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# Customary International Law

Developments towards a non-consensual source of  
international law?

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*“The process of the creation of customary law is one of the mysteries of the law, whether in international law or in national legal systems.”*

Common rejoinder submitted by the Government of the Kingdom of Denmark and the Kingdom of the Netherlands, I.C.J., Pleadings, North Sea Continental Shelf Cases, 30 August 1968, p. 512.



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## Abbreviations

AJIL	The American Journal of International Law
BFSP	British and foreign state papers
BYIL	British Yearbook of International Law
GA	General Assembly of the United Nations
ICJ	The International Court of Justice (1946-)
ICJ Reports	The International Court of Justice, Reports of Judgements, Advisory Opinions and Orders
ICJ Statute	The Statute of the International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICTR	The International Criminal Tribunal for Rwanda
ICTY	The International Criminal Tribunal for the former Yugoslavia
EJIL	The European Journal of International Law
ILC	The International Law Commission
PCIJ	The Permanent Court of International Justice (1922-1946)
UN	The United Nations
UNC	Charter of The United Nations
UNTS	The United Nations Treaty Series
VCDR	1964 Convention on Diplomatic Relations
VCLT	1969 Convention on the Law of Treaties
YILC	Yearbook of the International Law Commission



# Chapter 1 – Introduction

## 1.1 Preamble

Customary international law is, in a sentence, international obligations arising from recognized state practice carried out by a sense of legal obligation. Today's vast use and dominance of treaty based international law is a relatively new phenomenon within the international society. Customary international law is however neither an outdated relic nor a novel form of international law. Dating back to ancient Greece, rules of war and peace sprung from long-standing usage by Greek City States, which further crystallized into customary rules by a process of generalization and common observance. In the Middle Ages a similar process could be observed among the small Italian states.<sup>1</sup> In modern times customary law still plays an important role within international law, and has a significant role concerning the regulation of emerging economic interests and major political and institutional conflicts.<sup>2</sup> In fact from antique to modern time customary law, alongside with treaty law, have been the two principal methods for creating legally binding rules within the international society.

The treaties of Westphalia in 1648 marked a new era in international politics, one where all states, irrespective of their magnitude, were acknowledged as independent and autonomous states. This renaissance of international relations consequently reformed the system of international law, positioning independence as a fundamental value. To avoid infringing on the states independence, the principle of consent was applied whenever binding international law was created. Consent-based treaty law and customary law both responded to the basic need of not imposing legal duties on states not wishing to be bound, and thereby creating complete convergence between law-makers and those that the law was directed to.<sup>3</sup>

The 18<sup>th</sup> and 19<sup>th</sup> century saw a world shaped as a multifaceted society, made up of a large number of states and other legal subjects such as international organizations, of different grandeur and ideologies. The importance of customary international law started to fade, in regards to the creation of obligations between states. The aversion was

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<sup>1</sup> Shearer 1994, p. 32

<sup>2</sup> Cassese 2005, p. 166.

<sup>3</sup> Cassese 2005, p. 153.

especially frequent among the post-colonial developing countries and countries with a non-western political system, such as the USSR. Instead treaty-law was better suited as means to express the will of states, and thus sprouted the reliance of international law through treaties. Since the middle of the last century treaty-law became to some extent the predominant source of international law. The dominance was enhanced when large portions of the customary corpus were transferred into treaty law through law-making treaties and grand codifications, such as the 1969 VCLT and the 1964 VCDR.

Despite the numerous codifications which replaced customary rules, customary international law still maintains its position as an important source of international law today. New customary rules have emerged to fill vacuums left by treaties, and in the last couple of decades customary law has had a revival. Despite there being no explicit hierarchy between treaty-law and customary law, provisions of treaties often supersedes customary rules by the theories of *lex specialis* and *lex generale*.<sup>4</sup> But whereas treaty-law solely regulates a specific legal matter between its participants, thus making it insufficient to sustain the totality of international relations,<sup>5</sup> customary law has a general scope enabling it to create a legal framework for the international society as a whole. Its unwritten character also allows spontaneous creation rules of conduct without a long-drawn negotiating process, holding great practical value. The importance of customary law as a source of international law is also evident by the manifold areas it currently regulates. Examples of contemporary customary international law includes diplomatic correspondence, official manuals on legal questions such as manuals of military law, legislation, an extensive pattern of treaties in the same terms and practice of international organs.<sup>6</sup>

However, there is, and has long been, a debate regarding the uncertainty that exists within the law-making process of customary international law. The absence of a written constitution means that there are no formal sources prescribing requirements for the creation of international law. The lack of a global dominant legal culture enables academic disagreements to theories of law-creation.<sup>7</sup> Together this highlights the insecurity

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<sup>4</sup> Crawford 2012, p. 22.

<sup>5</sup> Condorelli, *Realizing Utopia* 2012, p. 148.

<sup>6</sup> Crawford 2012, p. 24.

<sup>7</sup> Kammerhofer 2004 ,*EJIL* 15, p. 552.

within the de-centralized system of international law, creating large uncertainty as to how a customary international law is formed.

The generally accepted view has long been that in absence of formal sources, article 38(1) b of the ICJ Statute defines customary law as “general practice accepted as law”. The definition of customary international law is likewise the formula of the law-making process that creates a customary international rule, and it has been described as the elements of customary law. According to the theory, an objective element of *state practice* and a subjective belief that that the practice was a legal obligation, or *opinio juris sive necessitatis*, is required for a customary rule to form. The building blocks for creating customary law were long seen as two static elements, but recent developments have raised doubts regarding the veracity of this theory. The emergence of international tribunals, various trends and theories in the legal community and among legal writers have challenged the theory of the elements of custom. As a consequence, some sorts of *alleged* customary law do not fit into the traditional blueprint of the elements of custom, thereby causing fragmentation of the theory. What actually constitutes a customary international law, beyond the traditional field, is therefore partly clouded in uncertainty.

A debate of great controversy surrounding customary international law is that of the extent of state consent required for a customary rule to impose obligations upon the state. The principle of state consent was developed to protect state independence and has long been a cornerstone of international law, including customary international law. However, there is uncertainty regarding if state consent needs to be expressed or if implicit consent is sufficient for a customary rule to be binding upon that state. There are also more radical theories as to the requirements of state consent. Some claim that that a customary rule ought to be capable of imposing obligations upon a state, even against that state’s express objection. The removal of the requirement of state consent could have vast consequences regarding state independence and the international society as a whole. The view is motivated by an alleged need of universal norms to resolve global concerns, such as environment, terrorism or nuclear weapons.<sup>8</sup> Instead of unconvincing and long-drawn negotiations, customary international law could serve as a dynamic

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<sup>8</sup> Charney 1993, AJIL 87, p. 529.

source of international law, creating effective rules binding all states, where the consensus needed for treaty-law cannot be reached.

## **1.2 Purpose and delimitations**

The purpose of this thesis is to illuminate the difficulties that recent development within international law has caused to the process of formation of customary international law. The thesis will show that the traditional view on the creation of customary law, based on the “elements of custom”, is no truism. The thesis will also examine the theoretical underpinnings to the binding nature of international law.

The purpose of the thesis is also to show how changes in prioritised values within the international society have challenged state sovereignty in the context of customary international law. The thesis will discuss the extent of consent required for a customary rule to be applicable to a state, and finally conclude whether a development towards customary law less reliant on state consent is a sustainable and desirable alteration.

Customary international law and the state’s role in its formation include a vast number of topics and therefore delimitations have been necessary to make. This thesis will focus on *general* customary international law, and discussions regarding *local* or *regional* customary international law will not be included.

The issue of *jus cogens* as norms with special legal power will not be examined or discussed as a subject of its own. *Jus cogens*, as expressed in article 53 of the VCLT, is a subject that would fit the purpose of this thesis. It is by its nature a non-consensual form of customary law but it is a subject that would require a full thesis of its own, mainly because its very existence and what is included in the concept is controversial. The purpose of the thesis is instead to examine whether also “common” customary law may develop non-consensual features.

The relationship and interactions between treaty law and customary law will only briefly be discussed. The thesis will not fully examine the issue of norm-hierarchy within international law.

Chapter 3 will examine possible legal basis for the binding force of international law. There are a vast number of possible underpinnings and the therefor delimitations have been necessary to make. A few have been selected, as particularly interesting in the context, but some have not been examined, for example Kelsens theory of the “basic norm”.

### **1.3 Disposition**

This thesis will start with a descriptive Chapter 2 about the traditional system surrounding customary international law as source of international law. The subject of international law as a system will be briefly touched on, as well as the sources that form the system. There will be a basic examination of how and why state consent played the primary role regarding formation of customary law. The traditional process of customary law formation, with the elements of custom comprising of *opinio juris* and state practice, will also be presented. The chapter will end by a short presentation of the new trends concerning customary international law.

Chapter 3 will examine the possible legal basis there may be for states accepting binding obligations. There are many potential underpinnings for accepting legal obligations, and in this thesis a few have been singled out as particularly interesting. The traditional consent based theory will be shown, as well the outdated theory of a natural law based obligations and its possible revival.

Chapter 4 will examine if the traditional definition derived from article 38 of the ICJ Statue, the theory of the elements of custom, is still authoritative today. Are the elements of custom in all situations a requirement for the formation of customary rule? If not, there is an uncertainty that will have consequences to the formation of customary rules. The chapter will also discuss generally accepted customary law that does not correspond to the elements of custom, and concept promoting a deviating from the traditional view on customary international law.

Chapter 5 will examine the degree to which the state consent is required for a customary rule to be formed. Is an explicit consent required for a customary rule to be legally binding to state? Or is an implicit consent sufficient for a customary rule to become binding

to a passive state? How can an implicit consent be shown? Is it even possible that a customary rule might apply to a state even when the state has pronounced that its will is not to be bound?

Chapter 6 will contain a summary of the central issues with conclusions. Here the traditional view will be compared both new developments. Will the abstract and uncertain form of customary international law allow it to combine with the thoughts of a consent-free international law? What ramifications would this have? Is it desirable?

## 1.4 Methodology, material and terminology

As many others, this thesis is based on the belief that there exists an international legal system containing standards and procedures for creating, applying and enforcing international law.<sup>9</sup> Theories of international law as not being true law will therefore be ignored. The starting point for the discussion of customary international law will be article 38(1) b, as it is viewed as the historically most important definition.<sup>10</sup>

Since the focus of the thesis is the general international discussion, rather than a domestic perspective, the **material** for this thesis will almost exclusively be international jurisprudence and international legal literature. The factual basis will be built on acknowledged works from recognized scholars, but discursive articles and textbooks will also be used to highlight the debate and the different views that exist regarding customary international law.

The **terminology** within international law differs widely depending on the author. Even though the terminology sometimes is used to accentuate an opinion, this thesis will not examine why this is, or which is the most appropriate term, and instead use the most commonly used terms. The elements of custom have a variety of titles. The first, *objective*, element of custom is sometimes referred to as *usus* or *diuturnitas*, but the most widely used is *state practice*. The second element, by some named as the mental or psychological element, will in this thesis be labelled the *subjective* element. It is expressed

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<sup>9</sup> Charney 1993, AJIL 87, p. 531 (with additional references in note 6).

<sup>10</sup> Crawford 2012, p. 21.

in different ways such but in this thesis the term *opinio juris sive necessitatis*, or the shortened term *opinio juris*, will be used.

The thesis is written in the area of public international law. Therefor expressions always refer to matters within the international sphere, unless otherwise explicitly stated. As examples “*customary law*” refer to international customary law and “*obligations*” refers to international obligations between states.

The thesis will examine the state’s role and its right to self-determination. The terminology in this area of international can be slightly misleading. The concept of sovereignty does not have any actual legal value apart from *territorial sovereignty*, a concept resulting from the theory of statehood.<sup>11</sup> Despite its questionable value in reality, it is a concept that is widely used in legal literature. The concept is also convenient to describe the ability of the state to independently govern its interests in international relations. In some passages of the thesis the use of the term independence may be more legally appropriate rather than sovereignty. However, in this thesis the term *sovereignty* will be used to describe the ability for states to exercise their independence, in other words autonomous governing of the state, while the term *independence* will be used as the objective fact to describe a state as being autonomous as per the statehood-concept.

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<sup>11</sup> 1933 Montevideo Convention, art. 1.

## Chapter 2 – The traditional view on customary law

### 2.1 The system of international law

#### 2.1.1 A brief history of customary international law

International law as a system provides a normative framework for the conduct of interstate relations.<sup>12</sup> International law has a long-standing history, but its modern characteristics were mainly developed over the last 400 years.<sup>13</sup> Modern international law has its origin in the institute of natural law, which emerged from the philosophical traditions of Roman law and the Roman Church, where *ius gentium*, the law of people, was a subset of *ius naturale*, natural law. *Ius gentium* was over time gradually separated from natural law by early influential writers, amongst them particularly Grotius and Vitoria in the 16<sup>th</sup> and 17<sup>th</sup> century. The *ius gentium* was also advanced into a *law of nations*, which was directed explicitly to rulers of states. This process of separation was further urged by events such as the reformation and religious wars, most notably the Thirty Years War and its conclusion with the Peace of Westphalia in 1648.<sup>14</sup> Today's term *International law* was created by Jeremy Bentham in 1789, a term that in the 18<sup>th</sup> century came to replace the older term *law of nations*.<sup>15</sup>

Until modern time, the corpus of international law consisted largely of customary rules,<sup>16</sup> but by the time that World War II ended customary international law was no longer the primary source of international law.<sup>17</sup> The process of treaty-reliance did to large extent originate from the UN. The UNC Article 13(1) assigned the General Assembly to make studies and recommendations for the purpose of “encouraging the progressive development of international law and its codifications”. The codification was primarily done by either through discussion and negotiation under direct control by states within the GA, or by draft treaties elaborated by the ILC which were subsequently discussed by states in the GA.<sup>18</sup> The ILC, the UN body for law creation, has had an important part in developing treaty reliance since the 1950s, and done so by two ways. The first way by a process entitled codification, which is defined as “the more precise for-

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<sup>12</sup> Crawford 2012, p. 20.

<sup>13</sup> Shearer 1994, p. 7.

<sup>14</sup> Crawford 2012, p. 7.

<sup>15</sup> Crawford 2012, p. 3, note 2.

<sup>16</sup> Shearer 1994, p. 31.

<sup>17</sup> Cassese 2005, p. 165.

<sup>18</sup> Cassese 2005, p. 167.

mulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine”.<sup>19</sup> The other by so called progressive development defined as “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”.<sup>20</sup>

Since the middle of the 19<sup>th</sup> century there has been an astounding growth of law-making treaties. Hudson enumerated 257 treaties that were created from 1864 to 1914.<sup>21</sup> Large codifications created in the middle of the 20<sup>th</sup> century, such as the 1969 VCLT, the 1964 VCDR and the four 1958 Geneva Conventions of the Law of the Sea, further replaced contemporary customary law.<sup>22</sup> The expansion of treaty-law has been accredited to the inadequacies of customary law in meeting the urgent demands of the international society for regulating pressing issues.<sup>23</sup>

The aversion to customary law as an instrument of international law was especially strong among countries desiring change of traditional Western standards, which meant primarily the socialist countries and third world states. The lengthy process and the inherent uncertainty in the unwritten nature of customary law meant that it was less suitable for achieving change, and thereby disadvantageous especially to the third world states.<sup>24</sup> As new states started to actively participate in the process of forming and instead law in pursuit of their interests, the old states favoured a process where negotiation and discussion would be present in remodelling the law to modern conditions. Thereby treaty-law was the preferred instrument by the majority of states.<sup>25</sup> The reason for the suitability of treaty-law is that it is an agreement considered having binding force only on its participants.<sup>26</sup> Even if it is a multilateral treaty, the actual obligations still run primarily between the two concerned parties. Consequently treaty is not truly a source of general international law, which is generally applicable, but rather a source of

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<sup>19</sup> ILC Statue, art. 15, second sentence.

<sup>20</sup> ILC Statue, art. 15, first sentence.

<sup>21</sup> Hudson, International Legislation Vol. I, p. xix f, as found in Shearer 1994, p. 37.

<sup>22</sup> Tunkin 2003, p. 145.

<sup>23</sup> Shearer 1994, p. 37 f.

<sup>24</sup> Cassese 2005, p. 165.

<sup>25</sup> Cassese 2005, p. 167.

<sup>26</sup> The exception being if the treaty-provision becomes a customary rule, see VCLT art. 38.

obligations.<sup>27</sup> This enables a direct change in law, but also makes it possible to control the process of change through the requirement of express state consent.

Another reason for the demotion of status of customary law was the fact that the international society now is significantly larger in number, than it was in the heyday of customary law. Over a time of 100 years it had grown from around 40 states to almost 200. The fact that states today are economically and politically deeply divided means that it is considerably harder to create consensus regarding a rule in the multitude of states.<sup>28</sup>

In spite of its difficulties, customary law has regained some of its vigour in present time. Today it is significant in at least three areas. The regulation of emerging economic interests, such as provisions concerning to the law of the sea, are to a large extent regulated by customary law. The long-drawn process of creating a treaty is unsuited for the rapid expansion of economical demands and the multitude of actors, leaving customary law as the often preferred instrument. Another area where customary law is significant, is large scale political and institutional conflicts where political disagreements often prevent the consensus needed for a solution via treaty-law. Customary law also plays a large role in updating and elaboration in the body of customary law.<sup>29</sup>

### 2.1.2 Norms

The term “norm” is of great importance when discussing the formation of customary international law. The former president of the ICJ Sir Robert Jennings once famously said that he would not recognize a norm if he met one in the street. In English a norm means a standard.<sup>30</sup> A norm is also said to represent intersubjectivity,<sup>31</sup> which basically is a subjective view shared by many. However, the term norm is often loosely used for normative principles or *lex ferenda*, giving an impression that it is an established legal instrument even though it is not. Therefore it is important to differentiate between a norm and a rule.

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<sup>27</sup> Crawford 2012, p. 21.

<sup>28</sup> Cassese 2005, p. 165.

<sup>29</sup> Cassese 2005, p. 165 f.

<sup>30</sup> Aust 2010, p. 8.

<sup>31</sup> Knight 2011, Global Responsibility to protect, p. 18.

An example of a norm is the view that torture is an unacceptable act, but a rule is a norm that has evolved into a legally binding instrument through customary law or a treaty. The given example, torture, first evolved into a treaty<sup>32</sup> containing a rule prohibiting the use of torture. This rule later also evolved into a customary rule of absolute prohibition of torture,<sup>33</sup> a rule which is now by many considered as *jus cogens*.<sup>34</sup> Customary law often starts out as a norm which leads to a pattern of actions by states, usage. This does not need to be the case though. A norm might never become customary law. Either it can be replaced by other norms, as the intersubjective view on a matter changes, or it might merely progress into a legal or political theory having no binding force on its subject.

### 2.1.3 Sources of international law

The international society is made up of formally equal states and consequently it lacks a hierarchy. There is no constitution and hardly any formal sources prescribing methods for the creation of customary international rules, which is binding upon those that the law addresses. Article 38 of the Statute of the Permanent Court of International Justice<sup>35</sup> is viewed as the historically most important attempt to specify and define the sources of international law.<sup>36</sup> The article was later assumed, nearly word for word, as Article 38 of the Statute of the International Court of Justice:<sup>37</sup>

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

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<sup>32</sup> 1984 Torture Convention.

<sup>33</sup> CAT, General Comment No. 2: Implementation of art. 2 by States Parties, p.1 para. 1.

<sup>34</sup> Condorelli, *Realizing Utopia* 2012, p. 152 f.

<sup>35</sup> 16 December 1920, 112 BFSP 317.

<sup>36</sup> Crawford 2012, p. 21 f.

<sup>37</sup> 26 June 1945, 892 UNTS 119.

In the planning of the PCIJ it was clear that the willingness of states to submit themselves to an international court was dependent on their confidence of the sources of law at that court's disposal. It was even suggested, but not enacted, that the court should be bound to use only positive law.<sup>38</sup> The end-product of negotiations, later transferred to the ICJ, was a statute where that the principal sources in Article 38(1) a – c, all had the prerequisite of state consent. Article 38 is not, both literally and intentionally, an enumeration of the sources of international, but rather a direction to the ICJ to apply certain types of rules when resolving disputes submitted to it.<sup>39</sup>

Despite the formal limitations of the ICJ Statue, the practice by states and the ICJ has created “political-legal grounds for a broader interpretation of the significance and effect of Art. 38.”<sup>40</sup> Today there is a strong tendency to regard Article 38 as the definition of the formally recognized sources of international law. This is a view that is also agreed on by as practically all states as well as by the ICJ itself.<sup>41</sup> For instance, the ICJ held that Article 38 “enumerated” the sources of international law in the *Nicaragua* case.<sup>42</sup>

## 2.2 State consent

The principle of state sovereignty is said to represent the “basic constitutional doctrine” of international law.<sup>43</sup> As is evident by article 2(1) of the UNC, the international society is still based on the principle of sovereignty.<sup>44</sup> It is a fundamental value and an underlying feature in all interstate relations and actions. A new kind of state was developed during the Reformation, and with it followed a new theory of the nature of the state; the doctrine of sovereignty. The first explicit formulation of sovereignty was made in *De Republica* by Jean Bodin in 1576, and henceforward it has been a central concept in international law.<sup>45</sup> This early modern period saw an emergence of independent states from the great empires of Europe. This meant that a substantial number of formally

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<sup>38</sup> Danilenko 1993, p. 30.

<sup>39</sup> Danilenko 1993, p. 33.

<sup>40</sup> Danilenko 1993, p. 34.

<sup>41</sup> Danilenko 1993, p. 34.

<sup>42</sup> *Nicaragua* case, ICJ Reports 1986, p. 92.

<sup>43</sup> Crawford 2012, p. 447.

<sup>44</sup> Condorelli, *Realizing Utopia* 2012, p.148.

<sup>45</sup> Clapham 2012, p. 3.

equal and independent entities now existed on the international stage, and the development of international law was one of the ways to manage interstate relations.<sup>46</sup>

However, it was of great importance that international law did not result in an infringement of the independence of states. Because international law was developed in a system that wholly lacked institutions, made up solely by formally equal states, the international society became highly state-centric and lacked authority above them. The individualistic character of the system was further enhanced by the development and subsequent dominance of legal positivism, a theory that held only positive law, that is to say law enacted or created by authority, as true law. In a highly individualistic society of totally independent states, carefully safeguarding this independence, to create legally binding obligations between its members posed a problem. The apparent paradox of creating law between sovereign states, whilst avoiding undermining their independence, was resolved mainly by the concept of state consent. This meant that even though international law might oblige states to fulfil obligations, the state was still guaranteed that only their “free will” would be able to create such an obligation.<sup>47</sup>

The difficulty of how the will of a state would be manifested was still a concern, at least regarding state consent as to customary law. In regards to treaty law, the signing and ratification by a state is an evident proclamation of consent to be legally bound by the treaty.<sup>48</sup> In these situations the state actively participates in a process whose main intent is to create legally binding rules. Customary law, on the other hand, is created through a process where states may be passive and an explicit consent might be absent. In fact it could be said that one of the main features of custom is that it is created through a process that is normally not a deliberate law-making process.<sup>49</sup> To avoid infringing upon the independence of states, customary international law is traditionally viewed as a tacit agreement. States consent could either be explicit or implicit, and as a consequence custom was created as a merging of will of all states<sup>50</sup>. This was a view that was also held by international courts, e.g. the PCIJ in the *S.S. Lotus* case.<sup>51</sup>

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<sup>46</sup> Crawford 2012, p. 9.

<sup>47</sup> Crawford 2012, p. 9.

<sup>48</sup> Note that a treaty may become binding upon a state via custom, see article 38 VCLT.

<sup>49</sup> Cassese 2005, p. 156.

<sup>50</sup> Cassese 2005, p. 153.

<sup>51</sup> PCIJ, *S.S. Lotus*, p. 18.

As a consequence of the theory of the tacit agreement, the traditional view is that a state could always, at least at the moment of formation, object to be bound by a customary rule. This is referred to as the principle of the persistent objector. This way the concept of state consent responded to the basic need of not imposing legally binding obligation on states that did not wish to be bound by them, while at the same time creating complete coincidence of law-makers and those that the law addressed. This was a view that was also held by international courts.<sup>52</sup> This system suited the international society as it reflected the prevailing view of individualism among states and avoided an outside legislator.<sup>53</sup>

## 2.3 The doctrine of the elements of custom

### 2.3.1 The ICJ

As mentioned earlier, Article 38 of the ICJ Statute is said to reflect the formally recognized sources of international law is reflected in Article 38 of the ICJ Statute.<sup>54</sup> Article 38(1) b defines customary international law as “international custom, as evidence of a general practice accepted as law”. Even though the wording of the article does not provide an exact definition of customary international law, the widely accepted view is that article 38(1) b lays down two criteria which are required for the creation of customary international law. The first is practice of states and the second is acceptance of this practice as law, usually referred to as *opinio juris*. While state practice crystallizes the content of the relevant rules of conduct, it is the *opinio juris* that transforms norms of behaviour into legally binding rules of customary law.<sup>55</sup> There is an almost unanimous agreement that a legitimate customary law-making process requires the presence of these two elements.

The ICJ has sought to clarify the formation of customary rules. It has identified “recognized methods by which new rules of customary international law may be formed”,<sup>56</sup> and refers to “elements usually regarded as necessary.”<sup>57</sup> The ICJ has also explicitly

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<sup>52</sup> PCIJ, S.S. Lotus case.

<sup>53</sup> Cassese 2005, p. 153.

<sup>54</sup> Crawford 2012, p.20.

<sup>55</sup> Danilenko, p. 81

<sup>56</sup> *North Sea Continental Shelf* cases, ICJ Reports 1969, p. 41.

<sup>57</sup> *North Sea Continental Shelf* cases, ICJ Reports 1969, p. 42.

stated that in its pursuit of a customary international law in a given situation it looks “primarily in the actual practice and opinio juris of states”.<sup>58</sup> The traditional view on how customary law is formed, is further confirmed by §102 of the Restatement of the Law<sup>59</sup> declaring that the American view is that “Customary international law results from a general and consistent practice of states followed by them from a sense of obligation”.

### 2.3.2 State practice

From article 38(1) can be derived that the first requirement for the formation of customary international law is “a general practice”. This criterion can be objectively determined, as it is the actual practice of states. It is sometimes proposed that this “practice” is limited to positive act, and not statements and claims.<sup>60</sup> Within the international society the prevailing view is that not only verbal acts, but also omission, abstentions and even silence may constitute state practice.<sup>61</sup>

Evidence of state practice can be found in a variety of forms, such as published material, statements from officials and the state’s laws and judicial decisions. However, the primary source for evidence of state practice, correspondence with other states and advice from the state’s legal advisers, are seldom published.<sup>62</sup>

Through its jurisprudence the ICJ has tried to shed light on what is to be seen as actual state practice in regards to Article 38(1) b. There is no requirement of complete uniformity, but in the *Anglo-Norwegian Fisheries* case the ICJ held that substantial uniformity in the practice is required.<sup>63</sup> In the *Nicaragua* case the court stated 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. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as in-

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<sup>58</sup> *Continental Shelf case*, ICJ Reports 1985 p.29.

<sup>59</sup> Restatement of Foreign relations Law of the United States (Third), 1987.

<sup>60</sup> E.g. the dissenting opinion of Judge Read in the *Fisheries* case, ICJ Reports 1985, p. 191.

<sup>61</sup> Malanczuk 1997, p. 43, Tunkin, 2003, p. 124f.

<sup>62</sup> Malanczuk 1997, p. 39.

<sup>63</sup> *Fisheries* case, ICJ Reports 1951, p. 131, 138.

dications of the recognition of a new rule.”<sup>64</sup> Consequently a large amount of state practice that is inconsistent with the alleged rule prevents the formation of a new customary rule.

Provided that the consistency and generality are established, there is no particular duration of time needed. Rules regarding the continental shelf and airspace have both developed in a relatively short time.<sup>65</sup> In the *North Sea Continental Shelf* case the ICJ stated that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new customary international law” as long as the state practice “within the period in question” has been “both extensive and virtually uniform”.<sup>66</sup>

Generality of practice is a relative concept largely depending on the circumstances in the case and the rule in question. General practice should include conduct of all states that can participate in the formation of a norm or all states whose interests the norm would have great influence over.<sup>67</sup> However, it is often difficult to distinguish objections from abstentions regarding practice followed by others, because silence might represent either a tacit agreement or a general lack of interest in the matter.<sup>68</sup> Practice can be general even if there is not unanimous practice of all states and other legal subjects in the world. Consequently, states can be bound by customary international law against its will, if it does not protest to the formation of the rule. For such an occurrence to take place it is required that the state is sufficiently aware of the new practice and the rule.<sup>69</sup>

### 2.3.3 *Opinio juris sive necessitatis*

*Opinio juris sive necessitatis* is Latin and literally translated it reads “an opinion of law or necessity”. The idea of *opinio juris* as a prerequisite to customary law goes as far back as Isidore of Seville (c540-636CE).<sup>70</sup> In modern times it was as implied by the PCIJ in the *S.S. Lotus* case of 1927, but not explicitly expressed by the ICJ until the

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<sup>64</sup> *Nicaragua* case, ICJ Reports 1986, p. 98.

<sup>65</sup> Crawford 2012, p. 24.

<sup>66</sup> *North Sea Continental Shelf* cases, ICJ Reports 1969, p. 43.

<sup>67</sup> Malanczuk 1997, p. 42.

<sup>68</sup> Crawford 2012, p. 25.

<sup>69</sup> Malanczuk 1997, p. 43.

<sup>70</sup> Crawford 2012, p. 26.

*North Sea Continental Shelf* case of 1969.<sup>71</sup> Its significance cannot be ignored in regards to the theory of the elements of custom.

According to article 38(1) b of the ICJ Statute “general practice” will not become customary international law until it is “accepted as law”, meaning that the practice is carried out by a sense of legal *obligation*. But there are not only rules imposing duties within international law but also permissive rules, such as a right to persecute foreign nationals for crimes committed inside the state’s territory. In regards to such rules the *opinio juris* means that the practice is carried out with a sense that the conduct is *permitted* by international law.<sup>72</sup>

The subjective element is the decisive component that separates usage from binding rules of customary international law. Usage is a general practice of states that does not reflect a legal obligation, such as the practice of granting certain parking privileges to diplomatic vehicles. Such practice is carried out by courtesy, and are neither articulated nor claimed as legal requirements.<sup>73</sup>

To evaluate the subjective view of a number of states is obviously a difficult task. There is a modern tendency to derive *opinio juris* directly from the action of states, rather than searching for a direct psychological belief of the states. The result is that evidence of *opinio juris* need not include official statements or alike. Instead omissions and abstentions can form evidence of a state’s conviction in a certain matter. Because international law controls interstate relations, evidence of *opinio juris* must be found in a substantial number of states, and likewise the absence of protest must be widespread, for conduct to have value to the formation of a customary rule. It is also necessary to prove that the state carried out its obligation under a sense of legal duty. Permissive customary rules can be proved by the fact that states have acted, or claimed that they are legally permitted to act, in a certain way. If other states that whose interests were affected by the actions, or claims, do not protest to the legality of the actions or claims, *opinio juris* is presumably present.<sup>74</sup>

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<sup>71</sup> Crawford 2012, p. 26, note 31.

<sup>72</sup> Malanczuk 1997, p. 44.

<sup>73</sup> Crawford 2012, p. 23 f.

<sup>74</sup> Malanczuk 1997, p. 44.

## **2.4 New trends**

### **2.4.1 A new basis of obligation?**

The prevailing view is that article 38 of the ICJ Statute defines the sources of international law. However, this is not an uncontested view, and some claim that international law is not based on consent, but rather a modern type natural law.

### **2.4.2 Fragmentation of the traditional elements**

Developments in international law have shone an unflattering light upon the traditional doctrine of the elements of custom. This doctrine is questioned in many ways. Some types of alleged customary law do not fit within this doctrine. This developments has caused the form of custom has become even more uncertain, and virtually abstract.

### **2.4.3 The battle of state consent and an efficient law**

There are claims that customary law has in a sense lost its consensual character. Today the international society has a high focus on human rights, and the traditional focus on independence appears to decrease. This change has also been acknowledged by the ICJ.<sup>75</sup> There have emerged theories that wish to carry this development even further by removing the traditional requirement of state consent for creation of customary law.

### **2.4.4 Towards a new form of customary law?**

The abstract and uncertain form of customary law can be claimed to enable a modification. Some claim that customary law can become the normative instrument and antidote to global concerns and such a view is further enhanced if the argument is combined with new basis of the obligation within international law and lack of required state consent.

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<sup>75</sup> E.g. Barcelona Traction case.

## Chapter 3 – The basis of legal obligations

### 3.1 General

Traditionally there have been two rival doctrines that have tried to answer the question of why states should be bound to observe the rules of international law. These are the doctrine of natural law and the doctrine of state consent.<sup>76</sup> However, there might also be other explanations to the basis of a legal obligation. The answer holds great value, because it gives an explanation as to why a rule of international law has binding force, and thus explain the origin of customary rules. As said above, the consensual theory has been dominant in modern time, but recent development means that is not the obvious choice.

### 3.2 The natural rights perspective

#### 3.2.1 Historical perspective

Theories of natural dates as far back as the ancient Greeks and can be found amongst Roman jurists.<sup>77</sup> The doctrine of natural rights teaches that the primary principles of international law can be deducted from the essential nature of the state. The very fact that a state is a state gives it certain inherited, or natural, rights. Generally, five rights are claimed to belong to a state namely self-preservation, independence, respect, equality and intercourse. The USSR shared the natural rights ideas as to the rights of the states, but in another format. The concept of *peaceful coexistence* included elements as the principle of respect of sovereignty, state equality.<sup>78</sup> The theory of natural rights is merely the older doctrine of the natural rights of man, by which Locke justified the English Revolution and became the philosophical inspiration for the American Declaration of Independence, transferred to states. It is hard to dispute its historical significance, but today the theory is by the majority seen as out-dated. The notion that a state has these rights inherently, rather than by membership in a society, and that these rights makes up the legal system is no longer widespread. In fact the opposite is frequently held as true, in that a right has no value unless there is a legal system that gives the right its value.<sup>79</sup>

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<sup>76</sup> Clapham 2012, p. 47.

<sup>77</sup> Shearer 1994, p. 18, note 1.

<sup>78</sup> Tunkin 2003, p. 72.

<sup>79</sup> Clapham 2012, p. 47 f.

### 3.2.2 A revival of natural law?

The traditional theory of natural rights is today generally viewed as an obsolete concept. However, there are still traces of natural rights ideas in today's modern international law. Kelsen claimed that after being dominant during the 17<sup>th</sup> and 18<sup>th</sup> century, and collapsing during the 19<sup>th</sup> century, natural law was once again on the rise within social and legal philosophy during the 20<sup>th</sup> century.<sup>80</sup> There is an argument to be made that today's debate regarding human rights and humanitarian law is coloured with natural law elements.<sup>81</sup> Human rights are proclaimed as fundamental rights, and numerous conventions have been drafted with the purpose of protecting these rights.<sup>82</sup> However, there is seldom any comprehensive explanation as to why the right is fundamental, but rather arguments such as "Recognizing that these rights derive from the inherent dignity of the human person".<sup>83</sup> These types of arguments bear a striking resemblance to historical arguments from the natural rights of man, and can be considered as a modern natural law, in which the origin of rights no longer derives from God.

The fact that the U.N. has labelled the doctrine of "Responsibility to protect" with the ambiguous entitlement "norm"<sup>84</sup> is also questionable as it implies that it has a legal value, even though no legal basis can be established. As previously said, a norm is not a legal instrument but merely an opinion shared by many, and the doctrine of "Responsibility to protect" cannot be entitled higher value than a method for using existing legal instruments more efficient or political instrument used for persuasion.

The definition of customary international law in article 38(1) b of the ICJ Statute is by many regarded as incorrect in its wording. Customary law is not an evidence of practice, but in reality the reverse is true.<sup>85</sup> General practice of states, if done by a presumed legal obligation, creates customary rules which thus serve as evidence of custom. It has been suggested that the formal definition of customary law by the ICJ reflects the influence

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<sup>80</sup> Kelsen, *The Foundation of the Theory of Natural Law*, 1973, as found in Shearer 1994, p. 20.

<sup>81</sup> Shearer 1994, p. 20.

<sup>82</sup> E.g. the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights.

<sup>83</sup> ICCPR, Preamble.

<sup>84</sup> <http://www.responsibilitytoprotect.org/>

<sup>85</sup> Danilenko 1993, p 76 / Crawford p 23.

of natural law theories who views custom as evidence of an already existing law, and not as a law-creating fact.<sup>86</sup>

### 3.3 The consensual approach

#### 3.3.1 The doctrine of sovereignty

The doctrine of sovereignty proclaims that rights such as independence and equality are inherent in the very nature of the state.<sup>87</sup> As previously mentioned, it has been the principal theory of modern international law, and the definition of the sources of international law in Article 38 of the ICJ Statute reflects the consensual view of the system. The consensual theory has been highly revered by Soviet lawyers. The Soviet doctrine used to teach that all international law was the result of agreements between states. The only difference between a treaty-law and customary law was one of form, meaning that treaties were the result of explicit agreements and customary law of implicit agreements.<sup>88</sup>

Despite being a well-established theory, there is criticism of the so called doctrine of sovereignty. The doctrine has been called “a denial of the possibility of development in international relations”.<sup>89</sup> The idea that rights as independence and equality is inherent in the nature of states fails to recognize the fact that such designations to states are simply a stage in a historical process. It was not until modern times that states were regarded as independent or equal. There is no reason to assume that the process of development has stopped, and it may even be desirable that the development continuous, creating a more interdependent international society.<sup>90</sup> This may not result in that states’ independence is limited in a formal sense, but in practice their *de facto* ability to exercise independence may be limited.

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<sup>86</sup> Danilenko 1993, p. 77.

<sup>87</sup> Clapham 2012, p. 48.

<sup>88</sup> Malanczuk 1997, p. 47.

<sup>89</sup> Clapham 2012, p. 48.

<sup>90</sup> Clapham 2012, p. 48 f.

### 3.3.2 Positivism

The theory of positivism has strong support and has been adopted by many influential writers.<sup>91</sup> Positivism is based on the belief that international law is the sum of rules that states have consented to be bound by, and that nothing can be regarded as international law unless a state has consented to it. The consent of a state to the formation of a customary rule can be either express, as is the case by signing a treaty, or implicit.<sup>92</sup> By the 1920s it was generally believed that international law fully depended on state consent, express or implied. It was held that international law controlled the international relations between independent entities, and therefore the will of states dictated international law. In the *S.S. Lotus* case the PCIJ proclaimed that:

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law ... Restrictions upon the independence of States cannot therefor be presumed.”<sup>93</sup>

The positivist view of why international law is binding is based on the concept of *pacta sunt servanda*.<sup>94</sup> To resolve the dilemma of the consensual approach to a unwritten and spontaneously appearing customary law the theory of tacit consent was developed. Thereby customary law, in the same way as treaty law, can be seen as a tacit agreement to which all states has, expressly or implicitly, consented to. The view is sometimes argued even further by proclaiming that membership in the international society involves an implied consent to the binding rules of established customary law.<sup>95</sup>

There are many objections to the positivist doctrine. One is that the theory cannot adequately give account of the actual system of international law that exists today. For example in the practical administration of international law states are constantly being treated as bound by rules and principles which they cannot be seen as having consented to, unless a significant construction of facts. A theory where facts are forced is by some regarded as clearly not satisfactory.<sup>96</sup>

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<sup>91</sup> Shearer 1994, p. 21.

<sup>92</sup> Clapham 2012, p. 49 f.

<sup>93</sup> PCIJ, *S.S. Lotus*, p. 18.

<sup>94</sup> Translated ”agreements must be kept” (Latin).

<sup>95</sup> Shearer 1994, p. 21 f.

<sup>96</sup> Clapham 2012, p. 50.

Another objection is that positivism fails to explain why international law is binding. The consent itself cannot create obligations, unless there is already a legal system in place that declares that a duly given consent creates binding obligations on the state. The positivist view that the concept *pacta sunt servanda* is itself founded on consent is to argue in a circle. An extension of the positivist view that nothing can be law unless a state has consented to it, would imply that as soon as a state withdraw its consent the obligation to the state would be cancelled.<sup>97</sup> This might be an option in regards to treaty law, if the treaty includes a provisions allowing secession, but withdrawal from a customary rule is a more complicated process. A state cannot simply take back its consent and acts against a customary rule would be considered a breach of international law. However, it is possible that such breaches may evolve into a change in customary law, if the majority of states comply with the deviating behaviour. Other writers dismisses the theory of *pacta sunt servanda* by claiming that it is no more than as a principle developed as a customary norm, rather than a legal basis for international law. Instead *pacta sunt servanda* is to be viewed as one of the many basic principle of international law, together with principles such as respect for state sovereignty and state equality.<sup>98</sup>

### **3.4 The pragmatic approach**

An interesting approach to the subject of the basis of legal obligations is made by Chapman. His view is that the problem cannot be solved by a solely judicial explanation. He claims that the belief that validity of international law raises some peculiar problems arises from the confusion which the doctrine of sovereignty has introduced into international legal theory. Clapham says that even if the assumption of absoluteness of state sovereignty is questioned, there is a tendency to accept that state sovereignty requires a pursuit of a specific quality in international law, which is not found in other kinds of law. Therefore Clapham's opinion is that international legal theory has accepted a false idea of the state as a persona with its own will and life. Instead he proposes that states are merely institutions put in place by individuals to secure certain objects, mainly a system of order. The will of the state is an illusion, a concept that solely reflects the will of the individuals that currently occupy their governance. Clapham's conclusion is that "the ultimate explanation of the binding force of all law is that individu-

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<sup>97</sup> Clapham 2012, p. 50 f.

<sup>98</sup> Tunkin 2003, p. 244.

als, whether as single human beings, or whether associated with other in a state, are constrained, in so far as they are reasonable beings, to believe that order and not chaos is the governing principle of the world in which they have to live.<sup>99</sup> This conclusion dismisses the need for a legal basis. Instead the pragmatic approach that societies, and the individuals that they consist of, want order and order can be achieved by following established rules.

Chapham's view resembles the pragmatic natural law approach taken by Finnis, who claims that even though there are no "direct 'moral' arguments of justice" for accepting customary international law as legally authoritative, "the general authoritativeness of custom depends upon the fact that custom-formation has been *adopted* in the international community as an appropriate method of rule-creation." Finnis thereby concludes that if states accept customary law as binding grants "all states an opportunity of furthering the common good of the international community by solving the interactions and co-ordination problems otherwise insoluble. And this opportunity is the root of all legal authority, whether it be the authority of rulers or (as here) of rules."<sup>100</sup>

In Finnis view the preconditions of customary law are actually determined by customary law, and the opportunity of improving the common-good creates the legal basis for this customary law. This is a highly pragmatic view that actually says that there is no traditional basis for legal obligations, except for the opportunity of improving the international society. Also Clapham's view is pragmatic as it also shuns the traditional basis of legal obligations and instead focus on the rationality, and desire of order, among the human beings that make up and controls the state.

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<sup>99</sup> Clapham 2012, p. 51 ff.

<sup>100</sup> Finnis 2011, p. 243 f.

# Chapter 4 – Fragmentation of the elements of custom

## 4.1 Fragmentation

### 4.1.1 The view of the ICJ

The starting point when discussing the formation of a customary rule is currently Article 38 of the ICJ Statute. However, the article, if read literally, provides rules for internal regulation of the ICJ. Furthermore, according to Article 59 of the Statute a “decisions of the Court has no binding force except between the parties and in respect of that particular case”. To summarise, formally Article 38 issues rules intended for the functioning of the Court.<sup>101</sup> The definition of customary law, as expressed in Article 38 of ICJ Statute, is not an absolute fact, and neither is the traditional doctrine of the elements of custom. Without any formal source determining what is required for the creation of a customary rule there is always going to be uncertainty

International jurisprudence does not give a clear picture either. As previously mentioned, the ICJ has referred to the traditional theory several times, and also proclaimed that it looks “primarily in the actual practice and *opinio juris* of states”<sup>102</sup> when searching for customary law in a given situation. In practice the ICJ has not been consistent in its assessments. There seems to be a different approach in determining whether a customary rule is seen as created depending on the character of the issue. When an obligation is treaty-based, it seems as if *opinio juris* is sufficient to develop the obligation to a customary rule, and the element of state practice is left unconsidered.<sup>103</sup>

A factor that further highlights the fragmentation of the traditional elements of customary law is proposed increasing preponderance of *opinio juris* by the ICJ when looking for the presence and content of a customary rule. The ICJ claims that it searches for customary law “primarily in the actual practice and *opinio juris* of states”.<sup>104</sup> In reality it habitually refrains from investigating actual and quantitative conduct of states, but instead focuses on whether there is general belief in its existence, which are factors that

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<sup>101</sup> Crawford 2012, p. 22.

<sup>102</sup> *Continental Shelf* case, ICJ Reports 1985 p.13, 29.

<sup>103</sup> Crawford 2012, p. 27.

<sup>104</sup> *Continental Shelf* case, ICJ Reports 1985 p.13, 29.

generally determines *opinio juris*.<sup>105</sup> As an example it can be contended that in the *Nicaragua* case the ICJ relied more on UN resolutions and international treaties, rather than actual state practice, stating that “the text testifies to the existence and the acceptance by the United States, of customary principle which has universal application”.<sup>106</sup>

#### 4.1.2 Single or multiple elements

There have been attacks launched at both the traditional elements of custom in legal literature. One opinion is that the objective element is the only one required for the creation of customary law. For example, Kelsen has referred to *opinio juris* as a fiction to disguise the creative powers of the judge.<sup>107</sup> He later also claimed that *opinio juris*, the belief that practice is performed by legal duty, is not required. This was motivated by a notion that a legal rule which is created by state conduct cannot determine the conduct before being created, at least not as a norm. To require *opinio juris* would therefore imply that the states must act in error. Instead *opinio juris*, if present, is a useful tool for distinguishing between customary law and usage followed by a sense of courtesy or other reasons.<sup>108</sup> However, Kelsen later abandoned the position that *opinio juris* is only an illusion.<sup>109</sup>

The requirement of at least some sort of *opinio juris* appears to be valid, but it does indeed create confusion and something that can be described as a “chronological paradox”.<sup>110</sup> The requirement that states must believe that a rule already exists, and that their practice is therefore adapted after the supposed rule, is not logically questionable. It may be possible that the adherence to a norm, which in retrospective may appear as *opinio juris*, is in some cases made by courtesy. Akehurst suggests that there might not actually be a requirement of *belief*, but that what matters is actually what states *say*. As an example if a state claim that a certain behaviour, which departs from previous rules, is law and the other states do not protest, then a new rule may be created.<sup>111</sup>

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<sup>105</sup> Condorelli, *Realizing Utopia* 2012, p. 150.

<sup>106</sup> *Nicaragua* case, ICJ Reports 1986, p. 107.

<sup>107</sup> Kelsen 1939, RITD, p. 263.

<sup>108</sup> Kelsen 1945, p. 114.

<sup>109</sup> Kelsen 1966, p. 440.

<sup>110</sup> Byers 1999, p. 130.

<sup>111</sup> Malanczuk 1997, p. 45.

The element of state has also been questioned in legal literature and practice. There are those that advocate *opinio juris* as the only required element of customary law. This view corresponds with that of Cheng, who claims that both the element of state practice and the time element are irrelevant to the formation of a customary rule. Instead *opinio juris* is sufficient for the creations of so called *instant* customary law, a type of law that Cheng argued regulated the use of outer space.<sup>112</sup> A famous example of the *de facto* development of a customary rule without a clear element of state practice, was the establishing of a 200 nautical mile exclusive economic zone. The rule was included in the 1982 Convention on the Law of the Sea,<sup>113</sup> but had previously been a part of customary law. What had been a controversial idea in the 1940's suddenly developed into a consensus, proclaimed by a majority of the coastal states, and thereby became a part of customary international law.<sup>114</sup>

#### 4.1.3 Treaty convergence

Article 38 of the VCLT holds that “nothing ... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such”. Within international law there is a growing correspondence between customary law and law based on treaties, for example the 1984 Torture Convention. In the *North Sea Continental Shelf* case the ICJ confirmed that a norm, in the form of a treaty rule, binding only to its signatories may be transferred into customary law and thus become binding on all states, including non-parties to the original treaty.<sup>115</sup> The ICJ also stated that “widespread and representative” adoption of treaty-rule, possibly also by non-signatory states, in combination with only a “short period” of time is enough for the transformation of a treaty law into customary law.<sup>116</sup> The ICJ also underlined that “there is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.”<sup>117</sup>

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<sup>112</sup> Cheng 1965, IJIL 5, p. 123 ff.

<sup>113</sup> Art. 57, 1982 UNCLOS.

<sup>114</sup> Nandan 1987, p. 172.

<sup>115</sup> *North Sea Continental Shelf* case, ICJ Reports 1969, p. 39.

<sup>116</sup> *North Sea Continental Shelf* case, ICJ Reports 1969, p. 42.

<sup>117</sup> *North Sea Continental Shelf* case, ICJ Reports 1969, p. 41.

The recognition of the creation of customary law on the basis of treaty law has rendered discussions, primarily concerning the requirement of state practice in the formation of customary rules. It is suggested that international human rights conventions constitute evidence of customary law binding upon all states, not only state signatories. It is also proposed that conventions themselves actually generate customary rules.<sup>118</sup> By that conclusion multilateral treaties constitute or generate customary rules *ipso facto*, consequently without a requirement of state practice, or by regarding ratification of a treaty as state practice. This is a theory that applies to large conventions, where “widespread and representative” is established by a large quantity of ratifications, showing a kind of *opinio juris*.

Treaty-law can thereby have influence on customary law formation as the starting point of the process that eventually forms a corresponding customary rule. But treaties can also exercise influence on customary law in other ways. A treaty can be an agreement that simply approve and confirm current practice, a process that is termed *consecration*. Treaties may also serve as *crystallization* which completes the process of formation of a customary rule that was not completely defined.<sup>119</sup> Curiously there appears to be a usage of large international convention as *opinio juris*, generating a law-creating fact for customary law by treaty law.

## 4.2 Jurisprudence as customary law

Jurisprudence of international courts sometimes evolves into what could be considered as customary law, without the need for state practice. It is claimed that the jurisprudence of international tribunals, such as the ICTY and the ICTR, has been elevated into customary international law. The majority of the jurisprudence of the ICTY and the ICTR follows generally accepted international law, but some of the case-law that departs from long-held international norms and creates new standards.<sup>120</sup>

Another court exert influence of over customary international law is the ICJ. The functioning of the ICJ is to decide disputes submitted to it “in accordance with international

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<sup>118</sup> D’Amato 1982, Columbia Law Review 82, p. 1129.

<sup>119</sup> Condorelli, Realizing Utopia 2012, p. 152.

<sup>120</sup> Baker 2010, EJIL 21, p. 184 f.

law.”<sup>121</sup> When deciding applicable law, judicial decisions are “subsidiary means for the determination of rules of law”<sup>122</sup>. However, the instruction is made “subject to the provisions of Article 59” which states that “the decision of the Court has no binding force except between the parties and in respect to that particular case.”<sup>123</sup> Consequently there is no obligation to follow previous decisions and the case-law of the ICJ has no binding precedent, except for states that are parties in disputes.<sup>124</sup> This means that the ICJ cannot create generally binding rules of international law. Despite these facts it is recognized that the jurisprudence of the ICJ may have an impact on the law that is applied by the court, which it may rely on previous decisions when determining applicable rules in future cases.<sup>125</sup>

Despite the confining provision of the ICJ statute, there is no doubt that the ICJ plays a major role in the development of international law. This is particularly true in regards to customary law, as its unwritten nature makes it uncertain. Apart from the broad interpretation and application of international law in general, it also shapes customary law by deciding in cases regarding the existence of an alleged customary rule.<sup>126</sup>

While there are arguments for that the jurisprudence of courts should be seen customary law, there are also arguments against such a contention. The formal fact is that the purpose of international courts is not to create law, but rather to apply it. The courts interpret the law relating to disputes in internal situations.<sup>127</sup> However it’s a common phenomenon that the jurisprudence of influential courts actually reshapes the law. As members are bound by the law, and the law is enlightened by interpretations of courts, the courts are in practice elevated into quasi-legislators. It can also be argued that if states follow case-law, and this is done by the fact that they see themselves as legally obliged to do so, some of the jurisprudence of international courts in fact becomes customary international law. During the time of its existence, doctrine has consequently been de-

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<sup>121</sup> ICJ Statute, art. 38 (1).

<sup>122</sup> ICJ Statute, art. 38 (1) d.

<sup>123</sup> ICJ Statute, art. 38 (1) d, art. 59.

<sup>124</sup> According to Article 94 of the UNC, “Each member of the United Nations undertakes to comply with the decisions of the International Court of Justice in any case to it is a party.”

<sup>125</sup> Danilenko 1993, p. 253 f.

<sup>126</sup> Danilenko 1993, p. 255 – 257.

<sup>127</sup> Baker 2010, EJIL 21, p. 185.

veloped containing arguments supporting the contention that the decision of the ICJ should be considered a distinct mode of law-making in the international society.<sup>128</sup>

### 4.3 Decrees of international institutions

States does not have a privilege of asserting the practice which leads to the formation customary rule. That also practice international organizations and institutions can contribute to the formation of customary rules was acknowledged long time ago.<sup>129</sup> As well as treaties can have influence on the formation of customary law,<sup>130</sup> non-binding decrees of international organizations may also have influence as a law-making factor for customary law. The most common examples of influential decrees are declarations and resolutions from the UN General Assembly. The ICJ has stated that resolutions from the GA sometimes have “normative value”, even if they are not formally binding. This value may provide evidence important for establishing the existence of a customary rule or the emergence of *opinio juris*, but it may also be an expression of the gradual evolution of *opinio juris* for the establishment of a new rule.<sup>131</sup>

There have been suggestions that resolutions adopted over the years by the GA may be seen as implementation of treaty provisions and are thereby binding upon the member states.<sup>132</sup> However, the decisive criterion for determining the normative effect of a decree is to what extent it is adhered to in practice.<sup>133</sup> A normative decree will not by itself constitute a customary rule. The idea that a repetitive resolution from the GA creates customary law cannot be seen as valid. Even though it would imply states’ belief in a matter, there may be other reasons for the vote, or abstention, by a state in the GA. Therefore resolutions cannot by themselves at all times be understood as *opinio juris*, and the existence of such elements must be established elsewhere. If such are found, GA resolutions can very well be seen as the starting point for the evolution of a customary rule.

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<sup>128</sup> Danilenko 1993, p. 261.

<sup>129</sup> YILC 1950, p. 372.

<sup>130</sup> Se above, Chapter 4.1.3.

<sup>131</sup> ICJ Advisory opinion, Legality if Threat or Use of Nuclear Weapons, 1996, p. 254 f., para. 70.

<sup>132</sup> D’Amato 1982, Columbia Law Review 82, p. 1128.

<sup>133</sup> Shearer 1994, p. 46.

International organizations also speed up the process of formation of a customary rule by providing a forum for the rules' development. Within the UN bodies, particularly in the GA, topics of interest can be discussed and arguments can be raised for the view of states. This way an issue can be singled out and eventually reluctant states may be persuaded to create general consent concerning the issue which generates a standard of behaviour. This standard of behaviour thereby becomes a "bridge" between the previous normative vacuum, which can serve as a basis for potential regulation by treaty or customary law.<sup>134</sup>

## 4.4 Concepts inconsistent with the elements of custom

### 4.4.1 Norms with special legal force

In this context a brief mention of *jus cogens* must be made. Article 53 of the VCLT proclaims that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". The article further defines a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". The VCLT, apart from a few rare provisions, is viewed as a record of contemporary customary law. Consequently there is general acceptance to the concept of customary law that supersedes and even invalidates treaty law, an exception to the otherwise presiding principle of customary law as *jus generale*. Even though the principle of peremptory norms are generally accepted, there is a heated discussion regarding which norms that are actually included in the concept of *jus cogens*. There are those with a broad view that includes prohibition of aggression, genocide, torture, slavery and forced labour in the concept, and claim that there has thereby formed a "material constitution" within the international society.<sup>135</sup> Others have a more narrow view and claim that only "basic rights of the human person" and the prohibition of aggression are meets the standards to be generally accepted rules of *jus cogens*.<sup>136</sup>

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<sup>134</sup> Cassese 2005, p. 165 f.

<sup>135</sup> Condorelli, Realizing Utopia 2012, p. 152 f.

<sup>136</sup> Malanczuk 1997, p. 58.

#### 4.4.2 The Maartens Clause

An example of where the traditional doctrine of the elements of custom is said to absent is within the humanitarian law of armed conflict. The renowned Maartens Clause was first adopted at the 1899 Hague Peace Conference and holds that:

“Until a more complete code of laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience”<sup>137</sup>

The clause puts “laws of humanity” and “dictates of the public conscience” at equal rank as “usage”, that is state practice. The logical outcome of such a statement is that a customary rule based on humanitarian law, or the dictates of the public conscience, may not need the objective element of state practice. At the least, the level of state practice that has to be presented is lower in these cases than customary rules based on other underpinning. Instead *opinio juris* will have a special status as the determining fact, enabling for example general prohibitions before devastating actions are put into practice.<sup>138</sup>

The Maartens Clause gained more influence than was expected by its creators. A modern version was later inserted in number of treaties, including the 1949 Geneva Conventions and the First Additional Protocol of 1977.

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”<sup>139</sup>

This principle has attained recognition by international tribunals,<sup>140</sup> and acknowledged by states that recognizes the social and moral value in such an instrument. Even though there are no concrete customary international rules created on the basis of the Maartens clause, it is not insignificant. It would be thoughtless to exclude the possibility that the ICJ might see it as a factor when assessing the potential existence of a humanitarian customary rule in a case where state practice is unpersuasive. At the very least the

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<sup>137</sup> Cassese 2005, p. 160.

<sup>138</sup> Cassese 2005, p. 160 f.

<sup>139</sup> Additional Protocol I, Article 1, para. 2.

<sup>140</sup> ICJ Advisory opinion, Legality of Threat or Use of Nuclear Weapons, 1996, p. 257, para. 78.

Maartens Clause has symbolic value and can be used as a political tool, persuading sceptics in case of disagreements.

## **Chapter 5 – State individualism or collectivism?**

### **5.1 State autonomy**

One of the main features of the process of formation of customary international law is that normally it is not a deliberate law-making process. When international treaty-law is created, states willingly participate in a process where the main and conscious intent of the states is to create legally binding rules. The participation of states in the process that forms a customary rule is often motivated by trying to safeguard economic, political or social interests, and the evolution of a customary international rule is a side effect of the collaboration of states.<sup>141</sup> In regards to the process of formation of a customary rule, a state may therefore be passive.

Because of states possibly passive role, the process that forms customary international law has been described as “unconscious and unintentional law-making” by Kelsen.<sup>142</sup> The matter is a highly controversial, because according to this view binding obligations between states might be formed without the explicit consent of that state. State consent is, as previously stated, a fundamental device and one of the cornerstones of international law. The reason for this is because it protects two of the most important values of states: sovereignty and independence. Article 1 of the Montevideo Convention<sup>143</sup> holds “capacity to enter into relations with other states” as one of the four criteria of statehood. If a state happened to be bound by an international law without its consent it could be seen as an infringement on that state’s independence. The infringement would be especially clear if there is no possibility for the state to protest against the rule being applicable to the state. There is also an issue concerning the equality of states. Article 4 of the Montevideo Convention holds that “States are juridically equal, enjoy the same rights, and have equal capacity in their exercise”. If a majority of states decide that a certain norm is to be binding upon a reluctant state, in a way they show themselves su-

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<sup>141</sup> Cassese 2005, p. 156.

<sup>142</sup> Kelsen 1966, p. 441.

<sup>143</sup> 1933 Montevideo Convention on the Rights and Duties of States.

preme upon the other state. It is a generally accepted view that the rules of international cannot bind a state against its will.<sup>144</sup> The most famous statement for the consensual-based view was made in the *S.S. Lotus* case.

## 5.2 Interdependence within the international society

As previously stated, the international society has traditionally been highly individualistic, and the prime focus has been on preserving state sovereignty while maintaining functioning relations. The priority given to the concept of consent has been the key barrier that safeguards the will of states. However, it could be claimed that sovereignty, as an attribution to states, is merely a stage in the historical development. A matter of fact is that until recently states were not at all regarded as independent or equal. There is no reason to assume that this development has come to a halt, and some commentators actually consider a development towards a more interdependent international society as clearly desirable.<sup>145</sup>

One could argue that in recent times the international society has to some extent changed its focus. Fundamental values have emerged to which content and importance the states agree. The international society is now more community oriented and there is a pressure on states to comply.<sup>146</sup> There has also been a rapid expansion of human rights norms within the corpus of international law.<sup>147</sup> The horrors exposed in the aftermath of World War II can partly be accredited the launch of this expansion. To a certain extent fundamental values can be observed in a society where states still have the right to consent, or not consent. There is also higher interdependence because of growing economic globalisation. Many states are *de facto* dependent on other states for trade patterns and currency exchange, which precludes states to isolate themselves.

The process of creating a treaty requires explicit consent. A treaty is furthermore a source of obligation, meaning that it creates legally binding obligations solely on its signatories. For a treaty-based rule to become authoritative and efficient a large number of signatories are necessary, but for it be truly powerful a global consensus is required.

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<sup>144</sup> Byers 1999, p. 142.

<sup>145</sup> Clapham 2012, p. 48 f.

<sup>146</sup> Cassese 2005, p. 155.

<sup>147</sup> Baker 2010, EJIL 21, p. 203.

It is virtually impossible to create acceptance, to the content and form of a norm carrying great significance, by the nearly 200 different states, in addition to hundreds of intentional organizations and other subjects, that makes up the global society today. A reliance on treaty law therefor results in the somewhat static international society seen today.

Customary law has the potential to be substantially more flexible than treaty law. That does however depend on which requirements that are prescribed for its formation. A customary international law that is based on absolute and explicit consent creates the same static international relations as treaty law. The same result can be argued to occur when there is a possibility for states to protest a new customary rule. If customary law can be viewed as a tacit agreement, accepting the idea that an implicit consent is sufficient, a rule may become binding upon states that does not give their explicit consent. It thereby receives theoretical acceptance from passive states and the norm gains influence.

There have also been suggestions<sup>148</sup> of a further reduction of the consent required for the formation of a customary rule. If the majority of states agree on the content of a norm, one could argue that there should not be a possibility for reluctant states to protest to its formation, or their own participation in that legal regime. If the principle of a persistent objector is obsolete, norms that the majority of states view as important can be enacted as customary law. Such ideas carry great ramifications, and maybe also disadvantages. If the state consent is sacrificed in the name of “the common good”, it would mean that state independence is no longer a priority within the international society. On the other hand, a customary law not relying on state consent would be much more flexible and can be argued as having significant benefits. Global concerns, such as the environment, international terrorism, crimes against humanity and the use of nuclear weapons are global concerns that have been on the agenda for some time. There are those that claim that absolute autonomy of states is no longer desirable when a state can cause global destruction and threaten the international society as a whole. Universal norms might be an instrument that will finally resolve some of the current global issues.

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<sup>148</sup> Charney 1993, AJIL 87, p 530.

## **5.3 A tacit agreement**

### **5.3.1 Safeguarding independence**

Because custom often is created without states direct intent of law-making, consequently is often formed without explicit state consent. It is usually a result of a series of actions and statements over time.<sup>149</sup> To avoid infringing on states independence a theory of the tacit agreement exists. The theory holds that customary law can be seen as a tacit agreement, an agreement to which all states consent. Because the agreement is tacit, the consent of a state can be explicit, but even if there is no express consent a state might still give an implicit, or tacit, consent. This results in a theory in which a customary rule is seen as a convergence of the will of all states,<sup>150</sup> and thereby protecting state independence. It also provides an opportunity for the efficiency of custom as a source of international law. A requirement of explicit state consent would be inhibitory for the formation of new customary rules. In practice it would denominate custom to simply a form of unwritten treaties, removing its potential of spontaneously forming rules through consistent practice of states.

### **5.3.2 Objections to the tacit agreement**

Some authors claim that the traditional view of custom as a tacit agreement is no longer tenable. Cassese claims that when a customary rule crystallizes, it does not need the support of all states but merely that a majority of states engage in consistent practice under the belief that it is a necessity. Indifferent states shall be bound by rule, for example a landlocked state in the case of a rule concerning the law of the sea. Cassese also believes that a state that has been passive and refrained from either expressing consent or disagreement shall also be bound by a customary rule. He concludes his argument by claiming that the fact that no court has ever examined the views of all states of the world is evidence that the universal participation, whether it be express or implicit, is not a requirement for a customary rule to form.<sup>151</sup>

Kelsen sees the theory of a tacit agreement as hardly different from the theory of natural law, and claims that the tacit agreement is a “political fiction”. He claims that customary

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<sup>149</sup> Byers 1999, p. 142.

<sup>150</sup> Cassese 2005, p. 153.

<sup>151</sup> Cassese 2005, p. 162.

law can only be seen as created by consent if it was based on acts by all states that are bound by it, or if customary law was only binding upon those states whose acts contributed to the formation of the customary rule. Because customary law is general international law it is binding on all states, it would therefore be necessary to prove that all states have consented to all customary law by their actual conduct. Because this is not a requirement for customary law and customary law actually binds states which never have consented to it, such as a new state, Kelsen therefor dismisses notion that consent, whether implicitly or tacitly, is required for all creation of customary law.<sup>152</sup>

Clapham holds that to fit the facts into a consistently consensual theory of the nature of international law is not possible. He therefor claims that implied consent cannot be seen as a “philosophically sound”<sup>153</sup> explanation of customary international law. This is because the reason for an individual or a state to oblige to a customary law is that it believes the rule to legally binding, not because the state has consented to it. Furthermore, the binding force of a rule does not depend, and is not felt by its followers, as dependent of the approval of the state it is addressed to. Clapham’s conclusion is that “implied consent is therefore a fiction invented by the theorist”.<sup>154</sup>

A more appropriate explanation to a state’s acceptance of a customary rule without express consent is the theory of *acquiescence*. In the *Gulf of Maine* case the ICJ held that “acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent”.<sup>155</sup> To distinguish between the implied consent, derived from the theory tacit consent, and acquiescence may in practice be difficult, however theoretically it serves an important purpose. A passive state can be considered acquiescent, in other words be giving passive agreement without protest. It does not imply that a state *de facto* gives consent, but rather a silent acceptance from the state in question. However, it may be hard to differentiate between silence by acceptance and silence by unawareness. Absence of protest is regarded as acquiescence only if the practice has influence on the interests and rights of the passive state. The passive state must also be aware of the claims of a new rule by other states in the international society. In

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<sup>152</sup> Kelsen 1966, p. 444 f, 453.

<sup>153</sup> Clapham 2012, p. 50.

<sup>154</sup> Clapham 2012, p. 50.

<sup>155</sup> *Gulf of Maine* case, ICJ Reports 1984, p. 305.

situations of passiveness to indirect interests or interests relating to global concerns, an absence of protests is regarded as acquiescence.<sup>156</sup>

## 5.4 The persistent objector

### 5.4.1 A guarantee for state consent

The natural consequence of a system of international law based on consent is that states have a right to object to any legally binding obligation applicable to the state. It is possible to argue that because states have given their consent to the process of customary law, they are therefore also bound by a rule which results from that process. It is however not likely that a state objects to the formation of a customary rule, unless the rule is perceived as significantly harmful to the interests of the state. Consequently it is unlikely that the reluctant state would comply with such a rule, and this type of “system consent” it may thereby encourage “law-breaking” by opposing states.<sup>157</sup> Such a solution is unsatisfactory because a widespread law-breaking may dilute customary law as a source of international law. The principle of the persistent objector has been developed to resolve these types of situations.<sup>158</sup> If a state can show that it has expressly and consistently rejected the rule since the earliest days of the rule’s existence the state avoids being legally bound by the rule.<sup>159</sup> Because there is a presumption of acceptance, evidence of objection must be clear<sup>160</sup> and a dissent after the time that the rule has become well-established will not prevent the rule becoming binding on the state.<sup>161</sup> If the “persistent objector” has met the formal criteria states can exempt themselves from a rule becoming binding to them. The principle thereby constitutes a guarantee for states not to be bound by a customary rule without their consent.

The existence of the principle of the persistent objector has been confirmed in international jurisprudence. The principle was recognized by both parties in the *Anglo-Norwegian fisheries* case, and the ICJ proclaimed that “the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt

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<sup>156</sup> Danilenko 1993, p. 108.

<sup>157</sup> Byers 1999, p. 180.

<sup>158</sup> Byers 1999, p. 180.

<sup>159</sup> Malunczuk 1997, p. 48.

<sup>160</sup> Crawford 2012, p. 28.

<sup>161</sup> Malunczuk 1997, p. 48.

to apply it to the Norwegian coast".<sup>162</sup> In the *Asylum* case the ICJ once again confirmed objections as a means to exempt a state from the application of a customary rule by proclaiming that an alleged customary rule "could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying" certain conventions including rules concerning diplomatic asylum supporting the alleged customary rule.<sup>163</sup>

#### **5.4.2 An obligation to object?**

Assuming that the principle of the persistent objector is valid instrument unto the creation of customary law, there are still some uncertainties. The initial question is whether there, at all times, exists an obligation for states to protest if they are not to be bound by a customary law.

If an obligation to protest does exist, a subsequent question arises. This question concerns the scope of the obligation. An absolute requirement of protest as a general rule would probably become impossible in practice, especially as the character of customary law means that it spontaneously appears without a formal process. A microstate, e.g. Nauru, in the periphery of international politics cannot be obliged to be aware of patterns developing regarding sea law in the north Atlantic, even though rules in this area would be of relevance and importance to Nauru as an island nation. Such an obligation would require vast resources and constitute a heavy burden even for the larger states.

There is also an issue if the principle of the persistent objector is realistically available on a long-term basis for states. The question is unanswered and there is no evidence of a state remaining as a persistent objector for an indefinite period of time. A telling example is that the non-industrialized and the socialist countries eventually withdrew their earlier opposition and accepted the doctrine of restrictive state immunity from jurisdiction.<sup>164</sup>

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<sup>162</sup> *Fisheries* case, ICJ Reports 1951, p. 131.

<sup>163</sup> *Asylum* case, ICJ Reports 1950, p. 277 f.

<sup>164</sup> Byers 1999, p. 181.

Acquiescence is however not always done knowingly. Instead states may not be aware of the matter. A suggestion to a solution is to have a *reasonable person (state)* test, which would establish a duty upon states to know that law is being made.<sup>165</sup>

### 5.4.3 Doubting the persistent objector

The general view is that the principle of the persistent objector is a valid instrument to avoid being legally bound by an emerging customary rule.<sup>166</sup> Even though it is rarely invoked, it has gained large attention in legal literature.<sup>167</sup> There are however those that are critical to the concept. Cassese claims that “customary law no longer maintains its original consensual features.”<sup>168</sup> This claim is supported by two grounds. Firstly that the character of the current international relations has gone from individualistic to community-oriented and based on social values. Consequently it is extremely difficult for an individual state to avoid the pressure to comply with the opinion of the vast majority of states. The second ground for Cassese’s argument is that there is no firm support for the principle of persistent objector in state practice or international jurisprudence. The two explicit arguments for the principle of the persistent objector are to be found as two *obiter dicta* of the *Anglo-Norwegian fisheries* case and the *Asylum* case. Therefore Cassese believes that “a State is not entitled to claim that it is not bound by a new customary rule because it consistently opposed it before it ripened into a customary rule”. He also claims that even though “strong opposition of major Powers to new rule may either prevent or slow down its formation” but that such events are “factual opposition not amounting to a legal entitlement”. Cassese claims this is similar to the case when a new state emerges, and it is then bound by all pre-existing customary law and cannot challenge it legally.<sup>169</sup> However, this argument cannot be considered persuasive.

The most prominent sceptic of the principle of the persistent objector is probably Charney who claim that “the persistent objector rule has no legitimate basis in the international legal system”.<sup>170</sup> His view however not generally accepted and has been labelled

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<sup>165</sup> Charney 1993, AJIL 87, p. 538.

<sup>166</sup> Malanczuk 1997, p. 48, Crawford 2012 p. 28, Danilenko 1993, p. 109.

<sup>167</sup> Charney 1993, AJIL 87, p. 538.

<sup>168</sup> Cassese 2005, 162 f.

<sup>169</sup> Cassese 2005, 162 f.

<sup>170</sup> Charney 1985, BYIL 56, p. 21.

“an exception one.”<sup>171</sup> Charney claims that the fact that the persistent objector rule has rarely been used means that it is open to serious doubt. He also suggests that there is much that the rule fails to cover. Because the process that forms customary law is so abstract, it is hard to determine exactly when a rule is formed. Since a protest after the new rules formation is void, the rule limits a state’s actual possibility to object. Charney also questions a state’s possibility to object when the objection is made timely, on the grounds that the actual *objection* has formal requirements such as persistency. He is also concerned with the possible international pressure an objecting state might suffer, as international law allows other states to act against an objecting state as if it was violating the law. This political pressure is a part of the process that forms customary law, and Charney claims that if the persistent objector was a true right, objecting states would logically gain recognition of other states as to that right rather than being viewed as a law-breaking state.<sup>172</sup>

Charney also proposes that there is no state practice or other evidence as to the existence of the rule, because the only jurisprudence is two judgements, only as *obiter dicta*, by the ICJ. The argument that a possibility to protest is necessary because international law is based on the sovereignty of states is dismissed by claiming that sovereignty may not always prevail over international law. As an example *jus cogens* is viewed as exception from the requirements of state consent, which to Charney looks as a diminishing fact to the credibility of the persistent objector.<sup>173</sup>

There is however great consequences following from the exclusion of the principle the persistent objector. The underlying purpose of giving states a right to protest against a customary rule is to safeguard state consent and thereby independence of the states. If states have no right to protest, customary law is ultimately no longer based on consent. In short term, such collectivism might promote law-breaking, since states rarely protest to a rule unless it does not intend to follow it. On a long-term basis, one of the dangers is that such a system might encourage states to not participate in the international society.

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<sup>171</sup> Malanczuk 1997, p. 48.

<sup>172</sup> Charney 1993, AJIL 87, p. 538 f.

<sup>173</sup> Charney 1993, AJIL 87, p. 540 f.

## Chapter 6 –Summary and Conclusions

Cardozo, an American judge, warned about when treating certain concepts as if they exist, and developing them without considering their consequences, the concepts may become our tyrants rather than our servants.<sup>174</sup> Therefore it is indeed important to examine the possibility, the product and the desirability of developments towards a non-consensual customary international law.

In summary, the traditional theory of customary international law was indeed a convenient theory to the contemporary international society. In the 19<sup>th</sup> century customary international law fell out favour as an instrument of international law, because of its uncertain character and inability to achieve rapid changes in a politically shifting world. This process was spurred by *codification* of existing customary law and the *progressive development*, a concept meaning that new norms of international law were enacted by treaty-law. Consequently treaty law became the dominant source of international law and customary law was relegated to virtually a secondary source. This was a development supported by the international society, comprising of states as well as international institutions, as a whole.

During this period of time independence, enforced by the concept of *state consent*, was the primary value within the international society, a value that was not to be infringed on. This was especially evident by the statements of the PCIJ in the famous *S.S. Lotus* case. By the influence of legal positivists, customary law was generally considered a tacit agreement, and consequently it was believed that all states had, either expressly or implicitly, consented to formation of all existing customary rule. Subsequently it was held that states were also able to protest to the formation of a new customary rule and there remain outside of that rule's applicability.

The establishment of the PCIJ and the subsequent creation of the ICJ produced an authoritative definition of the sources of international law, and customary law was defined as “general practice accepted as law”.<sup>175</sup> The interpretation by the ICJ, accompanied by legal writers, generated the generally accepted doctrine of the elements of custom.

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<sup>174</sup> Cardozo 1928, p. 65.

<sup>175</sup> Article 38(1) b of the ICJ Statute.

Thereby the creation of a new customary rule required two elements; the objective elements of general and fairly consistent *state practice* and the subjective element of *opinio juris*, a belief that state practice was performed under a legal obligation.

However, new trends as to customary law emerged in the latter half of the 20<sup>th</sup> century, casting an unflattering light on the traditional understanding of customary international law. Present-day customary international law is characterised by a plentiful of uncertainties surrounding the formations of customary international law and the state's role thereto.

Through history there have been numerous theories trying to explain the legal basis and of international law, and there are uncertainties as to which is present ruling theory. As mentioned above, the consensual view has in modern time overtaken the dominant position, a position that was previously held by the theory of natural law. The traditional natural rights theory which claimed that state rights were absolute and inherent is outdated. This is evident by the fact that a right, for instance the right to independence, is worthless if there is no legal system providing corresponding duties of respecting independence to other states. The same argument can be applied to the "modern natural law" that could be argued for. Even though human rights are motivated by "the inherent dignity of human person", it is not from this basis that the legal values of human rights derive. However, the logical assumption is that a right is not larger than the remedy provided for its breach, and the only human rights which are enforceable, if one assumes that any are, is those that are enacted in treaties or customary law. Also, if natural law was the legal basis there would be no need for state consent, which there obviously is.

The general view in international law is that some element of consent is required for a norm to become an international rule. After all, the international legal system is primarily made up of states, and it is unlikely that a state would comply with a prejudicial rule that it had not consented to. An absolute theory of state sovereignty, as the legal positivists promoted, appears implausible. It is a recognized fact that states can be bound by customary international law even though they consented to, as is the case when a new state emerges. A new state has obviously not participated in the law-making process and cannot thereby be considered to have consented to customary law it becomes bound by,

not even tacitly or by acquiescence as it did not exist. Also, the argument that *pacta sunt servanda* gives international law its binding force is an inconceivable circular argument.

Another area of great uncertainty is the formation of customary rules. Its unwritten character makes customary international law inherently uncertain, especially so as there is the lack of formal sources within a de-centralized international society. The traditional view stems from Article 38 (1) b of the ICJ Statute, where customary international law is defined as “general practice accepted as law”. A doctrine of the elements of custom has been developed by jurisprudence of the ICJ and legal writing. According to this theory the formation of a new customary rule requires two elements. The first being *state practice*, where a general and consistent pattern of practice amongst states must be established objectively. The second element is *opinio juris*, which can be described as a subjective belief of the state that actions have been carried out under a sense of legal obligation.

The traditional view, comprising of the elements of custom, has been questioned both theoretically and in practice. The first concern is that Article 38 actually determines which types of rules the court is to apply in disputes that have been submitted to it. The provision was not meant to be a formal source, enumerating the sources of international law, but rather it issues rules intended for the functioning of the court. Thereby the theory of the elements of custom is not unquestionable. Legal writers have questioned the existence of both elements, but none convincingly.

In practice there has also evolved types of customary law that is not completely compatible with the elements of custom. Today there is a correspondence between large parts of the customary law *corpus* and treaty-law. The two primary sources of international law influence each other in several ways. A particularly interesting aspect is that of customary law created on the basis of a treaty, a process recognised by Article 38 of the VCLT. Thereby a norm goes from being binding only on state signatories to being binding to all states. It has also suggested that under these circumstances there is no need for state practice, or that ratifications can be seen as state practice, and that the *opinio juris* is evident by a widespread and representative ratification of the treaty. In principle this is a valid method for the creation of customary law. The fact that most conventions in-

clude reservations, and the consent given to a treaty is often conditioned by a provision allowing exiting the treaty, may cause controversies if applied on a large scale.

There have also been suggestions that non-binding acts ought to be considered as customary international law. Jurisprudence of international tribunals, especially by the ICJ, is suggested being customary international law. It would be foolish not to recognise that courts may have influence on international law. However, jurisprudence is formally meant as an internal act, having legal force only to the parties of the dispute in the situation at hand. The same argument applies to decrees of international institutions. In summary, both courts and institutions can influence the behaviour of states, which consequently may develop into a customary rule.

Another area of uncertainty is the role and autonomy of states, in regards to the process of formation of customary international law. Because today's world is global with global issues there is quarrels as to how much states' independence should be valued and consequently respected. Independence has long been a fundamental value within international law. However, recent time has seen a shift in priorities. Human rights are today one of the most prominent issues. There are also concerns on a global scale, such as international terrorism and the threat of nuclear warfare. This has led to suggestions that complete state autonomy can no longer be accepted. Or at least, that independence is no longer a value that is cannot be infringed on. This has led to developments regarding the role of the state in formation in customary law.

If we have concluded that a consensual approach is the legal basis to international law, there still remains great uncertainty as to how this consent is to be shown. Whereas treaties are created by a clear participation and negotiation of states, customary law is formed spontaneously without an obvious law-making process. When a treaty is signed and ratified it reflects an express agreement, but customary law is the result of a slow process resulting in a diffuse consensus within the international society. Customary law is general international law, meaning that it as a general rule it is legally binding to all states. A question of how state consent is to be shown arises. In situations when states have not expressly given their consent to the formation of a customary rule, how can they be bound by it?

Because of the dominance of the consensual theory coupled with the influence of legal positivists the concept of customary law as a *tacit agreement* was developed. This theory conveniently explained that all states had, if not expressly then implicitly, consented to being bound by all customary law. As shown above, this theory is a fiction and cannot be considered valid today. However, state consent is still the legal base of customary obligations. If there is *opinio juris* there is at least some sort of consent expressed, implicit or express. A more appropriate concept for explaining this phenomenon is *acquiescence*. Unlike the *tacit agreement*, this theory explains that a passive state is considered *acquiescent* if it is aware of the development of a new rule and do not protest to its formation

So if we conclude that acquiescence can bind passive states a subsequent question arises. What will happen if state do not expressly consent, nor yet remain passively acquiescent, but actually protests to the formation of a customary rule? The traditional solution to this problem is that because customary law is dependent on state consent, there is a possibility for states to protest against becoming bound by a new rule of customary law. If the objection is persistent, clear and made before the rule has crystallized, the state will be exempt from the new rule's applicability. This has been labelled as the principle of the *persistent objector*. This principle is crucial to ensure state independence, since a state could otherwise become legally bound by a rule against its expressed will. A state cannot protest to stop a rule from developing, because customary rules can have less than universal acceptance, but still form a part of international law,<sup>176</sup> but it may exempt itself from that rules applicability.

There have however been suggestions that the principle of the *persistent objector* is not a part of the international law. It is true that the principle is seldom used. Instead protests are generally a stage in a norms development. However, it holds much value as a principle. A removal of the principle would see independence forcibly degraded, and customary law would no longer be based on consent. The motivation for such a drastic step could be that states should not be able to exempt themselves from issues highly

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<sup>176</sup> Crawford 2012, p. 28.

important for all of mankind, for instance a prohibition of nuclear weapons or environmental protection.

So, in conclusion *is* customary international law developing towards a non-consensual source of international law? It is fair to say that the present status is that customary law is *today* based on state consent. Despite some discrepancies, it does seem rational to conclude that today Article 38(1) b of the ICJ Statute reflects customary law as to how a customary rule is formed, albeit it might not a formal source of international law. There is a requirement of state practice, albeit it might be short. There is also a requirement of some sort of subjective belief that the acts taken are done so out of a legal obligation, creating a diffuse consensus of the states. This is a requirement that can be labelled *opinio juris*. This is supported by the fact that both states and the ICJ, the official court of the UN to which virtually all states are members, view these elements as required. It is also an accepted established doctrine accepted by states, international courts and most legal writers.<sup>177</sup>

However, it could very well be claimed that there are developments *towards* a less consent-based customary international law. The theory of *acquiescence* proves that there is not an absolute requirement of consent, as passive states can be bound. Cassese claims that even without a superior authority in the international society capable of producing and imposing heteronomous law on its addressees, some sort of law also imposing obligations, even on those that did not consent to it, is gradually starting to emerge<sup>178</sup>. This seems as a possibility, but not in the form of a non-consensual customary law. Rather the discussions, pressure and political tools, e.g. the *Responsibility to Protect* or the *Maartens Clause*, within the international society can be used to deter states from protesting to norms that protect important values, and thereby creating acquiescence.

The lack of formal sources leaves customary law open for configuration. The fragmentation of the elements of custom leaves great uncertainty regarding what actually constitutes customary international law. Can *anything* be argued to constitute customary law, if there is a conviction among the majority of states? In that case customary international law is open for modification, and could very well become a normative tool.

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<sup>177</sup> Malanczuk 1997, p. 39.

<sup>178</sup> Cassese 2005, p. 163.

If the principle of the *persistent objector* were to be recognised as void, a further step away from the consensual theory would be made. Charney argues that the credibility, even legitimacy, of that states may find themselves bound by a law they did not consent to can be derived to reformation of the international society in the aftermath of World War II.<sup>179</sup> Clapham claims that sovereignty is merely a term which designates a collection of particular and very extensive claims that states habitually make for themselves in their relation with other states. The fundamental problem is however that states possess power and there is always a problem of legal control of power.<sup>180</sup> They may both have a point, but the fact remains that a state has the control, and will not give anything up unless it wishes so. But as Crawford says, it is a fact that states can, and have, modified their independence, for example by membership in international organizations.<sup>181</sup> When states enter into organizations such as the UN and the EU, they willingly forfeit some of their power. The present state of the system is not absolute, and there is no legal reason for a fundamental change. The system of international law exists in a persistent, and even necessary, state of flux.<sup>182</sup>

Because state consent is still the basis of customary law, there must also be a possibility for states to object, not to the formation of a customary rule, but at least to the new rule's applicability to that state. Whether this is ensured by principle of the persistent objector, or in another form, this must be an option. Therefore it is not impossible, but rather simply highly unlikely. To create a customary law lacking the possibility of the *persistent objector*, a formal source prescribing this is probably needed. A constitutionalization of the system of international law may be a solution. A formal source would eradicate, at least some, of the uncertainty surrounding customary law. This is however a highly unlikely to happen in a near future.

As long as consent, whether it is express or implicit, is the basis for legal obligations, it can also be argued that the product is in a sense true law. However, if the principle of the persistent objector were to be declared invalid a situation arises where a new kind of

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<sup>179</sup> Charney 1993, AJIL 87, p. 543.

<sup>180</sup> Clapham 2012, p. 46.

<sup>181</sup> Crawford 2012, p. 16

<sup>182</sup> Crawford 2012, p. 16.

international law is created. The state consent gives customary law legitimacy and without consent, a customary rule might still have broad support by the international society but its legitimacy would always be open for questioning. Without legitimacy, the product could be argued to be a norm. But a norm is not a legal instrument, but rather a legal, or even political, doctrine.

For fundamental values there already is a tool in form of *jus cogens*. Even though there is an important to solve global concerns, there must be a balance between the rule's efficiency and state independence. Such an infringement on state independence would not be proportional as to the result. To expand customary law into a non-consensual source of law would also have a significant weakness, as a treaty can overrule the customary rule by the principle of *lex specialis*. Instead of striving towards customary law without a requirement of state consent, an option could be to embrace the concept of consent as a substitute for formal sources in international law, maybe a constitutional equivalent.

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