# The Importance of Custom and the Process of its Formation in Modern International Law

Farhad Talaie*

## I INTRODUCTION

Custom was traditionally the major source of public international law (international law).[1] This was because in traditional international law there were only a few law-making treaties that established rules for application in the relations between States. Today, however, there are a considerable number of treaties on a variety of subjects in international law. Conventions on the law of the sea,[2] on the law of treaties,[3] on space law,[4]

---

* LLB (Juridical Sciences, Iran, 1988), LLM (International Law, Iran, 1992), and Ph.D. (International Law, University of Wollongong, Australia, 1998).

1 Oppenheim considers custom as "the older and the original source of International Law in particular as well as of law in general." L Oppenheim *International Law* (Longmans, Green and Co., London, 1948) 25.

2 *Geneva Convention on the Territorial Sea and Contiguous Zone* (1958), 516 *UNTS* 205 (1964); *Geneva Convention on the High Seas* (1958), 450 *UNTS* 82 (1963); *Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas* (1958), 599 *UNTS* 285; *Geneva Convention on the Continental Shelf* (1958), 499 *UNTS* 311 (1964); and the 1982 *United Nations Convention on the Law of the Sea* (entered into force on 16 November 1994), 21 *ILM* 1261 (1982).

3 *Vienna Convention on the Law of Treaties* (1969), 155 *UNTS* 331.

4 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (1967); *Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space* (1968); *Convention on the International Liability for Damage Caused by Space Objects* (1972); *Convention on Registration of Objects Launched into Outer Space* (1975); *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (1979). Texts of these treaties are found in *The United Nations Treaties and Principles on Outer Space* (United Nations Office for Outer Space Affairs, Vienna, 1984).

and on diplomatic and consular immunities and privileges[5] are instances of law-making treaties. Although the number of law-making treaties and their importance are increasing, the necessity for customary law still remains.[6] This is because there is no international legislature, and existing international treaties are unable to deal with all issues in international law.[7] In particular, custom is a flexible and dynamic source[8] of international law. Today, there are many customary rules in almost all fields of international law from international law of human rights to international law of outer space.

---

5 *Vienna Convention on Diplomatic Relations* (1961), 500 *UNTS* 95 (1965); and *Vienna Convention on Consular Relations* (1963), 57 *AJIL* 995 (1963).

6 In the *Gulf of Maine Case*, the ICJ pointed out that custom is an ideal source of the development of general principles of law, particularly when a treaty fails to achieve universal acceptance. See the *Gulf of Maine Case* (*Canada v United Sates of America*) (1984) ICJR 246. Also Starke points out, despite the impact of growing law-making treaties on the importance of international custom, "international custom may still have a significant role to play as dynamic source of fresh rules of international law where the international community undergoes change in new areas untouched by treaties, judicial decisions or the writings of jurists." J G Starke, *Introduction to International Law* (10 ed) (Butterworths, London, 1989) 36.

7 It should also be noted that the range of application of an international custom is wider than an international convention. This is because such a custom may apply to all or majority of States, whereas the scope of application of an international convention is limited to its parties. Article 26 of the 1969 *Vienna Convention on the Law of Treaties* provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith [*Pacta sunt servanda*]" - see also Article 34 of this Convention. It is apparent that if a convention or a part of it is reflective of customary international law, the scope of the convention or that part would be as wide as customary law - see Article 38 of the Convention (*Rules in a treaty becoming binding on third States through international custom*). Also for discussion of the relationship between customary law and treaty law see R Baxter "Multilateral Treaties as Evidence of Customary International Law" (1965-1966) 41 *BYIL* 275, 298-300.

8 An analogy of a source of law is made with a stream of water. As a stream of water has its own source, a rule of law has also its legal source. Accordingly, a rule of law originates from a legal source. Oppenheim *supra* n. 1 at 24.

## II CUSTOM AS A SOURCE OF INTERNATIONAL LAW

To find out what the sources of international law are, legal scholars mainly rely on the Statute of the International Court of Justice (ICJ). Although sources of international law are not limited to those mentioned in this Statute, they are the most important law-making sources in international society. Article 38(1) of the Statute of the ICJ provides the sources of international law.[9] This Article contains the following sources of international law that the Court relies on for decision making. These sources are:

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;

(b) international custom,[10] as evidence of a general practice accepted as law,[11]

---

9 Article 38(1) does not explicitly refer to the term "sources of international law", but it is readily inferred that the asserted sources form the basic sources of international law. This is because the Court should apply the rules of international law in dispute settlement, and these rules are found in the aforementioned sources. Article 38(1) demonstrates explicit derogation from the theory of natural law.

10 In 1833, Chief Justice Marshall of the United States Supreme Court defined an international custom as "the usage of nations becomes law and that which is an established rule of practice is a rule of law." C Colombos *The International Law of the Sea* (Longmans, London, 1967) 7. This definition has been developed in passage of time. Section 102(2) of the Restatement Third, of the Foreign Relations Law of the United States of 1987, provides that customary international law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation." - see T Meron *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, Oxford, 1989) 3.

11 The definition of "international custom as evidence of a general practice accepted as law" has been criticised for it is practice of States which is an evidence for a rule of customary international law. Churchill defines international custom "as evidenced by a practice generally accepted as law" - see R Churchill and A. V. Vaughan Lowe, *The Law of the Sea* (Manchester University Press, Manchester, 1983) 7. Villiger states that the definition provided in Article 38(1)(b) for international custom is not based on "the logical order of events". The argument is that "it is general *practice* accepted as law which constitutes *evidence of customary rule*."- see M Villiger *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of the Treaties* (Martinus Nijhoff Publishers, Dordrecht, 1985) 3. Kelsen writes that the definition of custom as an evidence of State practice in the Statutes of the PCIJ was influence by the

(c) the general principles of law recognised by civilised nations;

(d) subject to the provisions of Article 59,[12] judicial decisions and the teachings of the most highly qualified publicist of the various nations, as subsidiary means for the determination of rules of law.[13]

Accordingly, Article 38(1)(b) of the Statute of the ICJ recognises custom as a main source of international law. Custom as a source of international law was first included in the 1919 Statute of the PCIJ. The need for such inclusion was to ensure that the Court would be able to make its decisions based on available customary law where international conventions could not shed light on the settlement of a legal issue in question.[14]

## III CONSTITUENT ELEMENTS OF AN INTERNATIONAL CUSTOM

It appears from the definition of an international custom in Article 38(1)(b) of the Statute of the ICJ that there are two components which form the foundations of such a custom.[15] The first component is "general practice of

---

theory that "custom is not able to create a legal norm, it is only an evidence of the existence of a legal norm" and that "custom has only a declaratory, not a constitutive character."- see H Kelsen *Principles of International Law* (2 ed) by Robert W. Tucker (rev and ed) (Holt, Reinheart and Winston, Inc., New York, 1966) 441-442.

12 Article 59 of the ICJ Statute reads that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."

13 Article 38 of the Statute of the ICJ is similar to Article 38 of the 1919 Statute of the PCIJ. As regards the issues related to the hierarchy of sources mentioned in Article 38 see M Akehurst "The Hierarchy of the Sources of International Law" (1974-1975) 47 *BYIL* 273-285.

14 Greig writes that if the Statute of PCIJ did not include international conventions and international custom as main bases for the decisions of the PCIJ, "it might have left open the possibility of the Permanent Court having to declare a *non liquet*, that is to say that, there being no treaty or established customary rule available, there was a gap in the law that meant that a decision could not be reached." - see D Greig "Sources of International Law" in S Blay et al (eds) *Public International Law: An Australian Perspective* (Oxford University Press, Oxford, 1997) 59. See also Kelsen *supra* n. 11 at 438-440 (the so-called "gaps" in the law).

15 Akehurst is of the view that the writings of eminent international lawyers and judgements of international tribunals should be taken into account as reflecting evidence of customary law - see M Akehurst *A Modern*

States." The second component is that such a practice should be accepted "as law."[16] The first component is known as material element (*objective criterion*) and the second one is considered as the psychological element (*subjective criterion*) of a customary rule. To prove whether a form of conduct reflects customary law, it is necessary to investigate the existence of these two elements regarding such a conduct. For this purpose, first it has to be proved whether a specific action has been reflected in State practice. Once this requirement is satisfied, the next question is whether such an action is empowered by legal obligation.[17]

### *Material element of an international custom*

The material element originates from the real practice of States. Examination of State practice, as material element of an international custom, is the first step in the evaluation of a specific conduct alleged to be a legal custom. In this regard, there are four major factors which have to be taken into account. These factors are duration, repetition, consistency and generality of State practice.

As regards duration, there are certain indications in national legal systems indicating the requirement of passage of time for a particular behaviour or usage. In common law, it is referred to "time immemorial", while in civil law the period of thirty to forty years is sufficient to change the nature of such a behaviour or usage to a custom.[18] There is no absolute criterion in international law to define the term of duration and it might be different

---

*Introduction to International Law* (6 ed) (Harper Collins Academic, London, 1991) 26.

16 In the *Continental Shelf Case*, the ICJ stated that "the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States ..." *Continental Shelf Case* (*Libya v Malta*) 1985 ICJR 29.

17 In comparison to its predecessor (PCIJ), the ICJ has been more involved in dealing with issues relating to customary international law. In a number of cases, the ICJ dealt with such issues as the status of customary international law, the requirements for generation of a customary rule, and the effects of objection on an emerging customary rule. In particular, the ICJ provided some guidelines in the assessment of a certain practice of States as part of customary international law.

18 M Shaw *International Law* (3ed) (Cambridge University Press, Cambridge, 1994) 64. As regards the distinction between usage and custom, one author writes that "[u]sage represents the initial stage of custom. Custom begins where usage becomes general." - see I Shearer *Starke's International Law* (11 ed) (Butterworths, London, 1994) 31.

from one case to another.[19] What is obvious is that the duration is not an important factor in generating an international custom. In the *North Sea Continental Shelf Cases*, the ICJ indicated that "... the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ...".[20] A clear example of a customary rule in which the passage of time was not a determinant factor is the rule of the sovereign rights of coastal States over their continental shelves.[21] This rule rapidly became part of customary international law.

The factor of repetition is associated with the duration. In fact, these two factors are interrelated. When it is said that the duration is a factor contributing to the establishment of a practice, it is because in a period of time a certain action of States is repeatedly performed. Mere passage of time produces nothing. This passage of time can be productive when it is accompanied by consistent action of States. It is obvious that repetition occurs in the light of passage of time. Duration and repetition are relatively vague factors of State practice.[22] It is not quite clear how long a practice should be exercised or how frequent a practice should be. However, the factors of duration and repetition are not fundamental in the formation process of a State practice.[23] These factors would be supplementary but not determinant. In the *North Sea Continental Shelf*

---

19 Lauterpacht writes that "[a]ny tendency to exact a prolonged period for the crystallisation of custom must be proportionate to the degree and the intensity of the change that it purports, or is asserted, to effect. " - see H Lauterpacht, "Sovereignty Over Submarine Areas" 27 (1950) *BYIL* 393.

20 *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark, Federal Republic of Germany v The Netherlands*) 1969 ICJR 43.

21 In the *North Sea Continental Shelf Cases*, the ICJ clearly stated that Article 1-3 of the 1958 *Geneva Convention on the Continental Shelf* were considered as reflecting or crystallising rules of customary international law relative to the continental shelf - see 1969 ICJR 39 para. 63. These articles concern the legal definition of continental shelf, the nature of rights of the coastal State over the continental shelf and the legal status of the superjacent waters and the air space over those waters.

22 Akehurst writes that "the number of States participating [in the creation of a custom] is more important than the frequency or duration of the practice." M Akehurst "Custom as a Source of International Law", (1974-1975) 47 *BYIL* 1 at 53.

23 Wallace writes: "although a particular pattern of behaviour may be engaged in frequently, it does not follow that the conduct is being practised out of any legal obligation. Similarly, an activity engaged in, albeit infrequently, may be practised because of a legal compulsion to do so." - see R Wallace *International Law* (Sweet & Maxwell, London, 1986) 10.

*Cases*, the ICJ made it clear that "[t]he frequency, or even habitual character of the acts is not itself enough."[24]

Consistency is, however, an essential factor. Its importance was acknowledged by the ICJ in the *Asylum Case* .[25] As the Court argued:

> The facts ... 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 ... that it has is not possible to discern ... *any constant and uniform usage, accepted as law.*[26] (emphasis added).

The Court asserted that a custom would crystallise "in accordance with a constant and uniform usage practised by the States in question".[27] The ICJ concluded that there was no "constant and uniform usage"[28] regarding the right of a State granting political asylum to a national of a State territory to decide whether a crime is political or criminal. Accordingly, the Court rejected that such a discretion was conferred according to customary law.

In the *Fisheries Case*, the ICJ indicated that there has to be some degree of uniformity in observance of a particular rule by States before such a rule

---

24 1969 ICJR 44. .

25 This case related to the issue of political asylum sought by a Peruvian citizen from the Colombian Embassy in Peru. The case concerned the issue of political asylum as a regional custom in Latin America. The major question was whether Colombia could define the asylum of a Peruvian citizen, Haya de la Torre, in the Colombian Embassy in Peru as political asylum.

26 *Asylum Case* (*Colombia v Peru*) 1950 ICJR 266, 276-7.

27 *Ibid* 276-7. This view was reflective of the opinion of the PCIJ in the *Lotus Case* in which it required State practice to be "constant and uniform" with respect to an alleged customary rule. In the *Lotus Case*, the question was whether Turkey was entitled to institute proceedings against a French citizen. The case arose from a collision between a French commercial ship, *Lotus*, and a Turkish commercial ship, *Boz-Kourt*. In this incident, which occurred on the high seas, a number of Turkish citizens lost their lives. Lieutenant Demons was in charge of the French ship at the time of the accident. As a result of this incident, Turkey arrested the French officer when the French ship came to a Turkish port. See the *Lotus Case* (*France v Turkey*) 1927 PCIJR Ser. A, No.10.

28 Harris states that "[b]y 'usage' the court means a usage that is to be found in the practice of States." - see D Harris *Cases and Materials on International Law* (4 ed) (Sweet & Maxwell, London, 1991) 27. In comparison to a regional custom, Shaw maintains that for a global custom "a lower standard of proof would be held' with regard to consistency and uniformity of State practice. Shaw *supra* n. 18 at 65.

could be recognised as a customary rule.[29] In this case, the UK rejected drawing straight baselines longer than ten nautical miles which were used by Norway for enclosing a number of bays. The argument of the UK was based on an alleged customary rule preventing the application of straight lines longer than ten nautical miles for enclosing bays. The Court asserted that States did not behave in a manner to demonstrate that the alleged rule formed a customary rule. In the view of the Court, if the practice of States is to acquire the status of customary law, "such State practice must be common, consistent and concordant."[30]

As regards generality, a custom does not necessarily require to be recognised universally. This is clear from the expression *general practice* in the definition of custom embodied in Article 38(1)(b) of the Statute of the ICJ. Judge Read in his dissenting opinion in the *Fisheries Case* stated that "[c]ustomary international law is the generalisation of the practice of States."[31] In the *North Sea Continental Shelf Cases*, the ICJ's opinion illustrated that for the purpose of the formation of customary international law State practice should be "both extensive and virtually uniform".[32] The Court was dealing with the question of whether the provision of Article 6(1)[33] of the 1958 *Geneva Convention on the Continental Shelf* had gained the status of customary law. The question was raised by Denmark and the Netherlands particularly because the Federal Republic of Germany was not a party to that Convention. The Court did not accept that States have extensively and uniformly acted in a manner recognising the provision as part of customary international law. The Court stated:

> ... [A]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both *extensive and virtually uniform* in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[34] (emphasis added).

---

29 See *Fisheries Case* (*United Kingdom v. Norway*), 1951 ICJR 116, 131 and 138.

30 *Ibid* 50.

31 *Ibid* 191.

32 *Supra* n. 20.

33 This Article contains a provision on delimitation of continental shelf with regard to adjacent States (the equidistance principle).

34 *Supra* n. 20.

In *Nicaragua v United States* the ICJ made it clear that State practice is not deemed necessary to provide an absolute uniformity with respect to a particular rule as a requirement for the transition of such a rule into customary international law. The Court again emphasised the necessity of consistency and generality of State practice. It held:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[35]

One relevant question concerning State practice is what constitutes the evidence of such practice. In 1950 the ILC presented a list of references as reflective of State practice. This list, which is not intended to be a comprehensive one, includes "treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisers and the practice of international organisations."[36] Brownlie extends the range of instances in which the evidence of the State practice could be found. He states that the evidence of State practice can be found in policy statements, press releases, official manuals on legal questions, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the ILC, recitals in treaties and other international instruments, a pattern of treaties in the same form, and resolutions of the General Assembly of the United Nations relating to legal questions.[37]

---

35 *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v the United States of America)* 1986 ICJR 98.

36 See (1950) 2 *YILC* 368-72.

37 I Brownlie *Principles of Public International Law* (Clarendon Press, Oxford, 1990) 5. For further discussion on the value of resolutions of international organisations (particularly the United Nations) as evidence of customary international law see, for example Akehurst *supra* n. 22 at 5-7; H Caminos "Sources of the Law of the Sea" in René-Jean Dupuy and Daniel Vignes *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers, Dordrecht, 199) 34-36; G Guttal "Sources of International Law: Contemporary Trends", in R.S. Pathak and R.P. Dhokalia (eds) *International Law in Transition* (Martinus Nijhoff Publishers, Dordrecht, 1992) 190-199; and J Charney "Universal International Law", (1993) 87 *AJIL* 543-545. Also see dissenting opinion of Judge Tanaka in *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)* 1966 ICJR 291-292.

Judge Read in the *Fisheries Case* based his dissenting opinion on the formation of State practice in line with the facts of the case. In his view, mere claims of States are not adequate to create a customary rule but States should enforce such claims if they wish to change the nature of these claims to customary law. Judge Read contended:

> ... [State practice] cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time. The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the water in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.[38]

However, in the *Fisheries Jurisdiction Cases*, the majority of the ICJ judges stated that claims made to maritime areas by States can be a basis for the formation of customary rules.[39] In addition, a number of publicists argue that State practice, whether actions or omissions, would be established either by performing an action[40] or issuing a statement.[41] Brierly is of the view that actions or statements of individuals with official positions on any aspect of international law represent State practice. Brierly writes that "[a]ny such act or declaration (statement) may, as far as it goes, be some evidence that a custom, and therefore that a rule of international law, does or does not exist; but of course its value as evidence

---

38 *Supra* n. 21 at 116 and 191.

39 Ten judges stated their views in support of the effects of claims of States on creation of customary law. For their arguments see *the Fisheries Jurisdiction Cases* (*United Kingdom v Iceland; Federal Republic of Germany v. Iceland*) 1974 ICJR 3, 47, 56-58, 81-88, 119-20, 135 and 161.

40 Thirlway writes that State practice takes place in the context of "some specific dispute or potential dispute." - see H Thirlway *International Customary Law and its Codification* (A. W. Sijthoff, Leiden, 1972) 58.

41 In a number of cases, the ICJ relied on verbal statements of representatives of governments to international organisation, declarations of States, resolutions of international organisations and other documents to assess whether *opinio juris* exists with respect to certain rules or norms. See, for example, *Military and Paramilitary Activities in and against Nicaragua Case* (*Nicaragua v United States of America*) 1986 ICJR 98-108; *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), 1971 ICJR 31-32; and *Western Sahara* (Advisory Opinion), 1975 ICJR 30-37.

will be altogether determined by occasion and the circumstances."[42] Also, Akehurst writes "[S]tate practice consists not only of what states do, but also of what they say."[43]

***Psychological element of an international custom***

The psychological element derives from the definition of an international custom as appears in Article 38(1)(b) of the ICJ Statute. This element is associated with the requirement of acceptance of State practice *as law*. To consider a particular action as part of customary law, States should behave in a manner to show that the performance of such an action is legally obligatory.[44] The legal expression for the psychological element is *opinio juris sive necessitatis (opinio juris)*.[45] States may traditionally behave in a similar way which does not always derive from legal obligation. In fact, the psychological element of customary rules distinguishes an international custom from conduct which is respected out of courtesy or comity. States perform these actions because they desire to do so. However, States respect a well-established customary rule because they are legally bound to do so. For example, flying flags when ships passing each other is a matter of courtesy or comity and there is no legal obligation to do so. If such a behaviour finds a firm foundation in State practice and becomes a legal requirement in the view of States, this behaviour would achieve the power of customary rule.

*Opinio juris* is independent of State practice and it is established in a way different from the creation of State practice. Accordingly, even when State

---

42 H Waldock (ed) J Brierly *The Law of Nations: An Introduction to the International Law of Peace* (6 ed) (Oxford University Press, Oxford 1963) 4.

43 Akehurst *supra* n. 15 at 29. Baxter *supra* n. 7 at 300 gives more importance to statements made by States in finding their positions concerning legal issues. Baxter asserts that "[t]he actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts." For a different view see A D'Amato *The Concept of Custom in International Law* (Cornell University Press, Ithaca, 1971) 88.

44 Customary rules are not limited to what States must do but they may be the basis for what States must not do.

45 The term "*opinio juris*" was first used by Francois Geny in order to separate "legal custom from mere social usage." Shaw *supra* n. 18 at 63.

practice is general, extensive, uniform, consistent, and long-established, such a practice is not itself a source of customary law. This practice will become customary law when States have a strong conviction that it should be respected due to a legal obligation.

Positivists give more importance to *opinio juris* than to the material element in general, and duration and repetition in particular.[46] They argue that States are sovereign units. States do something because they want to. It appears that in the theory of positivism, generality and uniformity of State practice are essential in the formation of a customary rule. Nonetheless, in this theory special importance is given to *opinio juris* as indicative of the States' belief in the compulsory observation of a rule. It seems that this theory has been followed by the idea forming the foundations of what is called "an instant or immediate custom." To create such a custom, the existence of well-established *opinio juris* is sufficient.[47] This *opinio juris* itself justifies the legality of the emerging custom. For example, if there is a consensus among States to accept a particular rule as being legally binding in their relations, this particular rule would create an instant custom. In most cases the matter of instant custom is associated with novel phenomena in international law.

In contrast, some writers consider that the psychological element is not a requirement for the creation of customary rules.[48] Some authors also go further by stating that "*opinio juris* is impossible to prove."[49] It is due to

---

46 *Ibid.* Simma and Alston write that in the view of some writers "practice no longer has any constitutive role to play in the establishment of customary law; rather it serves a purely evidentiary function." B Simma and P Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1992) 12 *AYIL* 82 at 89.

47 In certain cases, States indicate their strong will in bringing about a change in existing rules in international law or creating new international rules. Such strong will of States then results in establishing new customary rules which are classifies as "instant customs." Clear instances of instant customs are the basic principles governing outer space. Newly-emerged principles of outer space were quickly developed to customary rules after the first artificial satellite, Sputnik 1, was launched by the Soviet Union on 4 October 1957. See, for example B Cheng "United Nations Resolutions on Outer Space: 'Instant' International Customary Law (1965) 5 *Indian Journal of International Law* 23.

48 Examples of writers asserting that there is no need for *opinio juris* in the formation of customary rules are Guggenheim and Williams - see Brownlie *supra* n. 37 at 7 fn 31.

49 Shaw *supra* n. 18 at 63.

the difficulty of such proof[50] that authors such as Kelsen write that the courts are the only competent authorities to assess whether a certain action satisfies the requirements for generation of a legal custom.[51] This indicates that if State practice is uncertain, any conflicts of opinion on the validity of a particular conduct as a legal custom would be resolved by a competent court.[52] As regards the means of finding *opinio juris*, Akehurst states that "the modern tendency is not to look for direct evidence of a state's psychological convictions, but to infer *opinio juris* indirectly from actual behaviour of states."[53]

There is no doubt that the belief of States on the obligatory character of a rule should be identified, whether by their express recognition or through the acquiescence of States in such an obligation. However, it is not always easy to prove that there is a subjective conviction of States concerning an alleged rule of customary law.

The necessity of *opinio juris* was first pointed out in the *Lotus Case*. In 1927, the PCIJ required the existence of a legal obligation behind State practice before such a practice could be considered as part of customary law.[54] The ICJ in the *North Continental Shelf Cases* laid down two pre-conditions in the adoption of a rule as a customary rule. These pre-

---

50 On the difficulty of proving the existence of an *opinio juris* see A D'Amato "The Concepts of Human Rights in International Law" (1982) 82 *Columbia Law Review* 1141.

51 Shaw *supra* n. 18 at 63. As regards the evaluation and application of a rule of customary international law in a national court see, for example, the *Trendtex Case* (1975) which was dealt with by the English High Court. For an analysis of this case see N Dunbar "The Myth of Customary International Law" 1983 *AYIL* 1, 5-18. Also see *The Paquete Habana*, 175 U.S. 677 (1900).

52 The ICJ, in some cases, has decided that an alleged rule as legal custom has not become part of customary international law. For example, in the *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark, Federal Republic of Germany v The Netherlands*) *supra* n. 20 at paras 71-81 the ICJ argued that the provisions of the 1958 *Geneva Convention on the Continental Shelf* regulating the delimitation of overlapping continental shelves had not gained the power of customary law. The Court concluded (at para 81) that "... the Geneva Convention [on the Continental Shelf] was not in its origin or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose ...".

53 Akehurst *supra* n. 15 at 29.

54 *Supra* n. 27.

conditions are the existence of a settled practice of States and the existence of a subjective conviction - that is, *opinio juris*. The Court stated:

> Not only must be acts concerned amount to settled practice, but they must also be such, or be carried out in such away, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for a such belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not itself enough. There are many international acts, *e.g.* in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by consideration of courtesy, convenience, or tradition, and not by any sense of legal duty.[55]

In *Nicaragua v United States* the ICJ maintained that an action of a State in conflict with an established rule should be considered as violation of the rule.[56] This implies that such a rule must be accepted as law in order to be regarded as part of customary law. In this case, the ICJ referred to its judgement in the 1969 *North Sea Continental Shelf Cases* in which the necessity of two elements of State practice and *opinio juris* was underlined.

## IV REGIONAL AND INTERNATIONAL CUSTOMS

As far as the range of the application of a custom is concerned, there are two major customs in international law. These are general or international customs, and regional or local customs.[57] The scope of the former is wider than the latter. These customs may differ in content. They may, however, co-exist. A regional custom may be supplementary or contradictory to an international custom. The only exception concerns *jus cogens* which is the

---

55 *Supra* n. 20.

56 *Supra* n. 35.

57 As far back as 1926, the American Institute of International Law prepared a draft convention entitled "*Fundamental Bases of International Law.*" Article 6 of this draft convention provided that "international principles, rules, customs, etc. are either *general* or *particular*. Those followed by all or nearly all nations of the world are *general*. The *particular* principles, rules or usages may be: (a) continental, (b) regional, (c) particular to a school, (d) special, (e) national, or (f) constitutes rules of civilisation." Dunbar *supra* n. 51 at 4.

fundamental and peremptory rule of international law, derogation from which is not accepted in any way. Accordingly, general and regional customs cannot be inconsistent with *jus cogens*. Transformation of a rule into a general custom or a regional custom similarly requires the existence of the same elements, namely material and psychological elements. Nevertheless, the degree of importance of factors contributing to the crystallisation of a custom may be different depending on whether it is a general or a regional custom.[58]

Examples of regional customs are the epi-continental sea concept of the two hundred nautical mile limit among the Latin American States prior to general recognition of the concept of the exclusive economic zone; and the twelve nautical mile limit for the breadth of the territorial sea among the Middle Eastern Countries before its extensive adoption.[59] Also, in the *Right of Passage over Indian Territory Case* the ICJ maintained that there was a local custom allowing Portuguese ships to exercise the right of passage.[60] The ICJ was convinced that there was adequate consistency and uniformity in the practice and declared that the "practice was accepted as law by the parties and has given rise to a right and a correlative obligation."[61]

In the *Case of Rights of Nationals of the United States of America in Morocco*, the ICJ dealt, among other things, with the question of a custom originating from bilateral relations. The Court, as was the case in the *Asylum Case*, held that there was no evidence of *opinio juris* with respect to the USA's contention of a right to exercise consular jurisdiction. The Court said:

---

58 In fact, the ICJ has taken a number of factors into account to determine whether a particular rule has acquired the power of customary law. As Meron (*supra* n. 10 at 109-110) writes "the degree of attention given by the Court [ICJ] to the analysis of the elements of customary law is affected by the nature of the claims, the circumstances of the disputes, the arguments advanced by the parties, and the norms implicated."

59 According to Greig, (*supra* n. 14 at 66) one of the ways to demonstrate whether a rule is applicable to a dispute between two States is where "the two States belong to a group of States, whether the group exists on a regional basis or some other community of interest, between which the rule applies."

60 The ICJ stated that there was "no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States." *Right of Passage over Indian Territory Case* (*Portugal v India*) 1960 ICJR 39.

61 *Ibid* 40.

> In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco.[62]

## V BURDEN OF PROOF CONCERNING AN INTERNATIONAL CUSTOM

A mere claim that a rule is part of customary international law is not sufficient to create any legal obligation. An alleged rule of customary law must be proved by the claimant State. This principle was recognised by the PCIJ in the *Lotus Case* when the Court dealt with a general custom.[63] It is not acceptable to claim a rule as part of customary international law without providing appropriate evidence. A mere allegation of customary nature with regard to a specific rule is not sufficient for its acceptance by the international community to accept such a rule as being supported by customary law. This duty of substantiation was pointed out by the ICJ in the *Asylum* case with reference to a regional or local custom. The Colombian Government relied on the Latin American States' custom in issue. The Court held:

> [t]he Party which relies on a custom of this kind (regional custom) must prove that this custom is established in such a manner that it has become binding on the other Party.[64]

In the *North Sea Continental Shelf Cases*, the ICJ accepted that the equidistant line was employed for the delimitation of continental shelves of adjacent States. It, however, held that no evidence was presented to prove that:

> ... they (adjacent States) so acted because they felt legally compelled to draw them (the equidistant lines) in this way by reason of a rule of customary law obliging them to do so - especially considering that they might have been motivated by other factors.[65]

In the *Lotus Case*, France referred to a number of cases in which the States concerned avoided instituting proceedings against nationals of other countries in the case of collision on the high seas. However, France could

---

62 *Rights of Nationals of the United States of America in Morocco Case (France v United States)* 1952 ICJR at 199-200.

63 *Supra* n. 27 at 18.

64 *Supra* n. 26 at 276.

65 *Supra* n. 20 at 44-5. See also *supra* n. 62 at 176 and 200.

not convince the PCIJ that these States refrained from exercising their jurisdiction due to a legal duty to do so.[66]

## VI THE IMPACT OF PROTEST ON AN EMERGING INTERNATIONAL CUSTOM

International law provides a mechanism to prevent application of a custom to States not wanting to be bound by such a custom. This is because international law is founded on the consent of States. As Brownlie points out the principle of "persistent objection" is "well recognised by international tribunals, and in the practice of states."[67] The only exception to the principle that a rule of international law derives its binding force from the consent of States is *jus cogens*.[68]

There are certain pivotal rules of international law that are imposed on all States as peremptory rules - that is, *jus cogens*. Compliance with these rules is obligatory for such essential purposes as the maintenance of peace, security, and the order of the world, and also for the respect of human rights.[69] The 1969 *Vienna Convention on the Law of Treaties* defines *jus cogens* as "a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted."[70] This definition implies that no source of international law is superior to *jus cogens* and stipulates that a peremptory norm "can be modified only by a subsequent norm of general international law having the same character".[71]

As regards bilateral or multilateral treaties, there is no difficulty in determining whether a State has attached its consent to such treaties.

---

66 *Supra* n. 27.

67 Brownlie *supra* n. 37 at 10.

68 See the comment by Judge Lachs *supra* n. 20 at 229.

69 The imperious nature of *jus cogens* is recognised by the 1969 *Vienna Convention on the Law of Treaties*. Article 64 of this Convention, with the heading "Emergence of a new peremptory norm of general international law (*jus cogens*)", reads that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

70 *Ibid* Article 53.

71 The ILC provided some examples governed by the rule of *jus cogens* . These are an unlawful use of force, genocide, slave trading, and piracy. See 1966 *YILC* Vol.II, 248. Among other examples of *jus cogens* are the sovereign equality of States, and the right of self-determination.

States demonstrate their consent to be parties to a treaty by the means of ratification, acceptance, approval, or accession. This process is necessary before provisions of such a treaty become binding on such a State. However, as regards a legal custom there is no need for the express consent of a State. Its tacit consent or acquiescence is sufficient. Objection to an evolving custom is the only way for a State to neutralise the effects of such a custom. However, such an objection should satisfy two major requirements before it can invalidate a rule of customary law.

The first requirement is that an objection to a customary rule must be made at the time of an emerging custom.[72] If a customary rule has been established and a State has not protested to this rule before its establishment, this State is not able to reject the customary rule. It is because absence of protest by such a State is considered as its tacit consent or acquiescence to the emerging rule. In international law, acquiescence to an emerging customary rule is regarded as acceptance of this rule. If a State acquiesces to an emerging custom, then this State is not in a position to dissent from such a custom.[73] The second requirement is that the protest must be continuous. Continued protest is necessary to avoid the impact of an emerging customary rule. If the dissenting State does not continue to express its protest, it is implied that such a State is willing to change its position in favour of the existing custom to which it previously dissented.

The above two requirements - that is, "initial and sustained objection" - were recognised by the ICJ in the 1951 *Fisheries Case*. In this case, the ICJ stated that even if it was accepted that the maximum limit of ten miles, with respect to the enclosure of the mouths of bays, had crystallised into customary law, it would be "inapplicable as against Norway insomuch as

---

72 After World War II, a number of States became independent. A question arising from the emergence of new States was whether they were bound by the existing international rules, including customary rules. Some writers stated that these States had to comply with such rules. However, it was arguable how it could be justified to impose all existing rules to the new States without their consent. This was why the new States attempted to bring changes to international law to meet their needs. An example of this is the new rules of the law of the sea ensuring the interests of the whole community of the world. On the issue of sovereign consent see, for example, D Kennedy "The sources of International Law", (1987) 2 *American University Journal of International Law and Policy* 1, particularly at 70-87 (The Case of Custom).

73 As regards the role of acquiescence in the process of the formation of a customary rule see, for example, I MacGibbon "Customary International Law and Acquiescence", (1957) 33 *BYIL* 115.

she *always opposed* any attempt to apply it to the Norwegian coast".[74] (emphasis added). As a result, a rule of customary law is inapplicable against a State if such State always opposes the application of such a rule.[75]

## VII CONCLUSION

Codification of a large number of law-making treaties in the past few decades has affected the important role customary law has played in the development of contemporary international law. However, treaties do not have the flexibility of customary law and their range of application is more limited than customary rules.[76] There is still a law vacuum in many areas of international law and the need for legal rules is a necessity. Customary law is able to provide some sources of laws in such cases. In addition, many rules of treaties have originated from customary law. These special characteristics of customary law indicate that until an international legislative mechanism comes into existence, customary law continues to play its essential role in the progressive development of international law. Even after the establishment of such mechanism, if any, customary law will continue to play its role as the supplementary source of international law.

---

74 *Supra* n. 29 at 131. See also *supra* n. 26 at 277-278, and the comments by Judge Lachs *supra* n. 20 at 229 and 232.

75 For more discussion of the effect of persistent objection on a customary rule see J Charney "The Persistent Objector Rule and the Development of Customary International Law" (1985) 56 *BYIL* 1.

76 As was pointed out by the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (*supra* n. 35 at 95) "even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence." The Court added that "customary international continues to exist and apply, separately from international treaty law, even where the categories of law have an identical content." *ibid* 96.