which does not constitute an armed attack: *id* at 101 para 191.

145 *Id* at 100 para 188.

146 *Id* at 100 para 189.

147 *Id* at 107, 133, paras 203, 204, 264.

between various international fora. Nor does it offer real guidance as to the level of international support necessary for particular resolutions to constitute law.<sup>148</sup> It seems enough that at least the states which are in dispute over the existence of a rule of custom have supported the resolutions.<sup>149</sup>

In its treatment of the contribution of resolutions of international fora to the formation of custom, the *Nicaragua* Court goes considerably further than most jurists. As we have seen, resolutions of the General Assembly have been regarded as evidence of *opinio juris* but only when there is "a sufficient body of State practice for the usage element of the alleged custom to be established without reference to the resolution".<sup>150</sup> The *Nicaragua* analysis suggests that voting for a resolution in an international forum without more provides both adequate state practice and *opinio juris* for the formation of customary rules.

The Court goes beyond the possibilities jurists such as Cheng have proposed for the law making capacity of General Assembly resolutions. Cheng, who first coined the term "instant customary law", used it to describe the phenomenon of customary international law being conclusively established by a single showing of *opinio juris*. He examined instant custom in the context of unanimously accepted General Assembly resolution whose language unambiguously demonstrated *opinio juris communis*.<sup>151</sup> The *Nicaragua* Court proposes a different type of instant law. It apparently does not share Cheng's premise that *opinio juris* is the crucial element in custom and employs the traditional language of state practice and *opinio juris*. It is prepared, however, to find both these elements in a single action: acceptance of a treaty obligation or a resolution of an international organisation. It does not echo the strict condition proposed by Cheng on the type of resolution appropriate as such evidence. Moreover, *Nicaragua* extends the possibility of generation of instant custom to resolutions of international fora adopted by consensus rather than a vote. As consensus resolutions do not require the same degree of agreement as a unanimous vote,<sup>152</sup> the *Nicaragua* instant custom is less demanding than that envisaged by Cheng. It is also more inclusive than that supported by some jurists from developing nations.<sup>153</sup>

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148 See the separate opinion of Judge Ago expressing doubts about the Court's assumption that the acceptance of resolutions of international fora "can be seen as proof conclusive of the existence among the States concerned of a concordant *opinio juris* possessing all the force of a rule of customary international law". Id at 184 para 7.

149 One of the few exceptions to this is the reference to the acceptance of the right of self defence as customary international law by "the States represented in the General Assembly" through the adoption of the Declaration on Friendly Relations. Id at 102-103 para 193.

150 Thirlway, above note 16 at 67. See also above notes 38 and 58 and accompanying text.

151. See above notes 66-67 and accompanying text.

152 On consensus resolutions see Cassese, above note 4 at 195-197.

153 Abi-Saab, for example, proposes three criteria to gauge the customary law weight of a resolution: the circumstances of the adoption of the resolution and the degree of consensus; the concreteness of the contents of the resolution and whether they are specific enough to operate as law; and whether they contain effective follow-up mechanisms to encourage compliance. Abi-Saab G, *Analytical Study on the*



A novel technique employed in *Nicaragua* is the proof of a rule of custom by disproving the existence of its opposite. Although the project of establishing a customary norm of non-intervention is presented by the Court as identical to that of *disproving* the existence of a norm of intervention,<sup>154</sup> the two exercises are in fact quite different in the traditional theory of international law. Legal propositions, unlike those of formal logic, are not susceptible to such simple analysis. It is quite possible to establish that a particular rule does not exist without proving the existence of a contrary rule because the international legal system (as domestic legal systems) is neither a code nor a closed logical system. One of the classic principles of international law, formulated in the *Lotus* case,<sup>155</sup> is that states have complete freedom of action apart from the restraints imposed by international legal rules. Thus in the absence of a particular rule requiring or prohibiting certain actions, a state may act as it wishes: the absence of a rule does not imply its opposite. Moreover the very nature of the traditional theory of customary international law, with its requirements of positive proof of both "objective" and "subjective" phenomena, precludes formation of a customary rule by simply showing that a counter rule does not qualify as custom.

Even if the Court's proof of a principle of non-intervention by disproving its opposite were persuasive, its dismissal of a norm of foreign intervention on the ground of absence of *opinio juris* is weakly argued. The Court notes little *opinio juris* to sustain a customary norm of intervention: "the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition".<sup>156</sup> Examples of the justifications for intervention in other nations offered by the United States at various times are listed by the Court as "reasons connected with...the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy".<sup>157</sup> According to the Court these cannot constitute *opinio juris* because such justifications were "statements of international policy, and not an assertion of rules of existing international law".<sup>158</sup> Although the Court does not give examples of other United States' interventions, its distinction between policy and legal statements is quite tenuous in light of the available evidence. For example, a foreign intervention by the United States very recent at the time of the *Nicaragua* judgment was the invasion of Grenada in 1983. The justifications offered by the United States at

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*Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order*, UN Doc A/39/504/Add 1 (1984), pp 36-37, quoted in Cassese, above note 4 at 194-195.

154 The Court's view that these two exercises are identical is made clear in paragraph 209: "The Court therefore finds that no...general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations".

155 Above note 51.

156 *Nicaragua*, above note 5 at 109 para 207.

157 *Id.*

158 *Id.*

that time are in fact couched in legal rather than policy language.<sup>159</sup>

The category of *opinio juris* has always been both controversial and unclear. The *Nicaragua* account of *opinio juris*, while differing from earlier jurisprudence of the World Court, does little to clarify it. Its effect is to elevate the significance of *opinio juris* over practice, to make evidence of *opinio juris* easier to find and to give priority to words over deeds. The implication of the *Nicaragua* Court is that even if state practice tends to contradict formal statements made in an abstract context, the formal statements should take priority.

### *iii. Customary international law and treaties*

Because of the effect of the Vandenberg reservation, most of the substantive legal discussion in *Nicaragua* takes place on the premise that certain treaty provisions have parallel customary norms. The relationship between the two is not examined in any detail by the Court. The constant references to the terms of the treaties to define the content of the customary norms suggests the strained nature of its analysis. In *Nicaragua* the Court simply accepts the possibility that the provisions of the conventional law and customary international law with respect to the use of force, collective self-defence and non-intervention could be identical.<sup>160</sup> It notes that the two sources of law have an independent existence and treaty law does not oust parallel customary norms.<sup>161</sup>

In his dissenting judgment, Sir Robert Jennings points out the "very artificial postulate" of a parallel treaty and customary law with respect to the content of the United Nations Charter provisions dealing with use of force and self defence.<sup>162</sup> First, on the *North Sea Continental Shelf* cases analysis, proof of the development of a general customary law identical with the Charter provisions would require the derivation of relevant state practice from the behaviour of the few states not party to the Charter. Second, the special "objective" status of the United Nations Charter established in Article 2.6, which places an obligation on non-member states of the United Nations to act in accordance with the Charter principles "so far as may be necessary for the maintenance of international peace and security", would be unnecessary if non-member states were bound in any event by a custom identical to the Charter.

159 See eg Moore, "Grenada and the International Double Standard", (1984) 78 AJIL 145.

160 *Nicaragua*, above note 5 at 93-94 paras 175, 181. The Court finds in fact that the two sources of law do not completely overlap. On customary humanitarian law in the *Nicaragua* case, see Meron, "The Geneva Conventions as Customary Law", (1987) 81 AJIL 348.

161 *Nicaragua*, above note 5 at 94-97 paras 177-182.

162 *Id* at 532. In his separate opinion Judge Ago expressed "serious reservations with regard to the seeming facility with which the Court - while expressly denying that all the customary rules are identical in content to the rules in the treaties... - has nevertheless concluded in respect of certain key matters [the conditions for the exercise of the right to self defence, the prohibition of intervention and principles of humanitarian law] that there is a virtual identity of content as between customary international law and the law enshrined in certain major multilateral treaties...". *Id* at 184 para 6. See also Czaplinski, "Sources of International Law in the *Nicaragua* Case", (1989) 38 ICLQ 151 at 166.

The Court takes acceptance of particular treaty obligations or other international instruments as proof of both state practice and *opinio juris* for the creation of a customary norm. Thus United States' ratification of the 1933 Montevideo Convention on Rights and Duties of States and acceptance of the prohibition on the use of force in the Helsinki Accords in 1975 are taken as confirmation of *opinio juris* for a customary rule prohibiting use of force.<sup>163</sup> The Court offers no guidance as to whether all multilateral treaties, or only a limited category, will create a type of instant customary law without more. Customary law thus becomes of more durable significance than treaty law: a customary norm will continue to bind even if its treaty counterpart is terminated or suspended because of a material breach by one party.<sup>164</sup> This analysis is inconsistent with that of the International Court in the *North Sea Continental Shelf* cases. There, the Court refused to treat the actions of parties to the Geneva Convention on the Continental Shelf as evidence of *opinio juris* for a customary rule because the parties were bound by treaty to act in accordance with it.<sup>165</sup>

### A New Understanding of Customary International Law?

The discussion of customary international law in *Nicaragua* has provoked strong reactions. D'Amato, for example has described it as a "failure of legal scholarship" and its authors as "collectively naive" about custom as a source of law.<sup>166</sup> Is the *Nicaragua* judgment's account of custom simply an aberration of international jurisprudence?

Several problems arise from the decision. Most generally, the *Nicaragua* understanding of customary international law can be criticised for its obscurity. While retaining the traditional language of the elements of customary international law, the Court does not offer any clear definition of these elements and in fact seems to move away from much of the accepted jurisprudence in the area. The combination of familiar terms and categories with a redefinition of content serves to obfuscate rather than clarify an important area of law, and fails to acknowledge directly the shift in the Court's thinking. The Court's analysis of custom illustrates the accuracy of Sir Robert Jennings's observation that "we cannot reasonably expect to get very far if we try to rationalise the law of today solely in the language of Article 38 of the Statute of the International Court of Justice".<sup>167</sup>

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163 *Nicaragua*, above note 5 at 100 para 189.

164 *Id* at 95-96 para 178.

165 Above note 28 at 43. This point is also made in relation to whether obligations imposed by the United Nations Charter have become part of customary international law by Judge Jennings in dissent. *Nicaragua*, above note 5 at 531.

166 D'Amato, "Trashing Customary International Law", (1987) 81 AJIL 101 at 105. It is unclear whether D'Amato's title is intended to evoke the Critical Legal Studies movement which has introduced the verb "to trash" into American legal scholarship. The Critical movement, however, usually employs the term with approbation to describe the process of deconstruction (see eg Kelman, "Trashing", (1984) 36 Stan LR 293), while D'Amato uses it to express unequivocal disapproval of the World Court's jurisprudence.

167 Jennings, above note 4 at 9.

A second difficulty created by the *Nicaragua* decision is its account of the formation of customary international law. It envisages certain actions (such as participation in treaties or voting for resolutions in international fora) as constituting both state practice and *opinio juris* and thus giving rise readily to an "instant" customary law. For example, a General Assembly resolution expressing a legal norm, even as an exhortation or aspiration, may be recognised by the Court as binding and enforceable, unless express dissent about its law-making character has been registered. Thus a significant international obligation can be created by non-objection to a consensus resolution. Because the potential scope of custom is greatly increased by the *Nicaragua* decision, in that "soft" norms can transform into "hard" norms in one move,<sup>168</sup> states may be discouraged from participating in consensus resolutions. Indeed, the generally enhanced legal status of resolutions could encourage a renaissance of the "persistent objector" principle: on the *Nicaragua* analysis, express negative votes in international fora will be important if a state is not satisfied that every provision of a proposed resolution, separately applied, is acceptable. It may also encourage states to vote against aspirational instruments. The possibility of generation of a type of instant customary international law by participation in treaties is similarly unqualified in the *Nicaragua* case. The Court invokes regional as well as general treaties as conclusive evidence of rules of custom and fails to adequately answer the doubts raised by Weil as to the protection of the position of non-parties to treaties.<sup>169</sup> The effect of the Court's analysis, then, is to significantly reduce the distinction between treaties and resolutions of international fora in the generation of customary international law.

A third problem of the *Nicaragua* decision is its suggestion that the actual behaviour of states is considerably less important for the creation of customary international law than their public statements. Customary rules are formed not by actual state practice combined with evidence of *opinio juris* but may be generated simply by statements made by states which have violated an apparently customary rule. The detachment of customary international law from actual state practice implicitly proposed in *Nicaragua* may mean that customary rules will have little influence over the actions of states. With respect to the issue of foreign intervention, for example, it has been said that "[t]he realities all militate in favour of intervention....[T]he task of the international lawyer over the next few years is surely not to go on repeating the rhetoric of dead events which no longer accord with reality, but to try to assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion".<sup>170</sup> The *Nicaragua* decision does not accept this description of the task of international law. Although it purports to base

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168 For a discussion of this aspect of the *Nicaragua* case, see Chinkin, "The Challenge of Soft Law: Development and Change in International Law", (1989) 38 ICLQ 850 at 857-858.

169 Weil, above note 13 at 434.

170 Higgins, "Intervention and International Law" in Bull H (ed), *Intervention in World Politics* (1984), p 29 at 42.

legal principles on the behaviour of states, in fact the Court opts for an international law of ideal standards.

The analysis of custom presented in the *Nicaragua* case can certainly be explained by the importance of the norms being considered by the Court. To deny the existence of customary rules on use of force and non-intervention, especially in a case involving one of the superpowers, could have greatly reduced confidence in the Court.<sup>171</sup> An interesting rationalisation of the Court's decision has been proposed by Kirgis.<sup>172</sup> He describes a sliding scale. At one end very frequent, consistent state practice can establish a customary rule without a separate showing of *opinio juris*. As the frequency and consistency of practice decline, a stronger showing of *opinio juris* is necessary.<sup>173</sup> This analysis is particularly useful in the context of rules restricting governmental activity of a destabilising or offensive kind, for example in the area of human rights or use of force.<sup>174</sup> On the other hand, if the proposed rule does not so directly impinge on basic human values a more exacting demand for the traditional elements of practice and *opinio juris* should be made.<sup>175</sup> The actual terms of the majority judgment in *Nicaragua*, however, do not support this theory: the Court clings to the orthodox language of custom and tries to squeeze the facts before it into inappropriate categories.

What implications does the *Nicaragua* decision have for the more radical critiques of custom? In some senses the judgment reflects the concern of jurists such as Bedjaoui that resolutions of international organisations should be given special status in international law making.<sup>176</sup> At the same time Reisman's caution about the development of a "cult of custom"<sup>177</sup> is supported in the *Nicaragua* case. The ready identification of customary international law may encourage the use of custom as a slogan, a general panacea for the painful compromises suffered by some developed nations in participating in international legislation whose direction is given by the Third World.<sup>178</sup>

Does *Nicaragua* support the "old" or "new" pattern of international law? In some ways, the decision is a perfect example of what Cassese describes as the

171 Just as the decision of the Court in the *South West Africa* cases (*Eth v Sth Af*; *Lib v Sth Af*), ICJ Rep 1966, p 6, antagonised many members of the international community.

172 Kirgis, "Custom on a Sliding Scale", (1987) 81 AJIL 146.

173 Id at 149. A similar analysis is proposed of the *Lotus* case by Professor Greig: Greig, above note 7 at 18. Such an analysis is implicitly endorsed in the separate opinion of President Nagendra Singh who refers to the principle of non-use of force as "the very cornerstone of the human effort to promote peace in a world torn by strife". *Nicaragua*, above note 5 at 153. In dissent Judge Schwebel also acknowledges the general acceptance of the lack of consistency between "preachment" and practice with respect to the customary and Charter law on the use of force. Id at 303-304 paras 93-94.

174 Kirgis above note 172 at 147-149. In *Filartiga v Pena-Irala* 630 F 2d 876 (1980), reprinted in (1980) 19 ILM 966, for example, Judge Kaufman relied on human rights treaties and declarations to establish a customary norm prohibiting torture.

175 Kirgis, above note 172 at 147-149.

176 Bedjaoui, above note 101.

177 Reisman, above note 17.

178 Id at 142.

“unique coexistence”<sup>179</sup> of the Westphalian and the idealistic, communal orders in the international community. The majority judgment in *Nicaragua* displays a tension between a consent based view of the obligatory nature of customary international law and one that ascribes its force to its “societal context”.<sup>180</sup> Though the Court states that the concurrence of the parties’ views on the customary international law relating to the non-use of force and non-intervention does not enable the Court to avoid ascertaining the applicable law itself,<sup>181</sup> it gives particular weight to the practice and *opinio juris* of Nicaragua and the United States as though it were dealing with a type of regional custom.<sup>182</sup> In this sense it appears to endorse a consensual theory of customary international law which allows the possibility of different rules of customary international law existing between different groups of states.<sup>183</sup> The Court nevertheless presents particular rules as generally binding,<sup>184</sup> even as norms of *jus cogens*.<sup>185</sup>

In its discussion of whether a customary norm of non-intervention exists, the Court acknowledges the possibility that a persistent objector will not be bound by a rule of customary international law. The Court notes that the principle of non-intervention has been “reflected in numerous declarations adopted by international organisations and conferences in which the United States and Nicaragua have participated”.<sup>186</sup> The affirmative vote of the United States for one such resolution, Resolution 2131 (XX), was qualified by a statement of its representative at the time of the resolution’s adoption by the First Committee that it was “only a statement of political intention and not a formulation of law”. The United States is nevertheless bound by the norm of non-intervention, the Court reasons, because “the essentials of resolution 2131 (XX) are repeated in the Declaration [on Friendly Relations]...which set out principles which the General Assembly declared to be ‘basic principles’ of international law, and on the adoption of which no analogous statement was made by the United States representative”.<sup>187</sup> The persistent objector principle is usually associated with a view of customary law as based on the consent of individual states<sup>188</sup> and in this

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179 Cassese, above note 4 at 401.

180 See above notes 11-12 and accompanying text. For a survey of earlier cases of the World Court dealing with the role of consent in the formation of custom see Skubiszewski, above note 1 at 845-849.

181 *Nicaragua*, above note 5 at 97-98 para 184.

182 The few references to more general practice are found *id* paras 188, 190 and 193.

183 This point is also made by Akehurst: “*Nicaragua v United States of America*”, (1987) *Indian J Int L* 357 at 360 n 16.

184 Eg *Nicaragua*, above note 5 at 97 para 181, referring to the United Nations Charter and the customary prohibition on the use of force as based on a “common fundamental principle”; 107 para 204, referring to the norm of non-intervention as a “customary principle of universal application”. The Court refers to the conditions it elaborates for the exercise of the right of collective self-defence as either customary international law of “a general kind or that particular to the inter-American legal system”. *Id* at 105 para 199.

185 *Id* at 100 para 190.

186 *Id* at 107 para 203.

187 *Id*.

188 See above notes 16-20 and accompanying text.

sense the Court seems to support an "old" pattern of international law. The Court indeed appears to go beyond the traditional limits of the principle by implying that a qualified, or negative, vote on a resolution in an international forum can constitute a "persistent" objection and allow a state to opt out of a particular rule of customary law subsequent to its formation. The World Court's endorsement of this technique may give heart to those jurists seeking to reassert the influence of developed countries over the direction of international law.

At the same time as following the traditional, individualistic, consent-based patterns of international law, the *Nicaragua* decision has features of the newer, idealistic, centralised international order. This is seen particularly in the Court's attribution of greater weight to a state's words in institutional public fora than to its deeds. By building law on statements of principle rather than on expedient action, the Court is endorsing a view of international law as "no longer a faithful reflection of the existing constellation of power, but incorporat[ing] a large body of 'oughts',...of imperatives which are a far cry from political and economic realities".<sup>189</sup> The prominence accorded to resolutions of international organisations as evidence of customary international law is also a manifestation of this tendency towards centralised law making, as is the very restricted view of the possibilities of the use of force in international relations.

The effectiveness of international law, argues Charney, depends on its reflection of the "real interests" of the members of the international community.<sup>190</sup> The real interests of the international community do not only involve what its members perceive as their interests in the short term. Other aspirational norms and values also contribute to communal interests and the international legal order must accommodate both "reality" and "idealism". The *Nicaragua* case attempts, but does not finally achieve, a satisfactory accommodation of the two: it tries to stretch the traditional tests of customary law, based on the consent of states, to fit normative aspirations which bear little direct relation to practice. The Court thus fails to take up the challenge made by Jennings to provide a new elaboration of custom as a source of law.<sup>191</sup> The "delicate balance on which the classic theory of custom is based"<sup>192</sup> offers little to the modern international community and should not be preserved. A rethinking of the classic doctrine, however, may allow customary international law to survive into the next century.

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189 Cassese, above note 4 at 400.

190 Charney, above note 85 at 992.

191 Jennings, above note 4 at 9.

192 Weil, above note 13 at 438.

