> The more direct sources of international law are the agencies, human or other, by means of which it is expressed and rendered binding.[13]

Some writers have gone further to argue that the whole idea of 'sources' of international law is flawed. For example, O'Connell has written:

> Sometimes the word 'source' is used to indicate the basis of international law; sometimes it is confused with the social origin and other 'causes' of the law; at others it is indicative of the formal law-making agency and at others again it is used instead of the term evidence of the law... As a figurative association the word 'source' is misleading and should be discarded.[14]

3.2 Article 38 of the Statute of the International Court of Justice

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 recognised by the contesting states;

   (b) international custom, as evidence of a general practice accepted as law;

   (c) the general principles of law recognised by civilised 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.[15]

The traditional starting point for any discussion of the sources of international law has been Article 38 of the Statute of the International Court of Justice. Apart from a few formal changes the Statute is similar to the Statute of the Permanent Court of International Justice. The Permanent Court of International Justice (PCIJ) was created in 1920 under the auspices of the League of Nations and the Statute was drafted by an 'Advisory Committee of Jurists' appointed by the Council of the League of Nations. The role and procedures of the International Court are discussed in Chapter 12.

> The search for the thing which, by the highest compulsive force as it were, gives to the content of the rules of international law their character as law, whither should it be directed? The traditional approach leads one to turn to Article 38(1) of the Statute of the International Court of Justice – formerly the same article in the Statute of the Permanent Court of International Justice. Quite why this should be the approach is not wholly clear. That article, says Brierly, is 'a text of the highest authority',[16] which is to state the proposition to be proved. The article does not even say that it purports to be a list of sources otherwise than by implication. For it simply states that the Court 'whose function it is to decide in accordance with international law such disputes as are submitted to it, shall

13 E Lauterpacht (ed), *International Law – Collected Papers of Hersch Lauterpacht*, Vol 1, 1970, Cambridge: Cambridge University Press at p 51.

14 O'Connell, *International Law*, Vol 1, 1970, London: Stevens.

15 Article 38 of the Statute of the International Court of Justice.

16 Brierly, *Law of Nations*, 6th edn, 1963, Oxford: Clarendon Press at p 56.

> apply' that which it prescribes. One of the matters so prescribed is 'the writings of the most highly qualified publicists ... as a subsidiary means for the determination of rules of law', a formulation which suggests less a formal source than what Salmond would have called no more than legal literature – not even a literary source. Another item echoes, or is echoed by, Professor Corbett: namely 'international custom as evidence of a general practice accepted by law' – not a source at all according to him, if he admits any sources at all.[17]

Article 38 does not actually use the term 'sources' but rather describes how the Court is to decide disputes which come before it for settlement. Law is not necessarily simply defined in terms of how courts decide disputes. Article 38 does not refer to resolutions of the United Nations or other international organisations yet such resolutions may play an extremely important role in international society and may arguably constitute a source of law. A question that will be considered at the end of this chapter is the extent to which Article 38 is to be regarded as a comprehensive list of the sources of international law.

Another question that arises is whether Article 38 para 1 creates a hierarchy of sources. It is argued that there is no rigid hierarchy, but those drafting the article intended to give an order and in practice the Court may be expected to observe the order in which they appear. (a) and (b) are obviously the important sources, and the priority of (a) is explicable by the fact that this refers to a source of mutual obligation of the parties – source (a) is thus not primarily a source of rules of general application, although as we shall see, treaties may provide evidence of the formation of custom. It may be useful here to note what Lauterpacht has written on the issue:

> The order in which the sources of international law are enumerated in the statute ... is, essentially, in accordance both with correct legal principle and with the character of international law as a body of rules based on consent to a degree higher than is law within the state. The rights and duties of states are determined, in the first instance, by their agreement as expressed in treaties – just as, in the case of individuals, their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more states with regard to a matter regulated by treaty, it is natural that the parties should invoke and that the adjudicating party should apply, in the first instance, the provisions of the treaty in question.[18]

3.3 Treaties

Treaties represent a source of law whose importance has grown since 1945. In this chapter we are only concerned with treaties as a source of law. Chapter 4 deals with the mechanics of treaty making and enforcement in more detail. Treaties may be bipartite/bilateral or multipartite/multilateral and they may create particular or general rules of international law. A distinction is often drawn between **law-making treaties** (*traité-lois*) and **treaty contracts** (*traité contracts*). The essence of the distinction lies in the fact that **treaty contracts**,

17 Clive Parry, *The Sources and Evidences of International Law*, 1965, Manchester: Manchester University Press at p 5.

18 Lauterpacht, *International Law*, Collected Papers, Vol 1, p 87.

being agreements between relatively few states, can only create a particular obligation between the signatories, an obligation which is capable of fulfilment, eg an agreement between France, Germany and the UK to develop and build a new fighter jet. **Law-making treaties** create obligations which can continue as law, eg an agreement between 90 states to outlaw the use of torture. There has been a great increase in the number of law-making treaties throughout this century. One reason for this growth is the increase in the number of states and the fact that many new states have a lack of faith in any rules of customary international law in which they have not played a part in creating. The term 'law-making' can lead to confusion and it should be used with care – strictly speaking no treaty can bind non-signatories. Even a multipartite treaty only binds those states which are party to it. The mere fact that a large number of states are party to a multilateral convention does not make it binding on non-parties although its existence may be evidence of customary international law as was discussed in the *North Sea Continental Shelf* cases (1969).[19] For this reason sometimes the term law-making is replaced by 'normative'. Normative treaties bind signatories as treaties, but may also provide evidence of rules of custom which bind all states. Examples of normative treaties would include treaties operating a general standard setting instrument – eg International Covenant on Civil and Political Rights 1966; and treaties creating an internationally recognised regime – eg the Antarctic Treaty 1959.

Customary law and treaty law have equal authority. However if there is a conflict between the two it is the treaty that prevails. This point is illustrated by the *Wimbledon* case (1923).[20] In that case the PCIJ, while recognising that customary international law prohibited the passage of armaments through the territory of a neutral state into the territory of a belligerent state, upheld the Treaty of Versailles Article 380, which provided that the Kiel canal was to be free and open to all commercial vessels and warships belonging to states at peace with Germany. In stopping a vessel of a state with which it was at peace, Germany was in breach of treaty obligations. It should, however, be noted that there is a presumption against the replacement of custom by treaty – treaties will be construed to avoid conflict with rules of custom unless the treaty is clearly intended to overrule existing custom.

3.4 Custom

In any society rules of acceptable behaviour develop at an early stage and the international community is no exception. As contact between states increased, certain norms of behaviour crystallised into rules of customary international law. Until comparatively recently the rules of general international law were nearly all customary rules.

19 *Federal Republic of Germany v Denmark*; *Federal Republic of Germany v The Netherlands* [1969] *ICJ Rep* 3.

20 *PCIJ Rep*, Ser A, No 1.

3.4.1 Definitions of international custom

Custom in international law is a practice followed by those involved because they feel legally obliged to behave in such a way. Custom must be distinguished from mere usage, such as acts done out of courtesy, friendship or convenience rather than out of obligation or a feeling that non-compliance would produce legal consequences. Article 38 circumscribes customary law as 'international custom, as evidence of a general practice accepted as law.' The Court cannot apply custom, only customary law and subpara 1(b) arguably reverses the logical order of events since it is general practice, accepted as law, which constitutes evidence of a customary rule. Judge Hudson of the International Law Commission listed the following criteria for the establishment of a customary rule:

(a) concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;

(b) continuation or repetition of the practice over a considerable period of time;

(c) conception that the practice is required by, or consistent with, prevailing international law; and

(d) general acquiescence in the practice by other states.[21]

How then is custom distinguished from behaviour which involves no legal obligation? The traditional view is that a rule of customary international law derives its validity from the possession of two elements: a material element and a psychological element. The material element refers to the behaviour and practice of states; whereas the psychological element, usually referred to as the *opinio juris sive necessitatis* or simply *opinio juris,* is the subjective conviction held by states that the behaviour in question is compulsory and not discretionary. Any alleged rule of customary law must therefore be checked as to its material and its psychological element.

ASYLUM CASE[22]

> The Colombian government has finally invoked 'American international law in general'. In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American states.
>
> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the states in questions, and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.
>
> In support of its contention concerning the existence of such a custom, the Colombian government has referred to a large number of ... treaties ...

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21 UN Doc A/CN4/16 3/3/50 at p 5.

22 *Asylum* case (*Columbia v Peru*) [1950] *ICJ Rep* 266.

Finally, the Colombian government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule ... was invoked or – if in some cases it was in fact invoked – that it was, apart from conventional stipulations, exercised by the states granting asylum as a right appertaining to them and respected by territorial states as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American states only, it could not be invoked against Peru which, far from having by its attitude adhered to, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.

NORTH SEA CONTINENTAL SHELF CASES[23]

70 The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is due to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallised in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent state practice – and that this rule, being now a rule of customary international law binding on all states, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71 In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. 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 recognised methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

23 *Federal Republic of Germany v Denmark*; *Federal Republic of Germany v The Netherlands* [1969] *ICJ Rep* 3.

72 It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered *in abstracto* the equidistance principle might be said to fulfil this requirement. yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon on question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties – but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly, the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion. must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not made the subject of any revision brought about in consequence of a request made under Article 13 of the Convention – of which there is at present no official indication – it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73 With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were specially affected. In the present case, however, the Court notes that, even if allowance is made for the existence of a number of states to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked states, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied. The reasons are speculative, but the facts remain.

74 As regards the time element, the Court notes that it is now over ten years since the Convention was signed, but that it is even now less than five years since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle . Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a

new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

75 The Court must now consider whether state practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement ... Some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle – in the majority of the cases by agreement, in a few other, unilaterally – or else the delimitation was foreshadowed but has not yet been carried out ... even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, *a priori*, several grounds which deprive them of weight as precedents in the present context.

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

77 The essential point in this connection – and it seems necessary to stress it – is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris* – for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, eg in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78 In this respect the Court follows the view adopted by the Permanent Court of Justice in the *Lotus Case*, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (PCIJ Ser A, No 10, p 28, (1927)):

> Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstances alleged ... it would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that states have been conscious of having such a duty; on the other hand ... there are other circumstances calculated to show that the contrary is true.
>
> Applying this *dictum* to the present case, the position is simply that in certain cases – not a great number – the states concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so – especially considering that they might have been motivated by other obvious factors ...
>
> 81 The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent states; neither has its subsequent effect been constitutive of such a rule; and that state practice up-to-date has equally been insufficient for this purpose ...

It should be noted that in recent years a number of writers have criticised this traditional view of customary law. In an article written in 1982, Sir Robert Jennings, former President of the ICJ criticised the traditional view on the basis that it was outworn and inadequate and commented:

> ... most of what we perversely persist in calling customary international law is not only not customary law, it does not even faintly resemble a customary law.[24]

Critics of the traditional view argue that although the ICJ speaks in terms of state practice and *opinio juris*, increasingly its conclusions are determined by the application of legal rules that are largely treated as self-evident. The interpretation of state practice and *opinio juris* is never a straightforward automatic operation but involves a choice, usually justified on grounds of relevance, between conflicting facts and statements. Advocates of the non-traditional view, such as Martti Koskenniemi and Bruno Simma, argue that the study of international law must involve discussion of the way in which that choice is to be made. There is considerable merit to this view and an attempt will be made here to look critically at the way in which the ICJ deals with alleged rules of international custom.

24 'The Identification of International Law' in Cheng, *International Law: Teaching and Practice*, 1982, London: Stevens.

3.4.2 The material element

3.4.2.1 State practice

State practice includes any act, articulation, or other behaviour of a state which discloses the state's conscious attitude concerning a customary rule or its recognition of a customary rule. In 1950 the International Law Commission listed the following classical forms of 'Evidence of Customary International Law':

- treaties;
- decisions of national and international courts;
- national legislation;
- diplomatic correspondence;
- opinions of national legal advisers;
- practice of international organisations.

The list was not intended to be exhaustive but to provide a basis for discussion.[25]

There is some disagreement as to whether, for the purpose of the formation of customary law, state practice should consist merely of concrete actions, or whether it may also include abstract verbal, ie written or oral, statements of state representatives, or their votes, at diplomatic conferences, or in UN bodies. Judge Read's dissenting opinion in the *Anglo-Norwegian Fisheries* case (1951), explained the restricted view of state practice in more detail:

> Customary law is the generalisation of the practice of states. This cannot be established by citing cases where coastal states have made extensive claims ... Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time ... The only convincing evidence of state practice is to be found in seizures, where the coastal state asserts its sovereignty over the water in question by arresting a foreign ship.[26]

Dr Thirlway gives a similar view:

> The fact that the practice is 'against interest' gives it more weight than the mere acceptance of a theoretical rule in the course of discussion by state representatives at a conference, and considerably more weight than the assertion of such a rule ... Claims may be made in the widest of general terms; but the occasion of an act of state practice contributing to the formation of custom must always be some specific dispute or potential dispute.
>
> The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of state practice ... Such assertions can be relied on as supplementary evidence both of state practice and of the existence of the *opinio juris*.[27]

Such views regard abstract statements as less, or not at all, relevant, apparently due to a reluctance to accept the notion that one body or conference could make law. However, states themselves do regard comments at conferences as

25 (1950) *ILC Yearbook* at pp 368–72.

26 *Anglo-Norwegian Fisheries* case [1951] *ICJ Rep* at p 116.

27 *International Customary Law and Codification*, 1972, Leiden: AW Sijthoff at p 64.

constitutive of state practice and the courts do refer to abstract statements when identifying a customary rule. Also the term 'practice' in Article 38 is general enough to cover any act or behaviour of a state and it is not clear in what respect verbal acts originating from a state could not be considered behaviour of a state. It is also the case that the traditional evidence of state practice – diplomatic notes, instructions to state representatives – are often abstract and verbal. It could be argued that the restricted view of state practice is more compatible with a time when means of communication were much slower and there was less interaction between states. In the past, too, there has been a difficulty in obtaining evidence of state practice in situations not involving concrete actions. It is submitted that today such difficulties are no longer as great. Satellite communication and the development of techniques of information gathering and storage have made the collection of evidence of what states say far easier.

Of course, when using statements as evidence of state practice it is necessary to look at the context and the manner in which they were made. Consideration must be given to whether they were made *de lege lata* (about the law that is in force) or *de lege ferenda* (about the law which it is desired to establish), 'against' or 'not against interest', or as trading ploys. Statements made *de lege lata* and against national interest are likely to provide more compelling evidence than those made *de lege ferenda* or supporting national interest. It is not always easy to discover a state's true motives behind statements. It may be argued that it is unnecessary to look at motives, since whatever a state feels or believes when making a statement, other states may come to rely on the statement and the original state may become estopped from altering its position.

A further question concerns whether written texts such as conventions, ILC drafts, resolutions, etc can be regarded as state practice. There seems no difficulty in regarding treaties as state practice, providing it is remembered that state practice must be accompanied by *opinio juris* for the creation of customary law. In the *North Sea Continental Shelf* cases the ICJ stated that 'a very widespread and representative participation in the convention might suffice of itself' for a conventional rule to generate customary law – but it seems clear that *opinio juris* has to be demonstrated beyond mere contractual obligation in such cases. Mere participation in a conference and votes on single draft rules possess little value as practice, although votes on the draft text are of much more use but usually only when accompanied by statements and explanations.

In the end, one of the main problems in evaluating the evidence for state practice is trying to ascertain what states actually do – their practice is not always consistent. For example if one were looking at the law relating to military intervention in the internal affairs of other states does one look at USSR practice in Afghanistan in 1980 which was denounced by the USA or at USA practice in Grenada in 1983 which was denounced by the USSR; how does one reconcile a reluctance to intervene militarily in 'Yugoslavia' with military action taken against Iraq? It is exactly this point that the critics of the traditional view of custom wish to explore further. They are concerned to try to identify the basis on which the ICJ and others applying international law make decisions about conflicting state practice.

One final point should be made here. Although discussion has been of 'state practice' this should not be taken to mean that it is only the behaviour of states which is of interest. The practice of international organisations and even of individuals may well be taken into account in the attempt to establish the existence of a rule of customary international law.

3.4.2.2 The extent of the practice

The formation and existence of a customary rule requires general state practice. In the *North Sea Continental Shelf* cases the ICJ postulated that 'state practice ... should ... have been extensive'. The term 'general' indicates that common and widespread practice is required, although universal practice is not necessary. It seems also that practice must be representative in the sense that all the major political and socio-economic systems should be involved in the widespread practice. This marks a shift away from the position before the First World War when Professor Westlake could argue that to prove the existence of a rule of custom:

> ... it is enough to show that the general consensus of opinion within the limits of European civilisation is in favour of the rule.[28]

If practice is not widespread or general it may still give rise to a local or regional customary rule/special rule, as was argued, unsuccessfully, in the *Asylum* case (1950). In that case, the ICJ held that before state practice could be acknowledged as law, it had to be in accordance with a constant and uniform usage practised by the states in question. The case concerned political asylum – after an unsuccessful rebellion in Peru one of the leaders was granted asylum in the Colombian embassy in Lima. Columbia sought a guarantee of safe conduct of the leader out of Peru which was refused. Columbia took the matter to the ICJ and asked for a ruling that Columbia, as the state granting asylum, was competent to qualify the offence for the purposes of granting asylum – it argued for the ruling on the basis of treaty provisions and American law in general – ie local/regional international custom. The court found that it was impossible to find any constant and uniform usage accepted as law. There was too much fluctuation and inconsistency.[29]

However inconsistency *per se* is not sufficient to negate the crystallisation of a rule into customary law – the inconsistency must be analysed and assessed in the light of such factors as subject matter, the identity of the states practising the inconsistency, the number of states involved and whether or not there are existing rules with which the alleged rule conflicts.

The practice of specially affected states is also often significant – for example in the *North Sea Continental Shelf* cases it was coastal states with a continental shelf which were specially affected; the practice of landlocked states was not significant. However, it is not true to say that if all affected states follow a particular practice then a rule of customary law comes into effect, since the practice of non-affected states may be sufficiently inconsistent to prevent the

28 Westlake, *International Law*, Part I, 1904, Cambridge: Cambridge University Press.

29 For a successful assertion of a local/special custom see the *Right of Passage* case [1960] *ICJ Rep* 6.