Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law

*Stephen Donaghue**

What is the difference between law and the gunman's order? This question, first posed by Hart in relation to Austinian positivism,[1] will be seen to have important implications for a proper understanding of the decision of the International Court of Justice in the *Nicaragua* case.[2] The decision in *Nicaragua* is perhaps the most controversial in the history of the International Court or its predecessor. Much of the controversy relates to what might be termed substantive issues, such as whether the Court should have assumed jurisdiction or whether, having done so, it accurately set out the international rules relating to issues such as the use of force and non-intervention. However, the most lastingly significant aspect of the case relates not to a specific area of substantive law, but to the Court's treatment of one of the *sources* of such substantive norms—customary international law. It is the Court's analysis in this area that is the focus of this paper, for it is an analysis which potentially impacts upon all areas of international law.

Most of the literature which examines the Court's reasoning as it relates to customary law is extremely critical. For example, commentators such as D'Amato have labelled the Court as "collectively naive"[3] about the nature of custom, and condemned the judgment as a "failure of legal scholarship".[4] It will be argued that these comments incorrectly assume that the Court was attempting a traditional exposition of the theory of customary law. Instead, once the reasons *why* a customary practice can create a binding rule of law are understood, it will be contended that far from being a "failure of legal scholarship" the decision in *Nicaragua* should be seen as an attempt to reconcile, albeit imperfectly, a number of competing discourses or rhetorics. The most notable of these were the internal contradictions in the theory of custom itself, and the divergent aspirations of the developed and developing worlds. The manner in which the Court dealt with one of these internal contradictions, which relates to the ability

* BA, LL B (Hons) (Melb). Articled clerk, Minter Ellison.

1 Hart HLA, *The Concept of Law* (1961), p 91.

2 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), ICJ Rep 1986, p 14. (Henceforth "*Nicaragua*").

3 D'Amato A, "Trashing Customary International Law" (1987) 81 *American Journal of International Law* 101 at 102. Ironically, D'Amato himself has been criticised in a similar manner. See Czaplinski W, "Sources of International Law in the Nicaragua Case" (1989) 38 *International and Comparative Law Quarterly* 151.

4 Ibid.

of customary law to evolve, is one of the great advances made by the case. On the other hand, the way the Court dealt with State practice is open to criticism. This paper will first examine the traditional theory of custom in order to help explain the approach taken by the Court to the determination of customary law. That approach will then itself be examined.

Why does customary practice create law?

The traditional starting point in dissertations on the nature of custom is Article 38 of the Statute of the International Court of Justice, which sets out the sources of international law to which the Court may have regard. Article 38(1)(b) refers to "international custom, as evidence of a general practice accepted as law".[5] This is in fact an inadequate starting point, as it fails to explain *why* such practice gives rise to a binding rule. To answer this question, we must look more fundamentally at the nature of law itself.

Modern lawyers tend to view law as a social phenomenon, not as something residing in abstract external notions such as natural law. When lawyers started viewing law as a social fact, they started to focus more closely upon the actual behaviour of social agents.[6] Their starting point was to assume that an understanding of human behaviour would arise if the observer looked closely enough at the behaviour, compared it with other forms of behaviour, and gradually reached an understanding of its meaning. Koskenniemi, a prominent writer in this field, refers to this approach as materialism.[7] The problem with materialism is that it cannot distinguish between legally relevant and irrelevant behaviour. Furthermore, in its effective equation of law and power, it denies law any normative or aspirational role. There would be no difference between law and the gunman's order.[8]

Koskenniemi argues that the distinction between the relevant and the irrelevant, and between law and power, can be achieved by introducing a psychological element into law. He argues that laws are effective because they have been internalised, and so are obeyed as a matter of course, not because of some external constraint.[9] However, the problem with the psychological element, as Koskenniemi recognises, is the difficulty inherent in determining a social actor's motives. In practice it is usually only possible to attempt to grasp what motive the act itself "externally" seems to suggest.[10] This of course assumes what was to be proved, that is, that we can determine what behaviour

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5 Note the growing tendency to include all non-treaty international law under this banner. Cheng B, "Custom: The Future of General State Practice in a Divided World" in MacDonald R and Johnston D (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (1983), p 513.

6 Koskenniemi M, "The Normative Force of Habit: International Custom and Social Theory" (1990) 1 *Finnish Yearbook of International Law* 77 at 79.

7 Ibid, at 80–81.

8 Ibid, at 83.

9 Ibid, at 84.

10 Ibid, at 85–86.

"means" in order to suggest psychological motives, which themselves were needed in order to give the act external meaning.[11]

Koskenniemi summarises this discussion as follows:

> The social conception of law is in a dilemma: it cannot construe the normative sense of past behaviour in a bilateral relationship on the parties' real, psychological intent because such intent can neither be known nor authoritatively opposed to the State's own deviating view thereof. But it cannot base it on a non-psychological principle, either, because such principle will immediately look like a natural (political) principle, based on non-verifiable and contested value preferences.[12]

It is important to realise that these difficulties arise primarily from attempts to prescribe a normative role for law. It is possible that a purely descriptive regime of international law could be developed. In such a case, State practice would itself be determinative of law, and the phrase "illegal act" would become meaningless. While few writers are willing to embrace this extreme,[13] it is apparent that those who place very great weight on State practice are at the same time restricting law's normative role.[14]

If, however, a normative role is to be given to law, and the importance of practice thus restricted, then the source of this normative content must be addressed. This leads inevitably to the debate between naturalism and positivism.[15] Basically, a naturalist sees law as separate from and critical of State behaviour. Legal norms emanate from some higher moral order.[16] Positivists view law as grounded in and fused with State behaviour, with norms identified out of State practice.[17] As indicated above, the international community largely accepts the positivist approach as the proper theory underlying the legal order. Both, however, have their problems.

According to Kennedy,[18] the position that views law as separate from and critical of State behaviour suffers from the "problem of normative source". Conversely, the position that sees law as grounded in and fused with State

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11 Ibid, at 86–87. He also notes the additional difficulty that, given the discovery of the unconscious, an actor's actual psychological understanding of meaning may itself be incorrect.

12 Ibid, at 143.

13 Prosper Weil approaches this position. See Weil P, "Towards a Relative Normativity in International Law" (1983) 77 *American Journal of International Law* 413.

14 D'Amato A, "Trashing Customary International Law", n 3 above, p 101; Charney JI, "International Agreements and the Development of Customary International Law" (1986) 61 *Washington Law Review* 971 at 992; D'Amato A, *International Law: Process and Prospect* (1987), pp 145–46.

15 Indeed Koskenniemi resorted to a form of naturalism to break the cycle he had developed. Note 6 above, p 143.

16 Editorial Note, "Applying the Critical Jurisprudence of International Law to the Case Concerning Military and Paramilitary Activities in and Against Nicaragua" (1985) 71 *Virginia Law Review* 1183 at 1187–90.

17 Ibid, at 1190.

18 Kennedy D, "Theses about International Law Discourse" (1980) 23 *German Year Book of International Law* 353 at 383.

behaviour suffers from the "problem of normative legitimacy". Both these problems have been previously averted to, but Kennedy takes the discussion a step further by characterising it as a manifestation of the debate concerning whether international law is consensually or non-consensually based.[19]

He notes that a consensual rhetoric could differentiate and prioritise norms, but in choosing between norms must choose between the claims of two sovereigns about their autonomous consent. An extra-consensual rhetoric, on the other hand, has difficulty avoiding a more substantive choice among various systemically grounded norms. He argues, therefore, that the rhetorics must be combined.[20] This requires a complex process of repeated re-differentiation of various doctrines as either "hard" or "soft",[21] which eventually allows some synthesis or blending of inconsistent doctrines to be achieved. As an illustration of this process, he states:

> Sources discourse, so long as it seems hard, guarantees that the legal order will not derogate from—indeed will express—sovereign authority and autonomy. So long as it seems soft, sources rhetoric guarantees that the international legal order will not be subject to sovereign whim. So long as hard sources rhetoric remains different to soft rhetoric and is able to coexist with soft rhetoric, the international legal order can seem to express and transcend sovereign power.[22]

While clearly the complex debates which have been briefly canvassed above cannot be resolved here, what should emerge from this discussion is that the requirements of practice and *opinio juris* in Article 38 are in no sense random. Practice is vital given the prevailing positivistic view of law as a product of social behaviour. The psychological *opinio juris* requirement is necessary in order to help determine which behaviour is relevant, and to give behaviour meaning. It is further necessary as a limitation upon a pure "State practice as law" theory, if international law is to play any normative role.

It is apparent, therefore, even at this stage, that much of the debate about custom is misconceived. Arguments that practice,[23] or *opinio juris*,[24] should be discarded as requirements of custom, or that the two form part of a sliding scale,[25] are clearly incorrect as they fail to recognise the purpose of the

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19 Kennedy D, "The Sources of International Law" (1987) 2 *American University Journal of International Law and Policy* 87.

20 Ibid, at 88.

21 Ibid, at 88–89. Kennedy uses the term "hard" to refer to sources based on the consent of sovereign nations. "Soft" sources are those based on a general consensus of the just. (Note naturalistic overtones). See Landauer C, "International Legal Structures" (1989) 30 *Harvard International Law Journal* 287 at 288.

22 Kennedy, n 19 above, p 89. As an illustration in the human rights sphere see Simpson G, "False Harmonies and Tragic Ironies: Human Rights in the New World Order" (1991) *International Legal Section Journal* 5 at 7.

23 Cheng, n 5 above, p 531.

24 Most publicists accept that some *opinio juris* requirement should be retained, but often in a very watered down form. For example, Akehurst M, "Custom as a Source on International Law" (1974–75) 47 *British Year Book of International Law* 1 at 50.

25 Kirgis FL, "Custom on a Sliding Scale" (1987) 81 *American Journal of International Law* 146 at 149. However, it may be that this paper is intended to be descriptive of the International Court's approach, rather than an attempt to develop an underlying theory in itself.

inclusion of these elements in Article 38. Proposals of this sort are usually advanced in an attempt to overcome an anomaly of some sort in the traditional theory of custom. It is therefore instructive to examine the traditional theory, so that the developments in *Nicaragua* can be isolated and a judgment made about the extent to which these developments resolve the anomalies.

The first point which should be noted is that Article 38(1)(b) is extremely badly drafted. Instead of referring to "international custom, as evidence of a general practice accepted as law", it probably should read "international practice, as evidence of a custom accepted as law".[26] One possible explanation of this deficiency is that the Statute of the Court was drafted in a period where custom was viewed less as a means of creating norms than of discovering them, or serving as evidence of pre-existing norms (a natural law doctrine).[27] Ultimately, however, the exact wording is probably of little importance, for the traditional analysis has focused upon the nature of practice and *opinio juris* as distinct components capable of being studied separately. For convenience, this is the procedure which will now be adopted.

What is State practice?

It should be apparent from the analysis above that State practice is important, given that law is viewed as arising from the interaction of social agents. The focus of traditional theory has therefore been upon matters such as what type of acts should be attributed to a State, how much practice is required to create law, and how much consistency of practice is required.

Evidence of State practice is available from a very wide range of sources, including diplomatic correspondence, municipal laws and court decisions, treaties, negotiations, international decisions, and the practice of international organisations.[28] The main debate in this area has for some time focused upon whether mere words can amount to practice. The view is taken by a number of publicists that practice should be limited to the actual conduct of States in real situations.[29] The argument is that what States do in concrete situations is a much more reliable indicator of the way States actually behave than statements *in abstracto* in, for example, international institutions. It has also been argued that "a claim is not an act...Claims, although they may articulate a legal norm, cannot constitute the material component of custom".[30]

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26 Trimble PR, "A Revisionist View of Customary International Law" (1986) 33 *UCLA Law Review* 665 at 709.

27 Kunz JL, "The Nature of Customary International Law" (1952) 47 *American Journal of International Law* 662 at 664.

28 Ibid, at 667–68; Brownlie I, *Principles of Public International Law*, 4th ed (1990), p 5.

29 Franck TM, "Some Observations on the ICJ's Procedural and Substantive Innovations" (1987) 81 *American Journal of International Law* 116 at 119; Charney, n 14 above, p 993; Watson JS, "A Realistic Jurisprudence of International Law" (1980) 30 *Year Book of World Affairs* 265; Thirlway HWA, *International Customary Law and Codification* (1972), p 58.

30 D'Amato A, *The Concept of Custom in International Law* (1971), p 88.

It is suggested that this approach is overly narrow. As Akehurst has pointed out:

> Physical acts do not necessarily produce a more consistent picture than claims or other statements do...Moreover, it is artificial to try to distinguish between what a State does and what it says. When one State recognises another, it often merely says that it recognises the other State, without performing any physical act...[31]

He therefore takes a wider and preferable view of State practice, arguing that it covers any act or statement made by a State from which its views about international law may be inferred.[32]

Furthermore, the objection that words cannot amount to practice as they are often politically motivated is spurious. As Asamoah has pointed out,[33] it is idle to see law in isolation from political developments. "The development of law by whatever process is politically motivated. Customary international law develops from the practice of States which is politically motivated."[34]

The issue of the amount of practice required under traditional theory seems to have been settled in the *North Sea Continental Shelf* cases.[35] There, the International Court envisaged the possibility that very widespread and representative participation in a convention could of itself create customary international law, even without the passage of a considerable period of time, and without the need for repetition or subsequent practice. This is in accord with Akehurst's position, as he suggests that the number of States taking part in a practice is far more important than the number of separate acts which occur, or the period of time over which they are spread.[36]

It is also worth noting that the amount of practice required may depend upon the nature of the rule being considered. As Akehurst and D'Amato have realised, one can never prove a rule of customary law in an absolute manner but only in a relative manner—one can only prove that the majority of evidence *available* supports a given rule. The State which can cite the greater number of precedents has the *prima facie* stronger case.[37] Similarly, a greater quantity of practice is probably necessary to overturn an existing rule than is necessary to create a new rule where there was none before.[38]

In terms of consistency of practice, the *Right of Passage* case[39] seems to establish that a constant and uniform practice gives rise to a rule of customary law. Small amounts of inconsistency are permissible, for the practice need only be virtually uniform, not absolutely uniform.[40] It should be noted in this context that Article 38 speaks only of a "general", not a "universal" practice.

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31 Akehurst, n 24 above, p 3.
32 Ibid, at 10.
33 Asamoah OY, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966), p 10.
34 Ibid.
35 ICJ Rep 1969, p 3 at 42–43.
36 Akehurst, n 24 above, p 14.
37 Akehurst, n 24 above, p 13; D'Amato, n 30 above, pp 91–98.
38 Akehurst, n 24 above, p 19.
39 ICJ Rep 1960, p 6 at 40.
40 *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3 at 43; Brownlie, n 28 above, p 6.

A number of the elements of the traditional theory of practice outlined above are altered in *Nicaragua*. These developments will be considered further below.

What is *opinio juris sive necessitatis*?

The traditional approach to the *opinio juris* requirement was well summarised in the *North Sea Continental Shelf* cases, where it was said that the acts in question:

> must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it...The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[41]

The *opinio juris* requirement therefore reflects the internalisation discussed by Koskenniemi as the necessary psychological element to help distinguish legally relevant from irrelevant behaviour. The problem with this traditional formulation should, however, be immediately apparent, for if taken literally it seems to exclude the possibility of changing the law.[42] Only if a large number of States had simultaneously acted under a collective "initial mistake" as to the law would it ever be changed.[43] Furthermore, there is the problem pointed out by D'Amato that:

> [i]f 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 the creative element?[44]

The traditional responses to these problems are inadequate, as they generally fail to pay due regard to the purpose of the *opinio juris* requirement. For example one method, which was proposed by D'Amato,[45] by which the law may evolve is that a State which wishes to change the law may simply deliberately breach it. If other States follow this example and fail to object to the initial breach, the law is changed and in fact no breach ever occurred. Akehurst is of the view that this approach undermines the rule of law,[46] and he therefore suggests that the problem be solved by widening *opinio juris* so that a genuine belief in a binding rule is no longer required. A statement by a State about the content of customary law would therefore be taken as *opinio juris* even if the State did not itself believe in the truth of the statement. The law would then be changed if other States agreed.[47]

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41 *North Sea Continental Shelf* cases, n 40 above, at 44.
42 Trimble, n 26 above, p 710.
43 Ibid; Akehurst, n 24 above, p 32; Kunz, n 27 above, p 667.
44 D'Amato, n 30 above, pp 191–92.
45 "The Theory of Customary International Law: A Seminar" (1988) 82 *Proceedings of the American Society of International Law* 242 at 255–56; Also see Trimble, n 26 above, p 711; Cf Christenson GA, "The World Court and *Jus Cogens*" (1987) 81 *American Journal of International Law* 93 at 96.
46 Akehurst, n 24 above, p 8.
47 Ibid, at 37.

Both these positions can be criticised as reducing the requirement of *opinio juris* into a notional one.[48] The *opinio juris* requirement serves a purpose which is dependent upon the actual psychology of the social actor, for it is their internalised beliefs which allow relevant behaviour to be distinguished from the irrelevant, and some distinction between law and power to be maintained. Yet the initiators of change in both D'Amato and Akehurst's models have no such belief, and so cannot properly be held to have *opinio juris*.[49]

How then should the problem be solved? Some writers have suggested that *opinio juris* should be defined as a belief that conduct is required by some extra-legal norm, and that coupled with practice such a belief creates customary law.[50] This argument was, however, put to the International Court in the *South West Africa* case,[51] where it was unambiguously rejected.

It is submitted that the best approach to resolving the apparent inflexibility of traditional customary law is to recognise the development of a new category of declarative or "soft" law. As Agrawala has noted, such a rule:

> *may constitute the first phase—comparable to the formulation of opinio juris—in the creation of a new rule of customary law, the second phase of which is the "affirmation", so to speak, of the rule in the form of corresponding state practice.*[52]

Chodosh[53] has undertaken a very useful exposition of declarative law, which begins with the distinction between the Latin concepts of *ius* and *lex*. Roughly speaking, the distinction is that between law that is both declared and enforced (*ius*) and law that is declared regardless of whether it is enforced (*lex*).[54] Chodosh then goes on to distinguish declarative and customary law. He states:

> Declarative law meets only one of the two elements of customary law. It is either (1) accepted by only a minority of states (declarative *ius*) or (2) declared to be law even by a majority, yet still not accepted in fact (declarative *lex*).[55]

Many publicists would refer to declarative *ius* as special or regional customary law.[56] Declarative *lex*, on the other hand, seems to provide a possible

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48 Charlesworth H, "Customary International Law and the Nicaragua Case" (1991) 11 *Australian Year Book of International Law* 1 at 12.

49 The work of a number of other publicists has similar problems. See for example Cheng, n 5 above, pp 530–37.

50 Kelsen H, *General Theory of Law and State* (1945), p 144.

51 ICJ Rep 1966, p 3 at 34.

52 Agrawala SK, "The Role of General Assembly Resolutions as Trend-Setters of State Practice" (1981) 21 *Indian Journal of International Law* 513 at 518, quoting Verway WD, "The New International Economic Order and the Realization of the Right to Development and Welfare—A Legal Survey" (1981) 21 *Indian Journal of International Law* 1 at 25.

53 Chodosh HE, "Neither Treaty nor Custom: The Emergence of Declarative International Law" (1991) 26 *Texas International Law Journal* 87.

54 Ibid, at 93. This distinction is common to Chinese, Russian, Czech, German, French and Spanish systems of law.

55 Ibid, at 96.

56 For example D'Amato A, "The Concept of Special Custom in International Law" (1969) 63 *American Journal of International Law* 211. The possibility of special or regional custom was implicitly reaffirmed in *Nicaragua*, n 2 above, p 105.

mechanism for allowing customary law to develop. This is because these are rules declared as laws by the majority of States, but not actually *enforced* by them.[57] However, even in the absence of likely enforcement a State could believe, quite correctly, that it was bound by a soft law rule, thereby satisfying the psychological *opinio juris* requirement of a genuine belief. The rule has been declared as a rule of law, and States are no less obliged to follow it from a legal perspective just because no enforcement will occur.

It should be apparent that the ideal forum for the creation of declarative *lex* is the General Assembly of the United Nations. In one step, it would allow *opinio juris*, and therefore customary law, to change. It also provides some normative content to law which arises not from natural law, but from the aspirational declarations of the States themselves. On this analysis, therefore, the General Assembly has an important role to play in providing soft law, which in turn allows for the existence of the requisite *opinio juris* to allow "hard" customary law to develop. In this light, the approach of the *Nicaragua* Court to *opinio juris* assumes special importance. This will be considered again in the final section of this paper.

Background developments

Before moving to a consideration of the *Nicaragua* case itself, another more general development in the international community should be noted. This development is the emergence of a conflict between the developed and developing worlds, often categorised as the North/South conflict. An important part of this clash is the emergence of a movement challenging the "old" classical international law. The principle reason for this challenge is that "old" international law is viewed, rightly or wrongly, as an instrument for preserving a world political and economic order in whose creation the developing world did not participate, and which was designed to preserve the interests of those who created it, *ie* today's post-industrial societies.[58]

As McWhinney said:

> The normative quality...of the old international law rules is increasingly subject to the test of reason: those rules are to be critically re-examined in the context of the historically limited space-time dimension of their origins and then tested in terms of their claims, such as they may be, to continuing relevance and reasonableness in the larger world community of our time.[59]

This process was begun in the *Western Sahara* case,[60] particularly by Judge Ammoun. It took an interesting twist in *Nicaragua*, where, on one reading, not just the content of rules, but also their very source was reviewed. This would be a revolutionary change, and as such has elicited some concern among a number of publicists.[61]

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57 Chodosh, n 53 above, p 89.
58 McWhinney E, *United Nations Law Making* (1984), pp 22–23.
59 Ibid, at 37–38.
60 ICJ Rep 1975, p 12.
61 For example Chinkin C, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 *International and Comparative Law Quarterly* 850

The fear of these publicists is that new sources of law (most particularly General Assembly resolutions) will be developed, but that these sources will be able to be dominated by the developing world. A particular manifestation of the North/South conflict which is hence particularly pertinent to the *Nicaragua* case is the vexed question of the appropriate role of the General Assembly. It is clear that, in some contexts at least, the developing world (viewed collectively) thinks that the General Assembly should have some law-making power.[62] It is equally clear that the developed world opposes this view, although it is interesting to note the change in attitude since the developed world lost its majority.[63]

If the intent of the Charter's framers was to be decisive and strictly construed, it would be impossible to attribute binding legal force to General Assembly resolutions.[64] However, such intent has not been viewed as determinative, and there exists a huge diversity of views on the effect of such resolutions.[65] To summarise these views, the main arguments against resolutions making law are that they are able to be made too quickly, without time for proper consultation and by officials who are too junior to be allowed to create binding obligations. They are also often highly politicised decisions taken in the knowledge that they are not binding, and many resolutions are aspirational in character.

The main benefits of giving resolutions law-making force are that the General Assembly provides a global sounding board that can greatly facilitate the development and communication of new norms, with all States participating simultaneously—it is an inclusive arena. Furthermore, the Assembly is the closest thing to a democratic institution in international law, and it seems proper for the wishes of the majority[66] to carry some weight in law. Finally, there seems to be scant grounds for denying that State practice includes the collective

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at 858; Garibaldi OM, "The Legal Status of General Assembly Resolutions: Some Conceptual Observations" (1979) 73 *Proceedings of the American Society of International Law* 324 at 325.

62 See for example the claims of the Group of 77 at the 1978 7th Session of the UN Third Conference on the Law of the Sea, discussed in Schwebel SM, "The Effect of Resolutions of the General Assembly on Customary International Law" (1979) 73 *Proceedings of the American Society of International Law* 301 at 307.

63 McWhinney, n 58 above, pp 214–15. Indeed, decreasing Western support for the institutions it used to promote as the developing world's influence grows is a discernible trend. Note, for example, the United States attacks on the nationality of certain members of the ICJ bench in *Nicaragua*, the continuance of such attacks by Judge Schwebel in that case, and the response of Judge Elias in his separate opinion.

64 See 9 UNCIO Docs 70 (1945); Falk RA, "On the Quasi-Legislative Competence of the General Assembly" (1966) 60 *American Journal of International Law* 782 at 783.

65 Joyner CC, "UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation" (1981) 11 *California Western International Law Journal* 445; Morrison FL, "Legal Issues in the Nicaragua opinion" (1987) 81 *American Journal of International Law* 160; Asamoah, n 33 above, pp 7, 46, 54; Charney, n 14 above, p 971.

66 In this context reference is made to the majority of States, not of people.

practice of States, so at the least these resolutions should contribute to customary law as evidence of such practice.[67]

It is against the background of everything previously discussed, of the basis of customary law in legal theory, the traditional view of custom, and the emerging North/South conflict, that the decision of the International Court of Justice in the *Nicaragua* case should now be examined.

The Nicaragua case

Nicaragua brought an action against the United States claiming substantial damages flowing from United States involvement in aiding a guerilla/revolutionary movement within Nicaragua, and from operations carried out directly by United States' agents against Nicaragua. The Court found against the United States in 1984 on jurisdictional issues, and following that finding the United States refused to take any further part in the case. The Court did not therefore have the benefit of hearing argument on behalf of the United States during the Merits stage.

The primary substantive issues in the case concerned rules relating to the use of force and self defence, areas covered by the United Nations Charter (Articles 2(4) and 51). However, the Court found that a reservation in the United States' acceptance of the compulsory jurisdiction of the Court (the Vandenberg Reservation) operated to prevent the Court from applying the provisions of the Charter.[68] It was therefore obliged to consider what customary law rules existed in these areas.

The case was decided against the background of a Court showing a growing awareness of General Assembly resolutions 171(II) of 14 November 1947 and 3232(XXIX) of 12 November 1974, the former calling on the Court to apply the resolutions of the Assembly in its judgments and the latter to attempt as far as possible to espouse principles of the progressive development of international law.[69] An activist role was being encouraged. The Court may also have been exhibiting a discernible trend away from the traditional requirements of custom.[70]

Legal rulings in Nicaragua

The Court began with the general, and fairly uncontroversial, finding that customary and treaty norms may co-exist, even if the content of such norms is identical.[71] This freed the Court to address the substantive issues, despite the Vandenberg reservation. The Court then purported to apply the traditional

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67 Higgins R, *The Development of International Law Through the Political Organs of the United Nations* (1963), pp 2–4; Agrawala, n 52 above, p 517.

68 *Nicaragua*, n 2 above, p 38 (para 56).

69 Sathirathai S, "An Understanding of the Relationship between International Legal Discourse and Third World Countries" (1984) 25 *Harvard International Law Journal* 395.

70 *Continental Shelf (Malta v Libyan Arab Jamahiriya)*, ICJ Rep 1985, p 13 at 29–30; *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, ICJ Rep 1982, p 3 at 38, 48–49; See Charney, n 14 above, pp 971–72.

71 *Nicaragua*, n 2 above, p 96 (para 179).

theory, by stating: "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".[72] The content of these two traditional terms had, however, been changed.

With regard to State practice, the Court claimed still to require "established and substantial practice"[73] in order to create a rule. It was, however, prepared to hold that a rule could be formed despite the fact that violations of it were "not infrequent".[74] It stated:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. 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 the rule, not as indications of the recognition of a new rule.[75]

The Court clearly accepted that words could amount to practice. Indeed it appears that the Court has decided to treat words as more significant than the physical actions of a State, for where the two are inconsistent, words will be considered to be more significant than actions in determining the content of customary law. This emerges most clearly from a passage where the Court states that:

> 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 to weaken the rule.[76]

With respect to the breadth of practice required, at one point the Court acknowledges that the mere fact that the States before the Court declare their recognition of certain rules does not free it from itself having to ascertain the nature of the applicable customary rules by having regard to "the essential role played by general practice".[77] However, despite this passage, much of the Court's judgment focuses specifically upon the attitudes of the United States and Nicaragua,[78] with the Court often inquiring as to whether or not these States subscribed to the resolutions which it considers to reflect customary law. Except in the case of specific regional customs or in circumstances where a State claims to be a persistent objector,[79] the attitude of the States before the Court to an

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72 Ibid, at 97 (para 183).
73 Ibid, at 106 (para 202).
74 Ibid.
75 Ibid, at 98 (para 186).
76 Ibid.
77 Ibid, at 98 (para 186).
78 For example ibid, at 107 (para 203).
79 Neither of which were particularly relevant in this case. The Court did consider the possibility of an American regional custom, but this still logically required the consideration of the conduct of a much wider group of States than just the United States and Nicaragua.

alleged rule of customary law should be no more important than the attitude of any other State. However, the Court did not adopt this view, instead reaching the remarkable conclusion that:

> The Court 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 Parties unconnected with the dispute; nor has it authority to ascribe to States legal views they do not themselves advance.[80]

Finally, when considering the *opinio juris* requirement, the Court held that:

> *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions...The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[81]

Analysis of the Nicaragua reasoning

It is the contention of this paper that the above findings flow not from a misunderstanding of the traditional theory of custom, but from an attempt to reconcile the various anomalies in traditional theory, and the pressures upon the Court in relation to its own role and that of the General Assembly. Two aspects of the case invite further consideration. They are, first, the implications of the Court's partial adoption of the developing world's position on General Assembly resolutions, and secondly, the effect of the case upon traditional theory.

1. The role of resolutions

In its treatment of the contribution of resolutions to the formation of custom, the Court in *Nicaragua* goes considerably further than most jurists, by suggesting that voting for a resolution can, without more, provide both the State practice and *opinio juris* necessary for the formation of custom.[82] This, combined with a watering down of the generality of practice mentioned above, has the potential to create something bordering on majority rule. This is problematic, for as Zemanek discusses, the world community does not meet the social conditions necessary for successful majority rule.[83]

More problematic, however, is the effect the decision will have upon custom's enforcement mechanism, for custom is traditionally self-enforcing. As Reisman has noted,[84] there is now a division between those with formal law-making power and those with effective power. A formal authority lacking

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80 *Nicaragua*, n 2 above, p 109 (para 207).

81 Ibid, at 99–100 (para 188). This is doubted by Judge Ago in his separate opinion. Ibid, at 184.

82 Charlesworth, n 48 above, p 24.

83 Zemanek K, "Majority Rule and Consensus Technique in Law-Making Diplomacy" in MacDonald and Johnston, n 5 above, p 857 at 857 and 867–71.

84 Reisman WM, "The Cult of Custom in the Late 20th Century" (1987) 17 *California Western International Law Journal* 133 at 137.

effective power produces only "semantic legislation"; that is, law which is disregarded by the numerical minority of effectively powerful States, who characterise it as irresponsible.[85] The magnitude of the division in the General Assembly between formal power (which resides in the developing world) and effective power (which is largely held by the United States, and to a lesser extent by the other members of the permanent five) is now undeniable. It is brought home by the fact that it is now possible to achieve a two-thirds majority in the General Assembly by Member States representing in toto little more than 10 per cent of the world population, 4 per cent of the world's gross national product, and 3.5 per cent of UN budget contributions.[86] Consensus procedures have thus been forced to develop, as a way of re-configuring the processes of formal and effective power.[87] However, the aspirations of these groups are often so divergent that no meaningful consensus is possible.[88]

This presents a problem for customary law, which is traditionally obeyed due to the principles of reciprocity and enlightened self-interest.[89] If a resolution can create customary law against the wishes of the effectively powerful, it will experience sever problems with compliance. As Watson has noted

> This is the reason for the heavy reliance on consent in the traditional theory. It springs...from a realisation that since nation-States as a matter of fact are the primary wielders of power in the world, their co-operation is essential for the success of the limited normative role of international law.[90]

Thus, while it is apparent that the International Court may have been attempting to resolve part of the North/South conflict by transferring additional power to the developing world, all this process is likely to achieve is an undermining of law's normative role, for compliance is unlikely. While the Court seemingly adopted only what has been described as the developing world's "weak" claim concerning the effect of resolutions (that they are evidence of custom), in fact, given the changes to the definition of custom, it really equates to a "strong" claim (that resolutions can create law).[91]

It is, however, important to note that the Court has not suggested that *all* resolutions can have this effect, but instead that "certain" resolutions may be used in this way. The resolution relied upon most heavily by the Court in *Nicaragua* (resolution 2625(XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operations among

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85 Ibid, at 136–37.

86 Cheng, n 5 above, p 520. These are pre–1986 figures, and so do not take account of the recent burst of United Nations admissions. It has proved impossible to obtain more recent figures. It is however likely that the division between formal and effective power has become even more pronounced in recent years, given that most recent admissions to the United Nations have been relatively small and poor States.

87 Reisman, n 84 above, p 38; Zemanek, n 83 above, p 857.

88 Ibid.

89 Simpson, n 22 above, p 8; Asamoah, n 33 above, p 9; Watson, n 29 above, p 275.

90 Watson, n 29 above, p 274.

91 Garibaldi, n 61 above, p 325.

States in accordance with the Charter of the United Nations"), was adopted unanimously and is phrased in mandatory terms. If the reasoning in *Nicaragua* remains confined to resolutions of this type, then no potential for majority rule arises and problems with compliance are likely to be minimised, as consensus procedures would need to be utilised to ensure unanimity in the passage of the resolution. If this is the limit of the *Nicaragua* reasoning, there has in fact been no significant increase in the developing world's legal power.

2. *The impact of Nicaragua on traditional theory*

From the perspective of traditional theory there are positive and negative aspects to the Court's decision. Its main contribution is that the important role that resolutions (declarative law) can play in the formulation of *opinio juris* is recognised. This allows for one of the major anomalies of traditional theory to be overcome, in that changes in the law can now be achieved while retaining the meaningful psychological component of custom which is vital in distinguishing legally relevant from irrelevant behaviour. The Court expressly reaffirmed the importance of this psychological component, stating that to demonstrate *opinio juris* conduct must:

> evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. (I.C.J. Reports 1969, p. 44, para. 77.)[92]

The Court's retention of both *opinio juris* and State practice as necessary components of custom conforms well to the theoretical justification for ascribing custom normative force. Furthermore, aspirational General Assembly resolutions go some way towards solving the problem of normative source discussed earlier in this paper. Use of General Assembly resolutions in this way also demonstrates the repeated re-differentiation between consensual and extra-consensual processes which is necessary if pure positivism is to be restricted, and international law is to be allowed some normative role.

However, perhaps because of a desire to extend customary law's normative role, the Court's treatment of State practice is seriously flawed. This is so particularly in relation to its treatment of contrary State practice. As Charlesworth notes:

> 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 process. Given the unlikelihood of a state's acknowledgment that its actions violate...international law...the pool of actions which could constitute state practice becomes totally undifferentiated.[93]

The Court's focus on justifications results in it being forced to treat a State's words as *more* significant examples of State practice than its physical actions.

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92 *Nicaragua*, n 2 above, p 109 (para 207).
93 Charlesworth, n 48 above, p 22.

This is a position which is very difficult to justify.[94] It must be borne in mind that customary law is a social phenomenon which arises from behaviour, and so the behaviour must be accorded adequate attention. While there is some logic in treating an attempted justification for a breach as a recognition of the existing rule, there must be a point at which the rule itself becomes threatened by continuing breaches. The Court's reasoning effectively denies this by requiring a State to acknowledge its violation of customary law before the violation can be considered as evidence which threatens the rule's existence. As such an acknowledgment will very rarely occur, there is a danger of creating an international legal regime which bears very little relation to the way States actually interact, and so has its ability to credibly define the acceptable boundaries of State action seriously undermined.

The next major difficulty with the Court's treatment of contrary State practice is its spurious invocation of absence of jurisdiction.[95] As was discussed earlier, customary law results from a widespread and representative group of States acting consistently in a given way due to a belief that such conduct is legally required. Consequently, the International Court of Justice must be able to look at the behaviour of all the States in the world community if it is to be able to properly identify customary rules. Jurisdiction is only necessary in order to make the decision of the Court binding upon the parties.[96] There is nothing to prevent the Court looking at the conduct of States not before it, for any conclusion reached with respect to those States' conduct would contribute only to the determination of the existence of a customary rule. It would not be an authoritative or binding statement that the rule had been breached (even though this may be implied).[97] The Court, by claiming that it cannot ascribe to States' legal views that they do not themselves advance or rule upon the conformity of their conduct with international law, has *denied itself the ability to look to the very source material of customary law.* It has effectively confined itself to focusing upon the conduct of the two States before it and the justifications that other States have advanced for acting in a particular way. This gives at best a very partial picture of the way States actually interact.

This approach makes the pool of evidence to which the Court may look so small that it will inevitably have difficulty judging whether the conduct of a State should be seen to threaten the existence of a rule or instead to breach it. In *Nicaragua,* it allowed the Court to exclude much evidence which was inconsistent with the customary principle of non-intervention. This in turn led the Court to conclude that a breach had occurred, when in fact it was highly arguable that State practice on a worldwide basis was so inconsistent as to make

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94 Ibid, at 19, 29.

95 Ibid, at 20.

96 Statute of the International Court of Justice, Article 59.

97 That it is permissible for the Court to imply that States not before it have breached international law arises as a necessary result of the very limited scope given by the Court to the doctrine of indispensable third parties. See *Certain Phosphate Lands in Nauru*, ICJ Rep 1992, p 240; *Monetary Gold Removed From Rome* in 1943, ICJ Rep 1954, p 19.

the existence and content of the norm on non-intervention highly questionable. This error was compounded by the fact that the Court adopted the technique of endeavouring to prove the existence of a rule of custom by disproving its opposite.[98] Having satisfied itself that a norm *permitting* intervention did not exist, the Court immediately concluded that customary law *prohibited* intervention.[99] This technique is defective because "[l]egal propositions, unlike those of formal logic, are not susceptible to such simple analysis", in the absence of a closed logical system.[100]

It would have been preferable for the Court to view the principles it elicited from the relevant General Assembly resolutions as a form of soft or declarative law, which could allow States to conclude that they were legally obliged to refrain from the use of force or from intervention in other countries. However, unless there was evidence that a sufficiently widespread group of States had actually acted upon this view, the declarative law *should not have been enforced* by the Court. In endeavouring to enforce the normative aspirations embodied within the resolutions without requiring widespread practice which supported the view that the resolutions accurately reflect the law, the Court elevated the resolutions above the status of declarative law into customary law, with the result that non-compliance was almost certain to occur.

Conclusion

The *Nicaragua* case represents an important shift in the International Court's view of the nature of custom. Interestingly, it is possible that since custom is a primary source of law, and decisions of the Court are not, that the Court does not have the power to alter the definition of custom in any significant way.[101] This view has not, however, been generally adopted.

It has been argued above that the *Nicaragua* case should be understood as an attempt to reconcile a number of imperatives. Legal theory demanded that both practice and *opinio juris* be retained if custom was to create valid law. However, the traditional theory of custom, in utilising these two elements, was bound up in circularity and rigidity. In addition, the developing world was attempting to achieve more legal power, and was encouraging the Court to take a more active role in legal reform. Finally, and more immediately, the Court was faced with a conflict between the United States of America, a country with enormous effective power, and the formal legal rules developed in the General Assembly (principally by developing world nations).

Not surprisingly, the Court had some difficulty reconciling these conflicting forces. While its approach to *opinio juris* is broadly correct, the Court in future cases should pay greater attention to the requirement of State practice and refuse

98 *Nicaragua*, n 2 above, p 108.
99 Ibid, at 109.
100 Charlesworth, n 48 above, p 25.
101 Watson, n 29 above, p 279. Also see Dunbar NCH, "The Myth of Customary International Law" (1983) 8 *Australian Year Book of International Law* 1 at 7 for an analogous discussion of a similar problem in relation to incorporation theory.

to find a customary rule in the face of widely inconsistent State practice. General Assembly resolutions can play a legitimate part in creating declarative law and serving as evidence of collective State practice. However, unless a proposed rule is substantially reflected in the way States interact, not only does it violate the categorisation of law as a product of social forces, but it will experience severe problems with compliance. Substantial amounts of contrary State practice must therefore be seen as a challenge to the existence of a customary rule, not necessarily as a breach of the rule, irrespective of the content of declarative laws such as those found in resolutions.

In light of all of the above what, then, is the difference between law and the gunman's order on the international plane? How are we to determine when international law, through the International Court, must resist and censure the actions of the effectively powerful? The answer proposed above turns upon psychology. An action is not legal simply because the State which performs it is sufficiently powerful to be immune from enforcement procedures. Conduct is not in accordance with international law unless a wide group of States genuinely believe it is in accordance with international law, and themselves act accordingly. This, to an extent, is the message which lies behind the decision in the *Nicaragua.*

Customary international law is more than just a description of what States do, although State practice is and must be its foundation. It requires all States to act within a framework established by the international community as a whole. When individual States act outside this framework they must be censured. However, the framework must also be continually re-evaluated. As has been seen, traditional theory has made this re-evaluation difficult. The *Nicaragua* decision facilitates re-evaluation by recognising the role which the General Assembly can play in providing aspirational goals for States to work towards, and in allowing them to begin the process by which customary law evolves towards these goals.