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.

formation of a rule. It may be said that what is most significant is the adherence to a rule by all those states who had the opportunity to engage in such practice.

3.4.2.3 The practice of dissenting states and persistent objectors

If, and when, certain patterns of practice are emerging, or have emerged, states may wish to diverge or dissent from such practice. States may dissent from a customary rule from its inception onwards. The feasibility of such dissent was acknowledged by the ICJ in the *Anglo-Norwegian Fisheries* case (1951). The case concerned the manner in which Norway calculated its territorial sea and the Court found that Norway was not bound by the existing general rules of customary law relating to the matter. A persistent objector is not bound by the eventual customary rule if the state fulfils two conditions:

1 The objections must have been maintained from the early stages of the rule onwards, up to its formation and beyond.
2 The objections must have been maintained consistently, since the position of other states that may have come to rely on the position of the objector, has to be protected. The objector should not be able to rely on his own inconsistencies. Thus if a state objects and at other times invokes the rule, it will no longer be entitled to be regarded as a persistent objector. In all cases the persistent objector bears the burden of proving its exceptional position.

It may be that states dissent from a customary rule after its formation. Their position is untenable because other states have come to rely on the 'subsequent objector' originally conforming to the rule. Also, general customary law is binding on all states and cannot be the subject of any right of unilateral exclusion exercisable at will by any one state in its own favour. It should be noted, however, that a large number of subsequent objections may lead to desuetude or modification of the rule. It should also be noted that acquiescence over a period of time to an apparent breach of a general customary rule will lead to the result that the apparent breach cannot be challenged by those states acquiescing in it.

There has been some discussion regarding the situation of newly independent states. Such states have not participated in the creation of customary rules already in force when they come into existence, nor have they had any opportunity to oppose the rule's formation. It is open to the new state to contest the validity of customary rules or dispute their interpretation but it has no right to refuse to observe such rules, save in regard to those states which have expressly agreed to their waiver. When a new state begins to enter into relations with other states it must be taken to accept the rules of international law which are then in force. When a state applies for membership of the UN it must declare its acceptance of the principles of the Charter, the first purpose of which is the settlement of disputes 'in conformity with the principles of justice and international law' (Article 1(1)).

3.4.2.4 Duration of practice

In the *North Sea Continental Shelf* cases, the ICJ held that:

> Even without the passage of any considerable period of time, a very widespread and representative participation in the (practice) might suffice of itself ... Although the passage of only a short period of time is not necessarily, of itself, a

> bar to the formation of a new rule of customary law ... within the period in question, short though it might be, state practice ... should have been both extensive and virtually uniform.

There is no set time limit and no demand that the behaviour should have existed since time immemorial. The relative unimportance of time was highlighted by the ICJ in the *North Sea Continental Shelf* cases. The cases involved the Federal Republic of Germany, Denmark and Holland and a dispute over the continental shelf. Denmark and Holland argued that the equidistance principle which was contained in the Convention on the Continental Shelf 1958 was customary law. The two states had argued that even if no customary rule existed at the time of the Convention, a rule had since come into being, partly as a result of the impact of the Convention, and partly on the basis of subsequent state practice. The Court was therefore required to look at the time requirement and it ruled, in rejecting their argument, that 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, an indispensable requirement would be that the practice of states whose interests are specially affected, should have been extensive and virtually uniform.

The length of time required to establish a rule of customary international law will therefore depend on other factors pertinent to the alleged rule. If, for example, the rule is dealing with subject matter about which there are no previously existing rules, then the duration of practice required is less than if there is an existing rule to be overturned. Time has also become less important as international communication has improved – it is much easier to assess a state's response to an alleged rule than it was in the past.

3.4.3 The psychological element

In addition to the material element an alleged rule of customary international law also requires a psychological element, otherwise known as *opinio juris sive necessitatis*. State practice must occur because the state concerned believes it is legally bound to behave in a particular way – customary law must be distinguished from mere usage. The Statute of the International Court refers to 'a general practice accepted as law'. The essential problem then becomes one of burden and standard of proof. The position is probably as follows – the proponent of a custom has to establish a general practice and, having done this, must show that the general practice is due to a feeling of legal obligation. In many cases the International Court has been willing to assume the existence of an *opinio juris* on the basis of evidence of a general practice, or the previous determinations of the Court or other international tribunals (for example in the *Gulf of Maine* case (1984)). However, in a significant minority of cases the Court has adopted a more rigorous approach and has called for more positive evidence of the recognition of the validity of the rules in question. The first occasion where such an approach was taken was in the *Lotus* case (1927) where the Court said:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the agent for the French government, 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 a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that the 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.

More recently the ICJ stated:

> For a new customary rule to be formed, not only must the acts concerned amount to a settled practice, but they must be accompanied by the *opinio juris sive necessitatis*.[30]
>
> The generally held view of customary law, which has been endorsed by the International Court of Justice,[31] is that the creation of a rule of customary international law postulates:
>
> > ... two constitutive elements: (1) a general practice of states and (2) the acceptance by states of the general practice as law.[32]
>
> ...
>
> The precise definition of the *opinio juris,* the psychological element in the formation of custom, the philosophers' stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by states on the basis of alleged custom, put together. A present-day writer may be understandably reluctant to call upon his readers to devote further time to this juridical squaring of the circle, but it is impossible to discuss the future of customary law without some study of the elements which are regarded as going to its making.
>
> The simple equation of the *opinio juris* with the intention to conform to what is recognised, at the moment of conforming, as an existing rule of law has been exposed to the objection of Kelsen and others which, on its own terms, is unanswerable – that it necessarily implies a vicious circle in the logical analysis of the creation of custom. As a usage appears and develops, states may come to consider the practice to be required by law before this is in fact the case; but if the practice cannot become law until states follow it in the *correct* belief that it is required by law, no practice can ever become law, because this is an impossible condition. Nor does the avenue of escape indicated by the tag *communis error facit jus*, ie the argument that the belief, even the mistaken belief, of states in the existence of a rule of law requiring them to act, or refrain from acting, in a certain way, is sufficient to create the rule believed in, have many adherents.
>
> The extreme opposite view, the theory that the establishment of international custom does not require *opinio juris* at all, but that established usage is sufficient without evidence of states of mind, has also comparatively few supporters.[33] As Professor Zemanek has observed,[34] while the requirement of *opinio juris* does

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30 ICJ in *Nicaragua v US (Merits)* case (1986).

31 See particularly *Continental Shelf* cases [1969[*ICJ Rep* at p 44.

32 Schwarzenberger, *A Manual of International Law*, 1967, London: Stevens at p 32.

33 See for example, Kelsen, 'Théorie du droit international coutumier', *Revue internationale de la théorie du droit*, 1939, p 253ff; Guggenheim, *Lehrbuch des Volkerrechts*, 1948, pp 46–47; *Les deux éléments de la coutume en droit international, Etudes en l'honneur de G Scelle*, Vol 1, p 275; 'Principes de droit international public', 80 *Receuil des Cours*, 1952–I, at pp 70–72.

34 'Die Bedeutung der Kodifizierung des Volkerrechts für deine Anwerdung', in *Festschrift Verdross*, 1971, p 565 at p 574.

undoubtedly give rise to many problems in practice, particularly with regard to proof of its existence, to assert that it is wholly unnecessary is to 'throw out the baby with the bathwater'. Furthermore, it is admittedly difficult to distinguish between usage which has not (apart from cases, such as the *Right of Passage* case before the International Court of Justice,[35] in which the question is largely or entirely one of generality or consistency of practice), without allowing the psychological element in the creation of custom to creep back into the discussion by a devious route and under another name.[36]

A proposal for an interpretation of the traditional concept of the *opinio juris* which would not be subject to objection that it creates a *circulus inextricabilis* was advanced by Mr IC MacGibbon in 1957.[37] Mr MacGibbon starts by drawing attention to the importance of distinguishing between customary rules expressed as rights and customary rules expressed as obligations, and argues that the *opinio juris is* principally, if not wholly, of importance from the latter standpoint.

> It is only with difficulty that it can be conceived that a practice motivated by reasons of convenience or self-interest would have been initiated or evolved under the conviction on the part of the states participating that such a practice was in conformity with the law, far less that it was enjoined by the law, although such consideration may well apply to the formation of a customary obligation. To hold otherwise would be to suppose that the assertion of a claim, far from being made as of right or in a state of indifference as to whether or not it was in conformity with law, was made as a matter of duty.[38]

The distinction is of course a valid one, and it is perfectly correct that a state can hardly be supposed to believe that customary international law requires it to *assert* a certain claim, as opposed to requiring it to admit or recognise the claim of some other state, made in conformity with existing law. But the distinction as expressed by Mr MacGibbon is in fact an oversimplification of the problem: for the state which asserts a claim will be guided by what it believes to be the law in fixing the *extent* of its claim. The *opinio juris* in the traditional sense does therefore have a real existence and meaning on the side of the state which asserts a right, in that it claims as much and no more as it believes to be due to it,[39] that is to say, it does not *make* its claim because it believes that international law requires it to do so, but because it *limits* its claim because it believes that international law requires it to do so.[40]

The orthodox view is that a rule of customary law has two constitutive elements: (i) *corpus*, the material or objective element, and (ii) *animus*, the psychological or subjective element. The *corpus* of a rule of customary law is the existence of a usage (*consuetudo*) embodying a rule of conduct. The *animus* consists in the

35 *Right of Passage over Indian Territory (Merits)*, [1960] *ICJ Rep* at p 6.

36 *Cf* Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law' (1961) 49 *Cal LR* p 419 at p 476, with reference to Guggenheim's paper (*op cit* n 28 above).

37 'Customary International Law and Acquiescence', 33 *BYIL* at p 115.

38 MacGibbon, *op cit* at pp 127–28.

39 Of course in practice a state may, and probably will, claim more than it thinks it is entitled to, in the form of a sort of percentage to allow for objections, but this does not affect the point made above.

40 HWA Thirlway, *International Customary Law and Codification*, 1972, Leiden: AW Sijthoff at pp 47–49.

conviction on the part of states that the rule embodied in the usage is binding (*opinio juris*). This view finds expression in Article 38(1)(b) of the Statute of the International Court of Justice which speaks of the Court applying 'international custom, being evidence of a general practice accepted as law'.

There is a school of thought, the principal exponent of which at present is doubtless Professor Guggenheim, which disputes the reality and consequently the requirement of the subjective element of *opinio juris*. But both the Permanent Court of International Justice and the International Court of Justice have in a number of cases stressed the importance of the subjective element of *opinio juris*. indeed, it should be perhaps pointed out that by the so-called 'psychological' element of *opinio juris*, it is intended to mean not so much the mental process or inner motive of a state when it performs or abstains from certain acts, but rather the *acceptance* or *recognition* of, or *acquiescence* in, the *binding character* of the rule in question implied in a state's action or omission. It is not without reason that the Statute of the World Court speaks of 'international custom, being evidence of a general practice *accepted* as law'.

However, Article 38(1)(b) of the Statute would have been even more correct if it had said 'international custom as evidenced by a general practice accepted as law', for it is not the custom or customary rule of international law which is evidence of the general practice, but rather the general practice accepted as law that provides evidence of the customary rule.

Indeed, it may be permissible to go further and say that the role of the usage in the establishment of rules of international customary law is purely evidentiary; it provides evidence on the one hand of the contents of the rule in question and on the other hand of the *opinio juris* of the states concerned. Not only is it unnecessary that the usage should be prolonged, but there need also be no usage at all in the sense of repeated practice, provided that the opinio juris of the states concerned can be clearly established. Consequently, international customary law has in reality only one constitutive element, the *opinio juris*. Where there is *opinio juris*, there is a rule of international customary law. It is true that in the case of a rule without usage, objection might be taken to the use of the term custom or customary. But whether in such a case one speaks of international customary law or an unwritten rule of international law becomes purely a matter of terminology.

It should, however, be pointed out that in municipal law it would ordinarily not be possible to have a legally binding custom without usage; for in municipal law it is not the *opinio juris* of individual subjects of the legal system that is decisive but the *opinio juris generalis* of the community, locality, trade or profession concerned as a whole. To this *opinio juris generalis* the general law of the community gives its blessing and lends the weight of its own authority. Such *opinio juris generalis* can normally be established and ascertained only through a general and usually also prolonged practice.

But in international law, the possibility of international customary law without usage becomes obvious if it is remembered that in international society states are their own law-makers. From the analytical point of view, the binding force of all rules of international law ultimately rests on their consent, recognition, acquiescence or the principle of estoppel. If states consider themselves bound by a given rule as a rule of international law, it is difficult to see why it should not be treated as such insofar as these states are concerned, especially when the rule does not infringe the right of a third state not sharing the same *opinio juris*. The *Asylum* case and the *Right of Passage* case have shown that it is possible for such *opinio juris* to exist among a limited number of states or even between two states

so that, besides rules of universal international customary law, one finds also local and even bipartite international customary law.

From this point of view, there is no reason why an *opinio juris communis* may not grow up in a very short period of time among all or simply some members of the United Nations with the result that a new rule of international law comes into being among them. And there is also no reason why they may not use an Assembly resolution to 'positivise' their new common *opinio juris* ...

... when a General Assembly resolution proclaims principles recognised, albeit not long since, by members of the United Nations as principles of international law, and is adopted unanimously, it represents the law as generally accepted in the United Nations. In such an event, the binding force of these principles comes not from the resolution, but from their acceptance by member states as part of international law. They are, therefore, binding even before the resolution, although the resolution helps to establish their existence and contents.[41]

Discussion of custom usually takes place in the context of discourse about sources. For a positivist (and most international lawyers are more or less positivists today), what this means is process: we seek to identify the types of procedure which, if carried out by authorised actors, create law for members of the society in question ...

... What characterises [custom], above all, is its very lack of formality. So to discuss customary law in terms of elements, steps in its creation, and so on is to impose on it a framework which in a sense falsifies its nature. The problem is exacerbated by the modern jurist's unfamiliarity with customary law outside the international sphere. Not so very long ago, the general custom of the realm, the region, or the municipality was an important source of law throughout Europe, as well as in other places; but it came to be replaced by statute law and (to a greater or lesser extent) judicial precedent. True, customary law lingers on in parts of Africa and elsewhere, but even there it has become somewhat subordinated to the modern, 'Western' approach. So most commentators about the sources of international law slip easily into a formalistic mode of analysis without stopping to ask themselves whether the technique is suitable to the phenomenon under consideration. It is submitted that, *mutatis mutandis*, the study of domestic customary law societies, past and present, can afford useful insights into the nature of customary law ...

There is another methodological trap of which one should beware. Because in modern municipal societies jurisdiction is compulsory, it is at least feasible (if not wholly correct) to think of law in terms of what a judge will do; and in few areas is this more marked than in the doctrine of sources, where the question is often reduced to an investigation of what processes a judge would regard as capable of creating binding law. But it should not be forgotten that, in the international system, where jurisdiction is not compulsory, adjudication is the exception, not the rule. The more typical decision-maker is the government official, engaged either in advising his or her own government, or in negotiating with others. The difference in the observational standpoint has the following consequence for our topic. At least in theory, if the status of an alleged rule as customary law is challenged before a tribunal, the judge or arbitrator has to decide whether the processes for the creation of custom had been completed by the critical date.

41 Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', in Bin Cheng (ed), *International Law: Teaching and Practice*, 1982, London: Stevens at pp 249–52.

Government decision-makers, however, need not be so objective; whilst they may well want to find out how much support the practice has attracted up until now, if it is one which they wish to follow on its merits they will probably do so, even if the rule has not yet 'crystallised'...

Some identify the subjective element in custom as the state's will (or several or all states' will) that the practice become a rule of law: in other words, with consent to the (would-be) rule. Proponents of this, voluntarist, approach tend to equate the creation of custom with tacit agreement: just as treaties are the written, formal expression of states' will, so custom is its informal manifestation. Others reject the voluntarist thesis, preferring to regard the subjective element as a *belief* – a belief in the legally permissible or obligatory character (as the case may be) of the conduct in question: *opinio juris sive necessitatis*, or *opinio juris* as it is known for short.

The jurisprudence of the World Court has certainly failed to still the controversy, and proponents of both theories can cite judgments which expressly or impliedly support (or appear to support) their contentions ...

OPINIO JURIS SIVE NECESSITATIS

Literally, the phrase means 'belief (or opinion) of law or of necessity'. This does not make much sense in English, and in fact its clumsiness as a piece of Latin arouses the suspicion that it is not Roman at all. The present writer has not found it in the *Digest* or other classical writings on Roman law, and although the Glossators and post-Glossators have not been exhaustively combed through, the expression does not appear to have much of a pedigree in Roman law. The first person to use the complete phrase seems to have been Geny in 1919,[42] though, as Guggenheim noted,[43] one finds parts of the phrase or something like it in the writings of the German historical school in the late 18th and early 19th centuries. We shall return to the historical school later. So far as specifically international law is concerned, the expression does not seem to have been used by any of the so-called 'fathers' of international law, and the earliest use of the concept – though not the precise phrase – that the present writer has found in this context is in Rivier in 1896.[44] The idea was quickly adopted by many others, however.

It is quite common to dress up legal maxims and the like in Roman robes in order to give them an air of respectability, though only too often the toga can muffle thought. In this case, the robes seem not even to be genuine, and it is submitted that the linguistic incoherence of the phrase *opinio juris sive necessitatis* reflects a certain incoherence of the thought behind it.

What does *opinio juris sive necessitatis* mean, or what should it mean, in the context of international law? At this point, it may be helpful to offer a working translation or definition. It is *a belief in (or claim as to) the legally permissible or*

42 *Méthode d'interpretation et sources en droit privé positif*, 2nd edn, 1919, Paris: Librairie générale de droit et de jurisprudence at pp 319–24, 360.

43 '*Contribution à l'histoire des sources du droit des gens*' (1958–II) 94 *Recueil des Cours* pp 1, 52; *id*, '*L'origine de la notion de la* opinio juris sive necessitatis *comme deuxième élément de la coutume dans l'historie du droit des gens*', in *Hommage d'une génération de juristes au Président Basdevant*, 1960 at p 258.

44 *Principe du droit des gens*, Vol 1 p 35. But there are perhaps earlier hints of this in Savigny, *System des heutigen Romischen Rechts*, Vol 1, 1840, Heidelberg: Mohr at pp 32–34.

obligatory nature of the conduct in question,[45] *or of its necessity*. We shall return later to the part of the definition which refers to necessity.

On the subject of belief, it may also be convenient at this juncture to refer to an observation made by Virally,[46] and echoed by D'Amato[47] and Akehurst,[48] amongst others. We cannot know what states believe, it is suggested. First of all states, being abstractions or institutions, do not have minds of their own; and in any case, since much of the decision-making within governments takes place in secret, we cannot know what states (or those who direct or speak for them) really think, but only what they say they think. There may be something of an exaggeration here. In some instances, we can discover their views because the opinions of their legal advisers or governments are published.[49] Furthermore, it will be suggested later that the express or presumptive understandings and beliefs of the international community about the rules of international law are in certain circumstances relevant. We should not speak of a *psychological* element in custom, but of a *subjective* one, for it is more a question of the *positions* taken by the organs of state about international law, in their internal processes[50] and in their interaction with other states, than of their *beliefs.* This viewpoint is not unrelated to the well-known observation of McDougal that the customary process is one of claim and response, where the legal claims and the responses thereto can be implied in the conduct concerned without necessarily being expressed ...

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45 The bipolar nature of legal relations means that if X has a legal right (eg to compensation), Y will have a duty to pay; and if X has a liberty (eg of innocent passage through Y's territorial sea), Y will have no right to complain and an obligation not to interfere with that passage. These ideas can be expressed in terms of obligatoriness and permissibility. *Cf* Mendelson 'State Acts and Omissions as Explicit or Implicit Claims', in *Le Droit international au service de la paix, de la justice et du développement*, 1991, Mélanges Michel Virally at p 373. It is hard to follow MacGibbon's suggestion that the role of *opinio juris* should be limited to positive conduct.

46 'The Sources of International Law' in Sorensen (ed), *Manual of Public International Law*, 1968, London: Macmillan at pp 116, 133–4.

47 *The Concept of Custom in International Law*, 1971, Ithaca: Cornell University Press at pp 35–39. This volume, which enjoyed a considerable vogue, particularly in the United States, for some years after its publication, propounds a number of unconventional ideas, but unfortunately not a few of them seem unfounded or overstated. Reasons of space preclude a complete examination here, but among these questionable ideas are the following. (1) The equation or substitution of *opinio juris* with a theory of articulation, whereby if any entity, be it a state, international organisation, or scholar, has articulated what it, he or she considers to be a new rule of customary law, and that articulation is followed at any time thereafter by an act of state practice – apparently even a single one – then that will found the rule, even if the state which performed the act made no connection between its own conduct and the articulation by another – so long as it was aware of it, or had reason to be (pp 74–87). (2) So far as concerns the material element, the author appears to consider that treaty promises constitute (without more) qualifying state practice, but unilateral acts, such as legislation, cannot – a strange reversal (pp 89–91). (3) A mechanistic form of reasoning (pp 91–8) leads him to suggest that just two precedents can constitute a (*semble general*) customary rule. This seems far too crude. *A fortiori* the suggestion that, in litigation, a single precedent might well suffice. (4) The legal significance of protest is downgraded (pp 98–102) in a manner belied by the practice of states and the decisions of international tribunals.

48 'Custom as a Source of International Law' (1974–75) *BYIL* 47 p 1 at pp 36–37.

49 Though admittedly this is done only on a partial and selective basis and often only long after the event, and though it must also be conceded that the opinion of a legal adviser does not invariably become that of the government.

50 Including the communication of governments to national legislatures and courts, and the express or implicit *prises de position* about rules of international law by national courts and legislatures in the exercise of their functions.

Summary and conclusions

1 A state's consent to a rule will be a sufficient explanation of its being bound by it, and its refusal at the formative stage of a rule a reason why it is (probably) not bound. But the voluntarist approach does not provide a satisfactory explanation of the whole of customary law. In particular, it does not provide a convincing reason why states who have not truly participated in the formation of a rule should be bound by it – though undoubtedly they are.

2 *Opinio juris sive necessitatis*, for its part, is a phrase of dubious provenance and uncertain meaning. The concept was originally used by the historical school of jurisprudence to explain the content of substantive national law, and was transferred to the context of international law around the turn of the present century. It does have a role to perform in explaining why certain types of conduct constitute mere comity or otherwise do not count as precedents. It is not certain, however, that these functions could not be as well or better performed by using the language of claim and response.

3 In any case, there seems analytically to be no particular reason to insist on proof of the presence of *opinio juris* in the standard type of case, where there is a constant, uniform and unambiguous practice of sufficient generality, clearly taking place in a legal context and unaccompanied by disclaimers, with no evidence of opposition at the time of the rule's formation by the state which it is sought to burden with the customary obligation, or by another state or group of states sufficiently important to have prevented as general rule coming into existence at all.

The adoption of the present thesis would bring doctrine more into line with the practice of states and of international tribunals than the mechanical repetition of the necessity of the two elements. As a matter of theory, too, it is submitted that this approach could be justified in terms of the creation of legitimate expectations. This is not the place for a complete explanation of this author's theory of legitimate expectations which underlie the sources of international law. Perhaps it will suffice for the present to say that if a state actually consents to a rule, a legitimate expectation will be created that it will comply with it, just as a disclaimer or persistent dissent at the appropriate time will prevent such an expectation being created. And where there is a constant and uniform practice of sufficient generality, in a legal context, it seems legitimate for members of the community to expect all others to continue to observe that practice. And finally, as a matter of policy, the solution proposed seems a reasonable one. If a relevant practice is sufficiently widespread, it ought to become law, because otherwise the convoy will have to move at the pace of the slowest. To require proof of consent – or even *opinio juris* on the part of each and every state – seems excessive and unnecessary. At the same time, the sovereignty and the reasonable interests of states can be safeguarded. If a sufficient number of like-minded states object to a new practice, they can prevent it from ever becoming general law. And in addition, the individual state can individually opt out, at the formative stage, by becoming a persistent objector. By these means, customary law can continue to make a useful contribution to the formation of international law; and given that the treaty process has disadvantages as well as advantages, it is essential that custom continues to make that contribution.[51]

51 M Mendelson, 'The Subjective Element in customary International Law' (1995) 66 *BYIL* at pp 177, 178–81, 194–96, 207–8.

3.4.4 Treaties as evidence of customary law

The issue here is the extent to which a multilateral treaty can be used as evidence of customary international law. It is a general rule of international law which is confirmed in Article 34 of the Vienna Convention on the Law of Treaties 1969 that treaties cannot bind third parties without their consent. If a state wishes to enforce the provisions of a treaty against a non-party it is necessary to argue that the provisions of the treaty are valid as rules of customary international law. Two possible situations arise:

1 Where the treaty is intended to be declaratory of existing customary international law;

2 Where the treaty is constitutive of new law.

If the treaty on its face purports to be declaratory of customary international law or if it can be established that it was intended to be declaratory of customary international law, then it may be accepted as valid evidence of the state of the customary rule. If the treaty at the time of its adoption was constitutive of new rules of law, then the party relying on the treaty as evidence of customary law will have the burden of establishing that the treaty has subsequently been accepted into custom.

The ICJ in the *North Sea Continental Shelf* cases recognised that it is possible for a treaty to contain norm-creating provisions which become accepted by the *opinio juris* and bind non-parties just as much as parties to the convention but the court did lay down a series of conditions:

1 The convention provision must be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law;

2 There must be widespread and representative participation in the convention particularly of those states whose interests are specifically affected;

3 There must be *opinio juris* reflected in extensive state practice virtually uniform in the sense of the provision invoked.

The following point should also be noted:

> Since treaties and custom are on the same footing, it follows that the relations between rules generated by the two sources are governed by those general principles which in all legal orders govern the relations between norms deriving from the same source: *lex posterior derogat priori* (a later law repeals an earlier law), *lex posterior generalis non derogat priori speciali* (a later law, general in character does not derogate from an earlier law which is special in character), and *lex specialis derogat generali* (a special law prevails over a general law).[52]

3.5 General principles of law

> The general object, then, of inserting the phrase ['general principles of law recognised by civilised nations'] in the statute seems to have been, essentially, to make it clear that the Court was to be permitted to reason, though not to

52 Cassese, *International Law in a Divided World*, 1986 Oxford: Clarendon Press at p 180.