

MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

Customary International Law

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Subject(s): Sources, foundations and principles of international law; Overview articles

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A. Notion and Theory

1. Notion

- 1 The expression ‘customary international law’ concerns, on the one hand, the process through which certain rules of international law are formed, and, on the other, the rules formed through such a process. While these rules are not necessarily general in scope, all existing general rules of international law are customary (see paras 35–40 below; see also → *General International Law [Principles, Rules and Standards]*).
- 2 Even though language is necessary to communicate their content, expression through language is not an indispensable element of customary international law rules. The irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply them (→ *Interpretation in International Law*). Recently customary rules have developed in connection with written texts, whose interpretation may be relevant for determining the existence and contents of these rules. As we will see, contemporary customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts. Such texts may be the point of departure for the formation of a customary rule, and sometimes (in the case of widely ratified conventions) the basis for stating the existence of certain customary law rules. Through this connection with written texts, customary law is enabled to go into a measure of detail that was hitherto unconceivable.
- 3 The essential characteristic which customary international law rules have in common is the way they have come into existence and the way their existence may be determined. While customary international rules may give rise to the same problems as other categories of rules—such as: does the rule apply to certain facts? What is its relationship with other categories of rules?—the preliminary question of their existence is more complex than that, for instance, of the existence a treaty rule (→ *Treaties*), as it is necessary to ascertain whether, at the relevant time, the conditions for its existence are satisfied. In this way, consideration of the customary international law process becomes an indispensable element for the application of customary international law rules. Moreover, in order to apply a customary rule, it is not sufficient that it has come into existence: it must exist at the relevant time, as the process through which customary rules are modified or extinguished is the same as that through which they come into being.

2. Theory

(a) The Basis of Customary Law

- 4 Customary rules are the result of a process—whose character has been qualified by a number of authors as ‘mysterious’—through which elements of fact, empirically verifiable, acquire a legal character thus creating rights and obligations for the → *subjects of international law*. Theoretical discussions have divided, and still divide, legal scholars. One of the main objects of contention concerns what it is that makes factual elements legally binding in international law. This is the problem of the basis of customary international law. This problem is connected with ideas about the nature of law in general and of → *international law* in particular. A central question is whether there is a rule that makes customary rules binding, and, if it exists, what its content is. The views of scholars on the subject may be grouped in two, depending on whether such rule is deemed to exist.
- 5 The position that considers that such a rule exists, which may be indicated as positivist, includes one group—to which Soviet doctrine used to belong—which deems that custom is not essentially different from agreements: it is a kind of tacit, and sometimes presumptive, agreement. Consequently, the rule on which the binding character of customary rules depends is → *pacta sunt servanda*, the very rule on which the binding character of agreements depends. As underlined by D Anzilotti, who, together with H Triepel, is one of the main proponents of this

view, this rule cannot be demonstrated. It must be taken as ‘an absolute objective value’, as the ‘primary hypothesis’. Other positivist authors criticize the assimilation of customary rules with treaty rules as being a fiction. They state that customary rules are different from treaty rules and seek a rule of a level higher than customary rules as a basis for the binding character of these rules. This is the idea of the basic norm (*Grundnorm*) of H Kelsen, followed among others by G Morelli: a rule whose contents would be *consuetudo est servanda*, custom is to be complied with, or, in Kelsen's words ‘States ought to behave as they have customarily behaved’. These authors, similarly to the supporters of *pacta sunt servanda* as the basic rule, concede that this rule has a peculiar nature, as it is a ‘hypothetical’ rule, the hypothesis upon which the system is based.

- 6 The position that denies the existence of a rule making customary rules binding, and also the need for such a rule, holds that certain rules are binding per se, without a superior rule giving them such character. Customary rules emerge ‘spontaneously’ from the → *international community*. Their existence depends on whether it can be empirically ascertained that they are considered as binding by the members of the international community and whether they function as such in the relationships between these members. This ‘spontaneous law’ theory has been developed in particular by Italian authors of the mid-20th century (M Giuliano, R Ago, G Barile), and is followed by well-known scholars such as P Reuter and HLA Hart. These authors demonstrate the continuity of this view with that followed by international law scholars of the classical or natural law school of the 16th and 17th centuries, especially when they underline the necessary presence of legal rules in a community of independent → *States*, the *principes superiorem non recognoscentes* (princes not recognizing a superior; see also → *Natural Law and Justice*).

(b) The Elements of Customary International Law and the Role of the Will of States

- 7 Closely connected with the question of the basis of customary international law is the question of which are the facts to be ascertained empirically in order to determine that a customary international rule has come into existence. A key aspect of this question is whether these facts are produced by the will of States or through an involuntary process.
- 8 While the latter question is easily answered if the view that the basis of customary international law is the *pacta sunt servanda* rule is accepted, as customary rules would be produced in the same way as treaty rules, the question is more difficult if one starts from the basic rule or the spontaneous law approaches. According to these approaches, the customary process is not a voluntary one. What counts is that, as mentioned, certain facts should be empirically determined. The prevailing view is that these facts are to be grouped in two elements, an objective one, the repeated behaviour of States (*diuturnitas*), and a subjective one, the belief that such behaviour depends on a legal obligation (*opinio juris sive necessitatis*).
- 9 While the *opinio juris* is by definition an opinion, a conviction, a belief, and thus does not depend on the will of States, the conduct of States is always the product of their will. What makes the discussion complex is that in willing to behave in a certain manner States may or may not be wilfully pursuing the objective of contributing to the creation, to the modification or to the termination of a customary rule. This applies also to the expressions of views as to whether certain behaviours are legally obligatory or as to whether a certain rule of customary law exists: these may be real expressions of belief—manifestations of *opinio juris*—or acts, corresponding or not to true belief, voluntarily made with the purpose of influencing the formation, the modification or the termination of a customary rule. These latter expressions of views are objective facts rather than subjective beliefs. The difficulty of distinguishing behaviours and expressions of views that are, or are not, made with the will of influencing the customary process, explain why in modern international law, together with the prevailing theory of the two elements of customary law, theories are often held supporting the view that only the objective,

or only the subjective element, is decisive for the existence of a rule of customary international law and views that consider decisive only material facts and others that consider that manifestations of opinion are relevant.

(c) What States Do and Say: International Practice and the Ascertainment of Customary International Law

- 10 Independently of the theoretical starting point, it is clear that the material from which customary law rules are to be ascertained is the same, namely, international practice (→ *State Practice*). Such practice consists in what the subjects of international law do and say, both of which can be mere facts—or be perceived so—or evidence of *opinio juris*. Both may be voluntary or involuntary interventions in the customary process .
- 11 The increase in the number and frequency of multilateral forums, such as the United Nations General Assembly's sixth committee (→ *United Nations, Sixth Committee*; → *United Nations, General Assembly*), codification conferences etc, where States meet to develop or discuss new rules of written international law, gives States many more occasions than they used to have to express views as to customary international law. This has increased the quantity of what States say, even though it has also made it more difficult to distinguish whether what they say is what they believe is customary law or what, in light of strategies developed in their foreign legal policy—to use the *politique juridique extérieure* expression of G de Lacharrière—they want to become customary law.
- 12 It will be up to those who have to apply customary international rules, not only judges and arbitrators, but also States and other subjects of international law, to find what is the right mix of what States do and say, and of what States want (or consent to) and what they believe, that permits one to say that a corresponding rule exists.
- 13 Such a mix may not be the same for all rules. An expression, although too schematic, of this approach is the view recently put forward that the elements of practice should be put on a sliding scale, so that when States are very active, modest or no corroborating indications of *opinio juris* are necessary, while when the latter indications are abundant, the need for corresponding behaviour diminishes or disappears. It would seem, for instance, that, as regards certain basic rules for the protection of → *human rights*, such as the prohibition of torture (→ *Torture, Prohibition of*), manifestations of opinion in favour of the rule, and the lack of manifestations in opposition, overcome the fact that violations are frequent (see *Prosecutor v Furundzija [Judgment]* (1999) 38 ILM 317 para. 138; see also → *International Criminal Tribunal for the Former Yugoslavia [ICTY]*). This view is based on the traditional distinction between *diuturnitas* and *opinio juris*. In the light of the abovementioned fact that what States do and say may reflect their will or → *consent* and their belief, it would seem that ultimately the conviction of those who have to apply a rule that it has a binding character will be decisive in conferring on it a legal and not a merely non-binding character. In this sense *opinio juris* is the key element of customary law.
- 14 In determining the right mix of manifestations of practice, there is a difference between manifestations during the formative process of customary rules and those assessed at the time when the continuing existence of a rule must be determined in view of its applicability. While in the formative process manifestations of practice may or may not be based on the belief that they correspond to a legal right or obligation, when the time comes for assessing the practice in view of determining an applicable customary law, what States have said and done becomes significant when it is considered, by those that ascertain and apply customary rules, as corresponding to what is then seen as conforming to the law by the generality of States.

B. Art. 38 (1) (b) Statute of the International Court of Justice and the Jurisprudential Notion of Customary International Law

1. Art. 38 (1) (b) ICJ Statute

- 15 Art. 38 (1) Statute of the International Court of Justice ('ICJ Statute'; → *International Court of Justice [ICJ]*), often referred to as a catalogue of the → *sources of international law*, after saying that the court's function is 'to decide in accordance with international law such disputes as are submitted to it', states, in subpara. (b), that it shall apply 'international custom, as evidence of a general practice accepted as law'. The fact that the mention of treaties precedes that of international custom has no implication as to the hierarchy between the rules belonging to these categories. It only reflects the idea that, when a concrete case is submitted to a court, treaties, as special rules applicable between the parties, are to be considered and applied before customary rules, that are general (see paras 87–89 below).
- 16 It is often held that Art. 38 (1) (b) ICJ Statute is imprecisely written. It may be agreed that it would have been clearer had it referred to 'custom as evidenced by a general practice accepted as law'. This is how the provision is generally read, making the relationship between the rule and its constituent elements more logical. A similar definition is found in the European Union Guidelines of 23 December 2005 on Promoting Compliance with International Humanitarian Law (IHL) [2005] OJ C327/04 at para. 7: 'Customary international law is formed by the practice of States which they accept as binding upon them'. It seems sufficiently clear from Art. 38 (1) (b) ICJ Statute that the two elements mentioned above are required. However, the expression 'accepted as law' leaves it uncertain whether the subjective element is meant to be a voluntary or an involuntary one.

2. The Elements of Customary Law

- 17 The judgments of the → *Permanent Court of International Justice (PCIJ)* and the ICJ have been constant in stating that a customary rule requires the presence of the two elements mentioned above. Already in 1929, in the *Case of the Lotus (France v Turkey) (Merits)* PCIJ Rep Series A No 10 (→ *Lotus, The*), the PCIJ stated that international law is based on the will of States expressed in conventions or in 'usages generally accepted as expressing principles of law' (at 18). The ICJ has developed the two-element theory of customary law, especially in the → *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Merits)* ([1969] ICJ Rep 3), where it states that actions by States 'not only must amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, ie, 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' (at para. 77). Similarly, in the → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (Merits) ('Nicaragua Case')* ([1986] ICJ Rep 14), the court stated: 'For a new customary rule to be formed not only must the acts concerned "amount to a settled practice" but they must be accompanied by the *opinio juris sive necessitatis*' (at para. 207). In the *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Merits)* ([1984] ICJ Rep 246) (→ *Gulf of Maine Case*), the court speaks of 'customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas' (at para. 111).
- 18 The PCIJ has not been entirely consistent or clear as to the voluntary or non-voluntary character of customary international law. While in the *Lotus Case* there are indications that the 'will of States' (at 18) is decisive, other passages refer to 'being conscious of having a duty' (at 28) or that States 'recognized themselves as being obliged' (at 28); in the *North Sea Continental Shelf Case* and in the *Gulf of Maine Case* the references to the *opinio juris* seem to indicate that what is referred to is more belief than consent.

3. Norms for Ensuring Co-existence and Vital Co-operation of States and Other Customary Rules

- 19 The *Gulf of Maine* judgment underlines that ‘customary international law in fact comprises’, apart from ‘a set of customary rules’ whose presence must be found in the *opinio juris* in light of practice, in ‘a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community’ (at para. 111). The court would thus seem to distinguish from the normal customary law rules, a category of such rules for which the search for the objective and the subjective elements is not required.
- 20 In the court's jurisprudence after the *Gulf of Maine* judgment there are no further developments as to the definition of those customary rules that set the norms ensuring the co-existence and vital co-operation of members of the international community. There are, however, frequent statements of the customary status of certain rules in which no ‘analysis of a sufficiently extensive and convincing practice’ (at para. 111) is conducted in order to determine the presence of the *opinio juris*. For instance, in the *Nicaragua Case*, the court considers as applicable the minimum rules for armed conflicts set out in Common Art. 3 Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 135; → *Geneva Conventions I–IV [1949]*) as corresponding to ‘elementary considerations of humanity’ (at paras 215 and 218), a concept already resorted to in the → *Corfu Channel Case (United Kingdom v Albania) (Merits)* ([1949] ICJ Rep 4 para. 219). In the *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali) (Merits)* ([1986] ICJ Rep 554; → *Frontier Dispute Case*), the court bases its consideration of the → *uti possidetis doctrine* as ‘firmly established’ and as ‘general’ on that ‘it is logically connected with the phenomenon of the obtaining of independence’ (at para. 20). In the judgment in the → *Armed Activities on the Territory of the Congo Cases (Democratic Republic of the Congo v Uganda)* (ICJ, 19 December 2005, <<http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>> [12 March 2007]) the court states the existence of a number of customary international rules in the field of humanitarian law, supporting such statement with the fact that they are set out in the Hague Convention Respecting the Laws and Customs of Land Warfare (opened for signature 18 October 1907, entered into force 26 January 1910 [1908] 2 AJIL Supplement 90; at para. 219). In the same judgment, among other statements of the customary character of certain rules not based on search for practice and *opinio juris* (at paras 161, 162, 213 and 214) the court affirms that the ‘principle of permanent sovereignty over natural resources’ is ‘a principle of customary international law’ by referring only to three resolutions (not unanimously adopted) of the UN General Assembly, and notwithstanding the fact that in the case under consideration the principle was held not to be applicable (at para. 244). In the judgment on the → *Arrest Warrant Case (Democratic Republic of the Congo v Belgium) (Merits)* ([2002] ICJ Rep 3), the court stated that it had reviewed State practice, without, however, giving examples. This drew criticism in dissenting and separate opinions (see *Dissenting Opinion of Van der Wyngaert*, para. 58; *Joint Separate Opinions of Higgins, Kooijmans and Buerghenthal*, para. 12).
- 21 More than insisting on the idea that there is no need to determine the existence of the two elements as regards certain customary rules because of their importance for the co-existence and vital co-operation between States (→ *Co-operation, International Law of*), in these cases the ICJ states the customary character of certain rules by invoking moral imperatives, logical consequences of certain processes, the authority of certain conventions. As mentioned it has also happened that the determination has been made unnecessarily, a practice that seems not beyond criticism, especially when the materials invoked are controversial. Also not beyond criticism is the fact that in the last two decades the court has only rarely engaged in examining practice and *opinio juris* in order to ascertain the existence of customary international rules.
- 22 It must be noted that the ICTY insists that ‘to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of

supporting *opinio juris*' (*Prosecutor v Hadihasanović [Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility]* ICTY-01-47 [16 July 2003], para. 12). The principle of legality, applicable in criminal law, may have contributed to the rather rigorous practice of the tribunal. The same tribunal in *Prosecutor v Dusko Tadić (Decision on the defence motion for interlocutory appeal on jurisdiction)* (ICTY-94-1 [2 October 1995]; → *Tadić Case*), stated that 'a word of caution on the law-making process in the law of armed conflict is necessary'. Because accurate information concerning the behaviour of troops in the field 'for the purpose of establishing whether they in fact comply with, or disregard certain standards of behaviour', is largely inaccessible, as the parties withhold it and sometimes misrepresent it through voluntary misinformation, conclusions about State practice in the field of humanitarian law must, in the view of the tribunal, be based on other sources such as official pronouncements, military manuals and judicial decisions (at para. 99).

C. The Determination of the Existence of Customary Law Rules

1. Elements of Practice

(a) General

23 As stated (see para. 10 above), strictly speaking practice is what the subjects of international law do and say, what they want (or consent to), and what they believe. Such practice may in some cases be attributable to States taken singularly and in other cases to States taken in groups. In order to determine the existence of customary international rules, a broader notion of practice seems useful, however. Such broader notion also includes acts by non-subjects of international law which, because of the authority that subjects of international law have conferred upon them, or because of their influence on the relations between such subjects, indirectly provide elements to assess the existence of customary international rules or the relevance of the various elements of the practice of the subjects of international law (see also → *Non-State Actors*).

(b) The Time Factor

24 Duration of relevant practice over a long period of time has traditionally been considered as a requisite for the formation of customary international law rules. Recent developments show, however, that customary rules may come into existence rapidly. This can be due to the urgency of coping with new developments of technology, such as, for instance, drilling technology as regards the rules on the → *continental shelf*, or space technology as regards the rule on the freedom of extra-atmospheric space (→ *Space Law*)— Cheng speaks in this case of 'instant' customary law. Or it may be due to the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts, such as those in → *Rwanda* and *Yugoslavia* (see → *International Criminal Tribunal for Rwanda [ICTR]*; → *International Criminal Tribunal for the Former Yugoslavia [ICTY]*; → *Yugoslavia, Cases before the ICJ*) that brought about the rapid formation of a set of customary rules concerning crimes committed in internal conflicts—Condorelli speaks of '*coutume grande vitesse*', high-speed custom.

25 The intensification of practice within international organizations and conferences (see also → *International Law Development through International Organizations, Policies and Practice*), the adoption of multilateral treaties, and the existence and activity of specialized international tribunals has contributed to the acceleration of the formation of customary rules in these and other fields. In the *North Sea Continental Shelf* judgment, the ICJ states that: 'the passage of only a short period of time is not necessarily, as of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule', provided that, in the short period involved, State practice must be 'both extensive and virtually uniform in the sense of the provision invoked' (at para. 74).

2. Practice of States Taken Singularly

(a) Manifestations of the Practice of States

- 26 Manifestations of practice directly attributable to States taken singularly include, in particular, as regards what States say, government statements in the domestic framework (eg declarations in parliament) or in an international framework (notes or → *declaration*[s] setting out → *protest*[s] or claims, reactions to other States' claims, statements and documents submitted in international organizations and conferences) (see also → *Claims, International*; → *Diplomatic Communications, Forms of*). Positions taken as regards written texts, such as draft proposals for international legal instruments, have in recent times become particularly important because they may contribute to the formation of precise and detailed customary international rules. All these manifestations are directed at, or available to, other States. Consequently, they can directly influence the attitude of other States or cause reactions on their part. Manifestations such as instructions to diplomats, or internal memoranda and other messages developed in the administration of foreign affairs, do not normally reach other States. They may nevertheless be significant in order to determine what a State believes to be the law, as they usually are more candid than manifestations directed to other States. Domestic legislation and judgments of domestic courts and tribunals are also significant as they may be evidence of what States believe to be the law and of claims beyond the law.
- 27 As regards what States do, one may mention material behaviours such as movements of troops, economic and other measures taken as → *countermeasures* or retaliation, movements of fleets or aircraft. A telling example of the latter is the Freedom of Navigation Program pursued by the United States ('US'), inter alia through operational deployment of ships and aircraft, 'to assert its navigation and overflight rights' and to contrast what it deems to be 'excessive' maritime claims of other States (Statement of R Reagan, (1993) 1 Cumulative Digest of US Practice in International Law, 1743).
- 28 All these manifestations of practice directly attributable to States are relevant in two ways. On the one hand, they help in ascertaining what is customary international law in a given moment. In performing such a task, caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught. See, for instance, the words of caution about internal memoranda contained in an arbitral award in the *Eritrea-Yemen Land and Maritime Boundary Dispute (Eritrea v Yemen)* ((2001) 40 ILM 900 para. 94; → *Eritrea-Yemen Arbitration*). On the other hand, those manifestations of practice that are brought to the knowledge of other States are, in many cases, especially to be seen as parts of the customary process, as claims that, especially in recent developments, may take the form of written proposals put forward in international forums followed by → *acquiescence* or by opposition or counter-claims. In this case, the difficulty to be overcome consists in distinguishing, within the manifestations of practice that are not compatible with customary law as it stands at the moment, those that can be seen as simple violations and those that are the beginning of an evolution of the law. For instance, the Canadian Arctic Waters Pollution Prevention Act (18–19 Eliz 2 1970 c 47), claiming regulation of navigation within 100 miles from the baselines, was presented as a help to the development of the law in a field in which Canada considered it non-existent (Statement of P Trudeau (1970) 9 ILM 600). Even though it raised protests because of its incompatibility with customary law at the time, this position can now be seen as part of the process that brought about the customary law rule permitting the establishment of → *exclusive economic zone*[s] and of the powers coastal States enjoy therein as regards the protection of the environment, including a special rule on ice-covered areas.
- 29 A further difficulty consists in distinguishing, especially as regards written proposals presented in international forums, those whose aim and scope is limited to establishing new treaty law, or new rules of → *soft law*, from those that aim at, or objectively contribute to, changing customary international law.
- 30 Particularly significant are manifestations of practice that go against the interest of the State

from which they come, or that entail for them significant costs in political, military, economic or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy etc.

(b) Practice of which State Organs?

- 31 The organs of States whose contributions to practice are relevant are all the organs for whose behaviour States bear responsibility (→ *State Responsibility*). As with attribution of a wrongful act to the State, not only the executive, but also the legislative and judiciary powers of a State can, through what they say and do, contribute elements to that State's practice.
- 32 This coincidence between the organs whose wrongful acts are imputable to a State and those whose behaviour contributes to State practice that is relevant for determining the existence of a customary rule of international law is, however, just an approximation. In assessing the relevance and weight of specific manifestations of practice, the position of the State organ concerned is not unimportant. Statements by → *heads of State[s]* or of government (→ *Heads of Governments and Other Senior Officials*) or by ministers of foreign affairs or of justice, for instance, may be recognized as carrying particular weight. Statements of delegates to technical conferences may be seen as carrying less weight than those of legal experts to conferences with a strong legal content. Statements of agents before international courts may be seen as expressing the view of the State they represent, while statements of counsel—even though they can be presumed to have been approved by the State's authorities—may be seen as containing a strong advocacy element that may not always represent the general view of the law of the State they defend.

(c) A Role for Non-State Actors?

- 33 The attitudes of non-States actors (political movements, scholars, religious groups etc; → *Non-Governmental Organizations*) cannot be considered as relevant practice as such directly partaking in the formation of customary international law. The perception of these actors of what is permitted and of what is prohibited to States in their relationship with other States, and their impact on public opinion, nevertheless influences the perception of governments and ultimately their *opinio juris*.
- 34 Certain rules of customary international law have been considered as applicable as regards non-state actors: the rule on → *self-defence* has been invoked against terrorists (→ *Terrorism*), rules of international humanitarian law (→ *Humanitarian Law, International*) have been considered applicable to irregular armed formations. The impact of such applicability on the practice of the non-State actors concerned may have an impact on the scope of application of the customary rules concerned.

(d) How General Must Practice Be?

- 35 The practice relevant for establishing the existence of a customary international rule must neither necessarily include all States nor must it be completely uniform. Whatever oppositions of behaviour and of opinion there may have been in the formative stage of the rule, the existence at a given time of the rule requires that the generality of States consider the rule as binding. The generality of States does not necessarily include all States, and not necessarily all States explicitly, as non-opposition may qualify as acquiescence. It has been argued that this generality must include States representing the main legal, economic, and political orientations and geographical areas (*North Sea Continental Shelf Case [Dissenting Opinion of Judge Lachs]*).
- 36 The ICJ stated in the *North Sea Continental Shelf Case* at para. 74, that practice must be 'both extensive and virtually uniform'. It also specified that it must include the practice 'of States whose interests are specially affected' (ibid). While, for instance, it would be difficult to determine the existence of a rule on the → *law of the sea* in the absence of corresponding practice of the main maritime powers, or of the main coastal States, or, as the case may be, of the main fishing States, the silence of less involved States would not be an obstacle to such

determination. Similarly, rules on economic relations, such as those on foreign investment, require practice of the main investor States as well as that of the main States in which investment is made. The mention of the ‘specially affected’ States is often seen as alluding also to the *most important* States. Whether the practice of the most important States may alone, notwithstanding opposition, be sufficient to justify the formation of a customary rule is highly controversial.

- 37 As regards the need for uniformity, the ICJ stated in the *Nicaragua Case* at para. 186 that ‘it does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule’. Consistency with the rule in general is sufficient, if conduct inconsistent with it is treated as a breach and not as an indication of a new rule. Invoking exceptions or justifications for conduct that appears inconsistent with the rule, independently of their well-foundedness, ‘confirm[s] rather than weaken[s] the rule’ (ibid).
- 38 In the light of these considerations, as general practice but not practice of all States is needed, existing customary law is binding on new States. In fact, new States comply with most customary rules notwithstanding that, at the beginning of their existence, in some cases, they have held the contrary view, arguing that they had not been involved in the formation of customary international law. They have, nonetheless, developed positions and attitudes aiming at, and sometimes succeeding in, modifying certain existing rules and establishing others. Their participation in major endeavours to codify international law has also helped to develop their practice and involvement in the customary process.
- 39 Persistent objection to the formation of a customary rule of international law may, according to the majority (but far from unanimous) view, have the effect of excluding the objecting party from the subjective scope of a general rule that has nonetheless come into existence. Cases quoted are, however, not entirely persuasive and in most cases attempts at using the → *persistent objector* technique have not succeeded in making the new rule inapplicable to the objecting State.
- 40 While customary international law rules normally apply to all States, and the expression ‘general international law’ can be used as synonymous with ‘customary international law’, in some cases, the existence of particular (in general regional or local) customary international rules (→ *Regional International Law*), may be ascertained through the practice of a limited number of States (even of two). These rules correspond to a restricted community of States and, in determining their existence, supporting practice of all these States must be ascertained. Particular customary rules have been discussed by the ICJ in the *Asylum Case (Colombia/Peru) (Merits)*, denying the right of Colombia to qualify asylum on the basis of an alleged regional customary law rule applicable to Latin-American States ([1950] ICJ Rep 266 para. 276); and in the → *Right of Passage over Indian Territory Case (Portugal v India) (Merits)*, where the court found that right of passage was based on practice ‘accepted as law’ by the two parties ([1960] ICJ Rep 6 paras 39–40).

3. Practice of States Taken in Groups

(a) Joint Action, Statements and Declarations

- 41 Sometimes States intervene in the customary process jointly or separately in a co-ordinated way, considering that what they do and say may have a particular weight in the formation, or precise determination of the contents, of a customary international rule. For example, in 1989 the US and the Soviet Union issued a joint statement underscoring that the provisions of the United Nations Convention on the Law of the Sea of 1982 ‘in respect to traditional uses of the sea, generally constitute international law and practice and balance fairly the interests of all States’, and submitted to all States their ‘uniform interpretation’ of these rules (Union of Soviet Socialist Republics—United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage (1989) 28 ILM 1444).

42 Joint or co-ordinated positions having a bearing on customary law are often issued by the Member States of the European Community and Union (see also → *European Community and Union Law and International Law*). With the Council Resolution of 3 November 1976 on Certain External Aspects of the Creation of a 200-Mile Fishing Zone in the Community ([1981] OJ C105/01), they have contributed to the formation of the customary rule permitting the extension to 200 miles of the coastal State's maritime sovereign rights and jurisdiction. A number of times, through the State exercising the Presidency of the Council, they have lodged protests, or submitted requests for clarification, as regards legislation, or other action, taken by third States in particular in the field of the law of the sea. Similarly, they have, separately, but in a concerted way, objected to a declaration made by Brazil to the 1988 Vienna Convention on Illicit Traffic in Narcotic Drugs stating that it went 'further than the rights accorded to the coastal State by international law', with the result that the declaration, made upon signature, was not repeated at ratification (see also → *Treaties, Declarations of Interpretation*).

43 Declarations and statements made, or documents submitted, on behalf of groups of States (such as the → *Group of 77*, the European Union and its Member States etc), in the framework of international organizations, or conferences, may also contribute to the density of State practice and to its rapid development.

(b) Certain Resolutions of United Nations Organs

44 Certain resolutions of the UN General Assembly, in particular those setting out declarations of principles, may be considered as relevant, especially when adopted by → *consensus*, in order to ascertain the *opinio juris* of the States adopting them. In assessing their significance, caution is particularly necessary, as States often participate in the adoption of these resolutions in view of the fact that they are not binding. Declarations made upon adoption may also give indications relevant for assessing their significance. Caution is also necessary to distinguish provisions that can be considered as evidence of *opinio juris* from those expressing the will to introduce new rules.

45 In the *Nicaragua Case* at para. 188, the ICJ stated 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 UNGA resolutions'. In *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ([1996] ICJ Rep 226 para. 70), the ICJ stated that these resolutions 'can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*' (see → *Nuclear Weapons Advisory Opinions*). The relevant aspects are 'its content and the conditions of its adoption' (*ibid*). Moreover, 'a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule' (*ibid*). In a number of more recent cases the ICJ supported its statement that certain rules are customary by quoting one or more UN General Assembly resolutions, eg in the judgment on *Armed Activities in the Territory of the Congo Cases* (at para. 244) as regards permanent sovereignty on natural resources (→ *Natural Resources, Permanent Sovereignty over*; see para. 20). The → *Iran-United States Claims Tribunal* synthesized the view prevalent in international → *arbitration* tribunals as follows: 'United Nations General Assembly resolutions are not as such binding upon States and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute—among other factors—to the creation of such law' (*Sedco Case* (1986) 25 ILM 629 para. 33).

46 The → *Institut de Droit International* ('IDI') Cairo Resolution of 1987 distinguishes 'law-declaring' resolutions from 'law-developing' resolutions (The Elaboration of General Multilateral Conventions And of Non-contractual Instruments Having a Normative Function or Objective, [IDI, 17 September 1987] <http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_en.PDF> [15 February 2007]), and indicates various

elements as relevant in order to classify a specific resolution in one of these categories and for assessing its authority. These are: the intent and expectations of the parties, the respect for procedural standards and requirements, the text, the extent of support, the context of the elaboration of the resolution, and the implementing procedures provided by it.

(c) Treaties

- 47 Treaties are generally mentioned as elements of the practice of States relevant for the customary law process and for determining the existence of a customary international law rule. There is no doubt that treaties concluded with the purpose of codifying or progressively developing international law have an important function from this point of view (see → *Codification and Progressive Development of International Law*). We shall revert to them later (paras 60–76 below). The role of other treaties is important but ambivalent.
- 48 The fact that certain obligations are assumed in treaties by a number of States broadens the amount of law that binds States and thus may be seen as relevant for determining what is the law generally considered as binding. Still, in assuming treaty obligations, States often accept limitations to their → *sovereignty* that they deem would not be applicable to them under general international law.
- 49 As illustrations of such ambivalence, one may consider that the existence of numerous treaties in which States grant immunities to each other's diplomats confirms the existence of a corresponding rule of customary international law (→ *Immunity, Diplomatic*), while the existence of numerous treaties in which coastal States grant to other States the right to fish in their coastal waters is evidence that the contracting States assume that, without such treaties, fishing in those waters would not be allowed under customary law (→ *Fisheries, Coastal*). In these cases the ambiguity can easily be solved in the light of the general context of international law, in other cases it remains, so that obligations, even assumed in numerous treaties, are not helpful for determining the existence or content of a customary international law rule. For instance, the practice of → *lump sum agreements* after nationalization of foreign property can, in the view of the Iran-United States Claims Tribunal, 'be so greatly inspired by non-judicial considerations, eg, resumption of diplomatic or trading relations, that it is extremely difficult to draw from them conclusions as to *opinio juris*, ie, the determination that the consent to this settlement was thought by the States involved to be required by international law' (*Sedco Case* at para. 33).

4. Practice of International Organizations

- 50 As subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States. Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution: firstly, because of the limited scope of the competence of the organizations, and, secondly, because it may be preferable to consider many manifestations of such practice, such as resolutions of the UN General Assembly, as practice of the States involved more than of the organizations.
- 51 Nevertheless, on legal subjects that are directly relevant to their participation in international relations, the practice of international organizations is particularly abundant and significant. This applies, in particular, to the law of treaties concluded with or between international organizations (→ *International Organizations or Institutions, External Relations and Co-operation*), the law of international responsibility of international organizations (→ *International Organizations or Institutions, Responsibility and Liability*), or the law of succession between international organizations (→ *International Organizations or Institutions, Succession*). In the consultative opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* ([1980] ICJ Rep 73), the ICJ seems to deduce from the practice of agreements between States and organizations customary rules concerning rights and obligations of the organization and of the host State (see also *Separate*

Opinion of Mosler and Separate Opinion of Judge Ago). Also significant is the practice concerning membership of international organizations as regards general rules on the requirements for statehood and the law of State succession (→ *International Organizations or Institutions, Membership*; → *State Succession in Treaties*).

52 When, as in the case of the European Communities, the international organization replaces, in whole or in part, its Member States in international relations, its practice may be relevant in broader areas. Thus it is that the practice of the European Community is relevant in fields such as economic relations, the law of human rights, the law of the sea, and environmental law. The European Court of Justice (and the Court of First Instance) have on many occasions referred to customary international law rules (→ *European Communities, Court of Justice [ECJ] and Court of First Instance [CFI]*).

5. Judgments of International Courts and Tribunals

53 As the authority of international courts and tribunals to settle a dispute between States derives from agreement of the States involved, judgments of such courts and tribunals may be seen, indirectly, as manifestations of the practice of the States that have agreed to confer on them such authority and the mandate to apply international—including customary—law.

54 Decisions of international courts and tribunals are, however, much more important than that. International courts and tribunals, and in particular the ICJ, are fully aware that their task is not only that of settling the disputes submitted to them, but also that of determining the contents of international law. States share this point of view. Ascertaining customary law, together with the interpretation of treaties, is central in the work of international courts and tribunals. Courts and tribunals are the sole organs that can perform such a task with technical expertise and with an independent, impartial outlook. Suffice it to recall the requirements for election to the ICJ in Art. 2 ICJ Statute.

55 The importance of decisions of international courts and tribunals is greater than what emerges from Art. 38 (1) (d) ICJ Statute which indicates such decisions only as ‘subsidiary means for the determination of rules of law’. Although for decisions of international courts and tribunals there is no rule of → *stare decisis*, courts and tribunals tend to rely on their precedents, and States and pleaders expect them to do so. Moreover, international courts and tribunals can assess the existence and contents of customary rules on the basis of an unparalleled amount of materials, of which they dispose because of the high technical quality of the judges and of the registries, and also because of the detailed nature of written and oral pleadings, through which States parties to the dispute present, through experienced counsel, the relevant materials, very often unearthed from archives for the purpose of the case

56 The ICJ has insisted that its role is to ascertain the existence of international law rules, not to create them. In the *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland) (Merits)* [1974] ICJ Rep 3 para. 53, it stressed that ‘the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down’ (→ *Fisheries Jurisdiction Cases [United Kingdom v Iceland; Federal Republic of Germany v Iceland]*). In its *Nuclear Weapons Advisory Opinion*, although with its usual caution, the court has stated, however, the terms of the broader task it considers it has to perform. In rejecting the argument that to answer the question submitted to it would be tantamount to engage in legislative activity, the court, while underlining that ‘it states the existing law and does not legislate’, stressed that ‘this is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend’ (at para. 18).

57 What the court does, or at least is ready to admit it does, to contribute to the development of international unwritten law may be encompassed under the rubrics of specifying the scope of the law and of taking note of its general trend. In fact, the role performed by the ICJ often goes

beyond the mere stating of existing customary law. By stating what is implied in existing rules and extracting general principles from such rules, the ICJ has developed important chapters of international law, such as the law of delimitation of maritime areas and the law of effective nationality, and added density to many other areas of the law. In doing so the court deploys a relevant amount of creativity, adopting in many cases an inductive approach that contrasts with the deductive process it describes as appropriate for determining the contents of customary international law.

- 58 The loss of contact that can be seen in many judgments of the ICJ between the ascertainment of the existence of a customary rule in the context of Art. 38 (1) (b) ICJ Statute and the rule applicable to such process, has been seen as an indication of arbitrariness—or ‘violence’—that contributes to the loss of legitimacy of customary rules (Chigara). This negative assessment seems to be based only on judicial determination of customary rules, not taking into account that such judicial determination is not sustainable without the formation of a broader conviction involving the generality of subjects of international law, in which the possibility of consistent objections may be relevant. The remedies proposed, consisting of increasing transparency of the process of judicial determination of the existence of customary rules by clarifying the values that influence such determination, while unobjectionable, seem either far from being new, as they consist of what legal scholars have been trying to do for centuries, or naïve, as they would imply a rewriting of Art. 38 ICJ Statute.
- 59 During the last few decades a number of international courts and tribunals have become active, sometimes dealing with disputes between States, in other cases with human rights or → *international criminal law*, sometimes universal in scope, sometimes regional. All these tribunals apply international law, so their decisions are relevant for determining the contents of customary law. In the huge development of the corpus of international judicial decisions brought about by this phenomenon, there is a possibility that different tribunals may endorse divergent views about the existence or contents of customary rules. According to some, such divergent views might endanger the unity of international law (→ *Fragmentation of International Law*). In fact, divergences of this kind have been very rare and of limited scope. International courts and tribunals—with the exception of the ICJ, which seems reluctant to rely on or quote decisions of existing permanent judicial bodies—very often rely on each other's decisions, and especially on those of the ICJ, thus strengthening the authority of the judicial component of international practice. International law, in particular customary international law, has been enriched by many decisions in fields such as international criminal law and human rights law.

6. Codification of International Law and Customary Law

(a) General: Notion and Forms of Codification

- 60 Codification is the process through which legal rules appearing in disparate and non-systematic form, and sometimes having different scope of application, are expressed in written and systematic form and given a measure of authority. In international law, codification consists of the expression in written form of customary rules, while the added authority appertaining to such new written rules depends on the instrument in which they are incorporated.
- 61 When codification is a scholarly exercise, its results as, for instance, the resolutions of the IDI and of the → *International Law Association (ILA)*, have no added legal authority, even though their technical quality may be such that they can be utilized as subsidiary elements of practice as the ‘teachings of the most highly qualified publicists’ mentioned in Art. 38 (1) (d) ICJ Statute (→ *Teachings of the Most Highly Qualified Publicists [Art. 38 (1) ICJ Statute]*).
- 62 A different, very recent and particularly authoritative example of codification conducted without direct participation of States is the study of Customary International Humanitarian Law conducted by the → *International Committee of the Red Cross (ICRC)* with the collaboration of leading experts and researchers of all continents published in 2005 (JM Henckaerts and L

Deswald-Beck [eds]). The same can be said about the San Remo Manual on the International Law Applicable to Armed Conflicts at Sea (see → *Naval Warfare*), elaborated, on an unofficial basis, by a group of experts in positions of authority in the respective countries. The particular status of the experts participating and the support of the ICRC make it possible to see in these forms of codification something in between private scholarly codification and codification by States.

- 63 When the exercise is conducted by States, the results may be soft-law instruments, such as declarations of the UN General Assembly, or drafts adopted by the → *International Law Commission (ILC)* and recommended to the attention of States by the UN General Assembly, or treaties, which may be based on the work of the ILC or negotiated by States without the benefit of such work and which may be in force or not, and which, if in force, may have many or few contracting parties. While treaties in force are binding, the other results mentioned are not. On the other hand, the binding character of treaties in force is limited to the contracting parties.
- 64 From the viewpoint of customary law, however, the legal effect of the instruments in which the result of the codification process is contained, although not irrelevant, is not as important as the weight of the codification process and of its results as an element of practice contributing to the formation of customary rules and useful in the determination of the existence of such rules.

(b) Impact on Customary Law of the Codification Process

- 65 The codification process in which States engage in the framework of the → *United Nations (UN)*, with or without the contribution of the ILC, is a powerful machine to unearth existing but unknown or little known practice and to stimulate the production of new practice. To support the work of the ILC, and of its Special Rapporteurs, the UN Secretariat (→ *United Nations, Secretary-General*) usually prepares studies of practice, utilizing published materials and also material, published or not, submitted by States that are so requested by the Secretariat. The ILC, through the UN General Assembly, requests comments and points of view of States on the questions examined and on the drafts under preparation. Comments and points of view are also expressed by States in discussing the ILC reports at the UN General Assembly or in the framework of codification conferences and other activities. These materials all constitute practice relevant for the formation of customary law and for the determination of existing rules. In examining such practice it is, nevertheless, important to keep in mind that in some cases it may express views on existing customary law, in other cases it may be a voluntary intervention in the customary process intended to influence its evolution, and in yet other cases it may be intended as a contribution to the mere elaboration of treaty rules. Whatever the intention, all these manifestations may have a weight in the customary process.
- 66 Results of the customary process that are not yet definitive, such as drafts, sometimes not even final drafts, elaborated by the ILC, or conventions not yet in force, have been considered by the ICJ and other international courts and tribunals as indicative of the existence and contents of customary rules and sometimes as decisive evidence thereof.
- 67 In some cases courts and tribunals have considered it possible to resort to the provisional result of the codification process provided that they became persuaded that such result ‘is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary international law’ (so the ICJ in the *Case concerning the Continental Shelf [Tunisia/Libyan Arab Jamahiriya] [Merits]* [1982] ICJ Rep 18 para. 24; similarly, the arbitral award in *Differend concernant le Filetage à L’Interieur du Golfe du Saint-Laurent [Canada v France]* [1986] 90 *Revue Générale de Droit International Public* 713, 748). As regards the same convention pending entry into force, the ICJ in the *Gulf of Maine Case* stated that the fact that the convention was not in force and that a number of States did ‘not appear inclined to ratify it’ in no way detracted ‘from the consensus reached on large parts of the instrument’ and that provisions concerning the exclusive economic zone, ‘even though in some

respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question' (at para. 94). In other cases provisional results of codification work have been seen as evidence of customary law without further consideration of practice. So, in the → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)(Merits)* ([1997] ICJ Rep 7), the ICJ stated that the requirements for invoking a state of necessity (→ *Necessity, State of*) set out in the articles on State responsibility adopted on first reading by the ILC 'reflect customary international law' (at para. 52), followed by the International Tribunal for the Law of the Sea ('ITLOS') in *The M/V "SAIGA" (No 2) Case (Saint Vincent and the Grenadines v Guinea)* [1999] ITLOS Rep 10 paras 133–34.

(c) Impact on Customary Law of the Results of the Codification Process

- 68 Art. 13 (1) (a) United Nations Charter → *United Nations Charter* ('UN Charter') indicates as a subject for studies and recommendations of the UN General Assembly 'encouraging the progressive development and codification of international law and its codification'. Art. 15 Statute of the ILC ('ILC Statute') clarifies that 'codification' means 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine', while 'progressive development' means 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. The distinction has been taken to mean that codification consists of drafting existing rules of customary international law, while progressive development consists of the drafting of rules in areas where customary law is scarce or non-existent. In the early conventions based on drafts of the ILC, States tried to keep to this distinction. So, one of the four Geneva Conventions on the Law of the Sea adopted in 1958 on the basis of a draft of the ILC, that on the → *high seas*, states in its → *preamble* that it aims at the codification of the relevant rules of international law, while no such indication is given as regards the other three.
- 69 Further experience in the codification process has shown that the distinction is difficult to maintain as regards broad areas of the law, and that, even as regards specific provisions, to determine correspondence with customary rules requires very accurate assessment of international practice. Moreover, the very fact of expressing a rule in written form requires interpretation of the language used, a problem that does not exist as regards customary rules and introduces a difference between the two, even when pure codification is intended.
- 70 The ILC has not insisted on distinguishing in its work between 'codification' and 'progressive development'. In the field of international humanitarian law, however, the importance of a clear determination of existing customary rules has had as a consequence that the study on Customary International Humanitarian Law conducted by the ICRC (see para. 62 above) concentrated on determining the existence of such rules, without engaging in progressive development. The above-mentioned San Remo Manual on the International Law Applicable to Armed Conflicts at Sea has tried to remain faithful to the distinction, as its purpose was to draft a 'restatement' of contemporary rules 'together with some proposals for progressive development'.
- 71 The ICJ, confronted with concrete cases in which it had to determine whether a State not bound by a codification convention was bound by a customary rule corresponding to the relevant provision of the convention, probably keeping in mind Art. 38 → *Vienna Convention on the Law of Treaties (1969)* ('VCLT') which accepts the possibility of 'a treaty becoming binding upon a third State as a customary rule of international law, recognized as such', developed the distinction set out in the ILC Statute by clarifying the impact that 'progressive development' may have on customary international law. According to the ICJ, a rule 'enshrined in a treaty may also exist as a customary rule, either because the treaty ha[s] merely codified the custom, or caused it to "crystallize" or because it ha[s] influenced its subsequent adoption' (*Nicaragua Case* at para. 177; see also *North Sea Continental Shelf Case* at paras 63, 68–73). In the view of

the ICJ, conventional law, and especially that resulting from codification activities, may ‘codify’ customary rules giving them a written form, it may ‘crystallize’ an emerging rule in the sense that the fact that such rule is adopted in a codification convention adds to the practice the still missing element necessary to consider the emerging rule as customary, and may generate new customary law by constituting an element of practice that contributes to the formation of a new customary rule. Of course, a rule in a codification convention may also remain, or become, because of further evolution of customary law, merely conventional. The distinction drawn by the ICJ can apply also to codification set out in instruments different from treaties in force, such as draft conventions, articles adopted by the ILC, resolutions and other soft-law instruments (paras. 65–67 above). As seen above (see para. 46), a similar distinction has been proposed by the IDI between ‘law declaring’ and ‘law-developing’ resolutions.

(d) Authority of Codification Results in International Adjudication

- 72 International courts and tribunals have often referred to codification conventions or other instruments in order to support, in whole or in part, the assertion that a certain rule belongs to customary international law. As remarked above, in their view the fact that the relevant conventions or other instruments are in force or even are still in draft form is not decisive.
- 73 Cases are numerous and a full listing does not seem necessary. Suffice it to recall, as an example, that the ICJ, followed by other tribunals, including the → *World Trade Organization (WTO) Appellate Body* (→ *World Trade Organization, Dispute Settlement*), has stated that provisions of the VCLT concerning treaty interpretation reflect customary international law (eg the *Case concerning the → Territorial Dispute Case [Libyan Arab Jamahiriya/Chad]* [1994] ICJ Rep 4 para. 41; *Case concerning Oil Platforms [Islamic Republic of Iran/United States of America] [Preliminary Objection]* [1996] ICJ Rep 803 para. 23; → *Oil Platforms Case (Iran v United States of America)*; → *Maritime Boundary between Guinea and Guinea-Bissau Arbitration [Guinea v Guinea-Bissau] [Decision of 14 February 1985]* (1986) 25 ILM 252 para. 41; WTO *United States—Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body* [29 April 1996] WT/DS2/AB/R). In most cases, as in those just quoted, the reference to a rule in a codification convention is seen as sufficient by the ICJ and by other tribunals to conclude that the rule reflects customary international law. In some cases the ICJ and other tribunals have, however, specified certain requirements or introduced cautionary formulations relevant for reaching or not the above-mentioned conclusion.
- 74 In the *North Sea Continental Shelf Case*, the ICJ specified at para. 64 that when reservations are permitted as regards a provision in a convention it can be inferred that such provision is not ‘declaratory of previously existing or emergent rules of law’. In examining when a conventional rule may generate a corresponding rule of customary law, the same judgment states that it should be ‘of a fundamentally norm-creating character’ (at para. 72) and also that ‘a very widespread and representative participation to the convention’ may suffice, even though ‘the number of ratifications and accessions so far secured is, though respectable, hardly sufficient’ (at para. 73).
- 75 In some cases, especially when referring to a group of conventional provisions, the ICJ has stated that the provisions can be considered ‘in many respects’ as a codification of customary international law. This is a cautionary limiting formulation. It would seem to serve the purpose to reserve for the future a finding that a specific provision included in those considered may not be declaratory of customary rules. In fact the ICJ never analyzes the ‘respects’ in which the articles quoted are or are not a codification of customary rules. This limiting formulation can be found, for instance, in *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] ICJ Rep 16 para. 94) as regards the conditions for terminating a treaty on account of a breach set out in Art. 60 VCLT (→ *South West Africa/Namibia [Advisory Opinions and Judgments]*). In the *Gabčíkovo-Nagymaros Case* the ICJ used the same

formulation as regards Arts 60–62 VCLT (at paras 46 and 99) while as regards Arts 65–67 VCLT it was even more prudent, recalling that the parties to the case agreed that these provisions ‘if not codifying customary law, at least generally reflect customary international law’ (at para. 109). Such prudence was called for, as in the judgment of 3 February 2006 on the *Armed activities on the territory of the Congo Cases* the court stated without elaboration that the rules contained in Art. 66 VCLT do not have customary law character (at para. 125).

76 Even though, as remarked above, the fact that the codification convention is or is not in force or that it has attracted many or few ratifications is not a decisive element as regards the determination of its correspondence to customary law, conventions that have obtained ‘nearly universal acceptance’ may in certain circumstances be seen as particularly indicative. The → *Eritrea-Ethiopia Claims Commission* in its *Partial Award on Prisoners of War (Ethiopia's Claim 4)* (2003) 42 ILM 1056 stated that the Geneva Conventions I-IV (1949) ‘have largely become expression of customary international law’ and agreed with the view ‘that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules to be found in treaties’ (at 1062). The Commission qualified this statement by adding the following: ‘Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law the burden of proof shall be on the asserting party’ (at paras 30–32).

7. The Sources of Knowledge of Practice

77 The determination of the existence of customary international rules and the knowledge of the process leading to such existence require knowledge of the manifestations of international practice. To obtain such knowledge is not an easy task in light of the high number of States and international organizations. Printed collections of State practice have been and are published in a number of States officially or by scholarly institutions. They often appear in the systematic form of digests or of yearly reviews. Some collections of diplomatic papers are also available. So are collections of treaties (such as the UN Treaty Series) and of the judgments and often of the written and oral pleadings of international courts and tribunals. Documents of international organizations are published and made easily available to States. Of particular importance is the publication, by the UN and other international organizations, of the documents concerning the process of codification of international law, including studies of practice prepared in connection with the process and views of States obtained on the various drafts.

78 It has been observed that the collections of State practice give an unbalanced view, as they concern the practice of the relatively small group of the main powers. While there is some truth in this observation, it must also be stressed that the main powers engage in relations with most other States, so that the practice of almost all States is, at least in part, reflected in these collections. Moreover, in recent times a number of collections and reviews of practice of smaller and third world States have begun to appear.

79 Unpublished practice, while it may have an impact on the incident it concerns, has reduced influence on the customary process as it remains unknown to most States. It may help in illuminating the attitude of the States concerned once it is made known, for instance when materials from archives are utilized before international courts and tribunals. Reluctance to make available manifestations of practice by a number of secretive States, both large and small, and selectivity as to the documents made available, reflect a political choice between the desire to avoid criticism and to make it easier to contradict previous practice, on the one hand, and the desire to exercise leadership and influence the customary process, on the other.

80 Important changes in the availability of manifestations of international practice have been brought about in recent times by electronic means of knowledge now widely available. Such means have made it possible for a very high number of States to make their practice accessible,

remedying, at least as far as recent practice is concerned, the lack of balance of printed collections. They have also, admittedly only in part, made less acute the unfavourable position of those (government officials or scholars) who do not have access to the relatively few large and well organized libraries where the printed materials can be accessed. Lastly, electronic means have made practice available almost at the time the manifestations concerned come into being, thus eliminating the information gap existing between those States that have at their disposal well organized foreign services and other States, as well as most scholars.

D. Various Kinds of Customary Rules

- 81 Some distinctions between different kinds of customary international rules have already emerged in previous developments. As regards the manner in which the existence of customary international rules is determined, the distinction made by the ICJ between norms for ensuring co-existence and vital co-operation of the members of the international community and other customary rules must be recalled (paras 19–21 above). As regards the subjective scope of the application of customary international rules, the distinction between general and particular (or regional or bilateral) rules has also been made (see paras 35–40 above). Another kind of particular customary rules are the customary rules that emerge within an international organization, such as, for example, the rule according to which the abstention of a permanent member of the UN Security Council (→ *United Nations, Security Council*) does not preclude the adoption of a resolution (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] notwithstanding Security Council Resolution 276 (1970)* at paras 21–22).
- 82 As regards the subjects of international law on which customary international rules confer rights and obligations, the category of *erga omnes* rules has recently emerged. The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (International Law Commission ‘Report of the International Law Commission on the Work of its 53rd Session’ [23 April–1 June and 2 July–10 August 2001] UN Doc A 56/10) consider obligations—set out both in customary and treaty rules—that are ‘owed to the international community as a whole’ (Art. 48 (1) (b) Draft Articles on Responsibility of States for Internationally Wrongful Acts). These rules include those customary rules in whose application all States, or the international community, have an interest, and whose violation creates claims for all States. This notion has been put forward in a well known passage of the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Merits)* ([1970] ICJ Rep 3; → *Barcelona Traction Case*): ‘[A]n essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’ (at para. 32). The same notion had already been identified, albeit in relationship with a treaty—that can nevertheless be considered as broadly corresponding to customary law—in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ([1951] ICJ Rep 15; → *Genocide Convention, Reservations [Advisory Opinion]*). More recently, the ICJ has stated that the principle of self-determination of peoples applies *erga omnes* (*East Timor Case [Portugal v Australia] [Merits]* [1995] ICJ Rep 90 para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion]* [ICJ, 9 July 2004] <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> [15 February 2007], paras 155–59 and 163, → *Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]*).
- 83 As regards the relationship with treaty rules (and possibly with other customary rules), from practice and scholarly opinion emerges the notion of a particular category of customary rules: peremptory or → *jus cogens* rules. These rules often, but not necessarily, coincide with rules creating *erga omnes* obligations. In the above quoted *East Timor Case* and the *Israeli Wall*

Advisory Opinion the ICJ seems to prefer referring only to *erga omnes* obligations and to avoid references to *jus cogens*. Recently, however, in the judgment on jurisdiction on the *Armed Activities on the Territory of the Congo Cases* both notions are used (at para. 125; see para. 89 below).

E. Customary International Rules and Treaty Rules

1. Co-existence of Customary and Treaty Rules

- 84 The statement in the written form of a codification convention, or of the UN Charter, of a rule of customary law, even when the treaty rule is very widely ratified, does not eliminate the customary rule, which maintains its separate existence. In the *Nicaragua Case* the ICJ has made this point as regards the rule on non-use of force set out in the UN Charter: ‘There are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter “supervenes” the former, so that customary international law has no existence of its own’ (at para. 177). The court went on to elaborate on the reasons why identical customary and treaty norms ‘retain a separate existence’ (at para. 178). These reasons have to do with possible differences as to applicability, interpretation, and the organs competent to verify implementation.
- 85 It may happen that the customary law rule changes under the influence of practice and that the coincidence between the treaty and the customary rule that existed when the treaty rule was adopted disappears with the passing of time. This was probably the case of a number of rules set out in the Geneva Conventions on the Law of the Sea of 1958, which were made obsolete by the wave of divergent opinion held by newly independent States when these Conventions had just entered into force.
- 86 The point has been made, however, that when the parties to a codification treaty become very numerous, their practice must be seen as compliant with the treaty obligations so that there can be very little practice outside the convention, and the corresponding separate customary rule remains frozen. It would seem, however, that this view does not take into account the fact that the existence of a broadly-ratified convention and broad compliance with its rules are by themselves elements of practice influencing the customary rule, and that the line separating practice that can be seen as interpretation, application or even modification of a convention, from that giving rise to new customary rules—in some cases going beyond the conventional rules, in others growing in the interstices between the written rules—is very thin indeed. Art. 10 Statute of the → *International Criminal Court (ICC)* seems to aim at avoiding such an alleged freezing effect on the development of customary law of the codification and progressive development of important rules of humanitarian and international criminal law contained in the statute. Referring to the part of the statute setting out the definition of crimes, this provision states: ‘Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’.

2. Relationship Between Treaty and Customary Rules

- 87 There is no hierarchy between customary and treaty rules. Even though the validity of treaty rules depends on a rule of customary international law (the rule *pacta sunt servanda*), in a concrete case treaty rules usually prevail over customary rules because of their specialty, as very often treaty rules introduce limitations and exceptions to areas of freedom set out in customary rules. The assessment of specialty must nonetheless be made with caution, and the application of the treaty rules does not always exclude that of customary international law. The Iran-United States Claims Tribunal has stated: ‘As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and application of its provisions’

(*Amoco v Islamic Republic of Iran* (1988) 27 ILM 1316 para. 112). Recent studies on the figure of the so-called → *self-contained regime* confirm this conclusion.

- 88 In certain cases, in which customary international law evolves very rapidly, it has been held that an emerging customary rule may have the effect of abrogating a treaty rule. This view has been held in a French decision as regards the impact of the then new rule of the 12-mile width of the → *territorial sea* (Cours d'appel [regional court of appeal] Rennes, 26 March 1979 [1980] *Annuaire Français de Droit International* 809, 823) and in a more cautious manner in the *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977) 18 RIAA 3 (→ *Continental Shelf Arbitration [France v United Kingdom]*): '[T]he Court recognises that a development in customary international law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations' (at para. 47).
- 89 The very notion of *jus cogens* rules implies that they prevail over incompatible treaty rules. Arts 53 and 64 VCLT state the invalidity of treaties that are in conflict with an existing or supervening rule of *jus cogens*. Recent practice also shows a far from uniform tendency towards considering that customary rules of *jus cogens* prevail over other rules of customary international law (Cassazione [Italian Court of last appeal in civil and criminal matters] Sez un civ, 11 March 2004, n 5044, *Rivista di Diritto Internazionale*, 539 [*Ferrini v Germany Case*]); see also the joint dissenting opinion of Rozakis and Caflisch joined by Wildhaber, Costa, Cabral Barreto and Vajič in *Al-Adsani v United Kingdom* Series A No 35763/97 (2001) against the majority opinion). The ICJ has moreover stated in the *Armed Activities on the Territory of the Congo Cases* that 'the mere fact that rights and obligations *erga omnes* or peremptory norms of international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties' (at paras 64 and 125).

F. The Continuing Importance of Customary International Law

- 90 The view is often held that the development of written international law and, in particular, of conventions for the codification and the progressive development of international law, diminish the importance of customary international law, relegating it to a marginal position. There is no doubt that important sectors of international law which in the past were subject exclusively to customary international law rules, are now subject to widely ratified treaty rules: relevant examples are the law of diplomatic relations, the law of treaties, and the law of the sea. The customary process and customary rules remain nonetheless an essential part of international law.
- 91 While sectors of international law that are entirely subject to customary law are becoming few and some of them are undergoing the codification process (such as diplomatic protection and responsibility of international organizations), customary law remains the basis for determining the law applicable to States that are not parties to the relevant codification conventions. It is also indispensable for assessing the law in new fields, such as the genetic resources of the deep seabed (→ *International Seabed Area*). In rapidly evolving sectors of international law the customary process can produce rules in a timely and adequate manner. The extension to internal armed conflicts of the rules of humanitarian law codified for international armed conflicts is a telling example. The application to international organizations of rules on subjects covered by codification conventions is obtained through the mechanism of customary international law. The low level of participation, including by international organizations, in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 20 March 1986, not yet entered into force) ((1986) 25 ILM 543) seems to indicate that the customary law of treaties as codified in the VCLT is seen as sufficient. Customary law remains essential as the basis for assessing the binding character of rules set out

in codification instruments that are not in treaty form, such as the articles on international responsibility for internationally wrongful acts elaborated by the ILC of which the UN General Assembly has merely taken note.

92 What increasingly characterizes contemporary customary international law is the strict relationship between it and written texts. We have mentioned the relevance in the customary process of such written texts (see paras 7–9 and 26 above), and we have just seen that very often the existence of customary law rules is determined starting from codification texts. The approach taken by the ICRC study on Customary International Humanitarian Law of not analyzing each treaty provision with a view to establishing whether or not it is customary and of analyzing instead ‘issues in order to establish which rules of customary international law can be found inductively on the basis of State practice’, although commendable, is the exception rather than the rule.

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