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Contemporary Principles and Perspectives

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It is, however, appropriate to first dispose of an argument that is occasionally raised to suggest that custom is essentially rigid and difficult to change. To replace an existing custom with a new custom, states must, for some time before the emergence of the new custom, act in a way that is consistent with the nascent norm but inconsistent with the pre-existing norm. Some commentators have suggested that this involves a logical contradiction, since law cannot be created by breach of its own provisions.[196] However, this objection is fallacious, as behaviour inconsistent with a custom is only a breach of that custom, not a breach of the formal source of custom. As discussed above,[197] the formal source of custom is the norm that custom is created through state practice and *opinio juris*, the material source of which is Article 38(1)(b) of the ICJ Statute.

This point is illustrated by the *Anglo-Norwegian Fisheries* case,[198] which concerned the issue of whether Norway's practice over a 60-year period of using the straight baseline system to delimit its territorial waters had crystallized into custom. The new delimitation expanded Norway's territorial sea so as to cover economically important stretches of the high seas. The ICJ held that the custom had crystallized even though, prior to its crystallization, Norway had acted in breach of the freedom of the high seas by excluding British fishing interests from what were international waters. Norway had been acting in breach of the previous custom, but it was engaging in conduct (state practice and *opinio juris*) that was formative of new custom.

The following sections examine the twin elements required for the formation of custom. They are (1) consistent state practice, and (2) *opinio juris* – the belief that the practice is required by law.

2.2.2.2 State practice: the first element of custom

2.2.2.2.1 Consistency of state practice The *North Sea Continental Shelf* cases[199] concerned the delimitation as between several states of the areas of the continental shelf in the North Sea. In the course of holding that there was no rule of custom specifying how such delimitation should occur, the ICJ formulated the following oft-cited principle:

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[196] See, e.g., G.J.H. van Hoof, *Rethinking the Sources of International Law* (Deventer; London: Kluwer Law and Taxation, 1983) 99, quoted in Kammerhofer, above note 189, 531. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 19.

[197] See discussion above at section 2.2.

[198] *Anglo-Norwegian Fisheries* case (*United Kingdom v Norway*) [1951] ICJ Rep 116.

[199] *North Sea Continental Shelf* cases, above note 112.

> [A]n 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.[200]

In the *Asylum* case, the ICJ also spoke of state practice, or 'usage', having to be 'constant and uniform'.[201] References to uniformity were never intended to suggest that every state must have engaged in the relevant practice for the norm to emerge. It is not the common consent of the international community that crystallizes a norm, but the consent of a 'widespread and representative'[202] part of it.[203] Indeed, a land-locked state can hardly participate in creating a maritime custom as it is not specially affected. If, however, the state subsequently acquires a stretch of coastline, it will be bound by the customary law of the sea. So too will a new state, which is born into a world of laws and cannot pick and choose which laws it will observe.[204]

Even state practice directly opposed to the norm will not necessarily constitute divergent practice such as to destroy it. In *Military and Paramilitary Activities in and against Nicaragua* ('*Nicaragua* case'),[205] the ICJ considered whether the United States had violated, *inter alia*, the customary norm against the use of force other than in self-defence. In a claim brought in 1984, Nicaragua claimed that the United States, in actions taken against the left-wing Sandinista government, mined Nicaraguan internal and territorial waters and gave assistance to the *contras* guerrilla forces fighting against the government. Although applicable treaties existed between the countries governing the issue, a US reservation to the jurisdiction of the ICJ under Article 36(2) of the ICJ Statute restricted the Court's jurisdiction to customary law. Nevertheless, the Court held that the United States had contravened several customary norms, including the norm against the use of force.[206] In a highly influential judgment, the Court recognized the following principle:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. . . . If a State acts in a way prima facie incompatible with a recognized rule,

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200 Ibid., [74].
201 *Asylum* case (*Colombia v Peru*) [1950] ICJ Rep 266, 276.
202 *North Sea Continental Shelf* cases, above note 112, [73].
203 Kelsen, above note 168, 445.
204 Jennings and Watts, above note 17, 29.
205 *Military and Paramilitary Activities in and against Nicaragua*, above note 11.
206 The implications of the *Nicaragua* case for the law of state responsibility and the use of force are discussed in Chapters 9 and 10 respectively.

> but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[207]

A striking example of this is the customary – indeed *jus cogens* – norm against torture. Despite reliable evidence indicating that many states have engaged in systematic torture, frequent breaches of the *jus cogens* norm prohibiting torture have never been justified on the basis that it is lawful.[208]

2.2.2.2.2 Kinds of state practice – acts, omissions and acquiescence The kinds of act that constitute state practice include the exclusion of others from territory, the institution of legal action, positive acts of state officials and armed forces, financial and material assistance to individuals or groups and actions intended to have legal effect, such as recognition of another state.[209] While the identification of the positive acts of states may seem relatively straightforward, as revealed in the decision-making of international courts and tribunals, in practice it can be extremely difficult to identify state practice among the states of the world sufficient to arrive at a considered opinion on a matter of international law.

Omissions, as evidence of state practice, are more difficult to characterize. In the 1996 *Nuclear Weapons* Advisory Opinion,[210] the ICJ was asked to determine whether there was a customary norm prohibiting the threat or use of nuclear weapons. The Court held, first, that there was no specific custom banning nuclear weapons. Secondly, the Court stated that it 'could not decide' whether any conceivable use of nuclear weapons would be contrary to the customary norms of the laws of armed conflict. This second ruling amounted to a *non liquet* (a refusal to decide), which will be discussed in more detail below.[211] However, its first finding that there was no specific custom banning nuclear weapons was made even though no state had used nuclear weapons since 1945, 50 years before the decision. The Court appeared to accept that this was state practice consistent with

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[207] *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [186].

[208] Higgins, above note 196, 20.

[209] *Anglo-Norwegian Fisheries* case, above note 198; *SS 'Lotus'* (*France v Turkey*), above note 125; *Military and Paramilitary Activities in and against Nicaragua*, above note 11.

[210] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 ('*Nuclear Weapons* (Advisory Opinion)').

[211] See discussion below at section 2.2.3.3.

the prohibition of nuclear weapons, but focused its attention on whether *opinio juris* could be inferred from this omission.[212]

This approach is consistent with an early decision of the Permanent Court of International Justice in the *Lotus* case. This case concerned a collision on the high seas between a French and Turkish steamer in which eight Turkish nationals were killed. The Permanent Court of International Justice had to decide whether Turkey had jurisdiction to prosecute the French officer of the watch at the time of the collision for involuntary manslaughter under Turkish law. One of the French submissions was that states had, in practice, abstained from prosecuting unless the alleged crime occurred on a ship flying that state's flag. The Court, however, held that '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'.[213] The Court went on to find that no such *opinio juris* existed to convert the practice into custom.

In the foundation case for the principle of acquiescence, the *Anglo-Norwegian Fisheries* case,[214] the ICJ, refusing the claim of the United Kingdom, held:

> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[215]

The absence of protest by a state affected by another state's practice, where the former has actual or constructive knowledge of the latter's practice, would convert an omission – otherwise neutral in effect – into passive practice supporting the latter's active practice.[216] It is interesting to note that acquiescence need not be coupled with *opinio juris* of the acquiescing state in the strict sense; only to the extent that *opinio juris* is inferred from the omission can it be said to exist. Therefore, the United Kingdom's absence of protest or other conduct in reaction to Norway's use for 60 years of the straight baseline system is grounded more in justice than consent.[217] The holding in *Anglo-Norwegian Fisheries* therefore develops and expands the effect of omissions as formulated in the *Lotus* case. As

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212 *Nuclear Weapons* (Advisory Opinion), above note 210, 253–4.
213 *SS 'Lotus'* (*France v Turkey*), above note 209, 28.
214 For the facts of this case, see the discussion above at section 2.2.2.1.
215 *Anglo-Norwegian Fisheries* case, above note 198, 138.
216 Kammerhofer, above note 189, 529.
217 MacGibbon, above note 187, 145.

noted by MacGibbon, acquiescence will be more relevant where a state is directly affected by a right exercised by another state, as opposed to where the other state is performing an obligation.[218]

2.2.2.2.3 Quantity of state practice The amount of state practice required for the creation of custom varies, depending on the nature of the norm. Rosalyn Higgins has raised the following problem:

> Applying the same tests that it enunciated in the *Continental Shelf* cases to the question of genocide, would the Court have determined that there were relatively few ratifying parties to the Genocide Convention, that they did not include most of the potential butchers, and that the basis of the practice of most states in not committing genocide has to remain 'entirely speculative'?[219]

It may be responded that with essentially proscriptive norms, such as the norm against genocide, *opinio juris* becomes central and state practice, though still indispensable, becomes secondary.[220] Conversely, norms allocating rights between states, such as a custom specifying the extent of a state's territorial sea, refocus the analysis on how consistent or divergent state practice has been. In yet another field, space law, it has been suggested that customary norms in respect of outer space developed in a very short period of time, simply from a UN Resolution on Outer Space, given that at the time only the United States and the Soviet Union were capable of reaching that realm.[221] This view – of 'instant custom' – has been implicitly rejected by the ICJ.[222] Indeed, it runs counter to the orthodoxy of Article 38(1)(b) of the ICJ Statute and is arguably a contradiction in terms.[223] Some state practice must occur for at least a 'short'[224] period of time before one can speak of a 'custom'. There is, however, no strict rule on this, as Judge Tanaka stated in his Dissenting Opinion in the *North Sea Continental Shelf* cases:

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[218] Ibid, 129, 131, 144–5. See section 2.2.2.3 for further discussion of acquiescence in the context of *opinio juris*, though the issues are somewhat intertwined.

[219] Higgins, above note 196, 30–31.

[220] Cassese, above note 7, 158.

[221] B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23.

[222] *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [188].

[223] Peter Malanczuk and Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law* (London; New York: Routledge, 1997, 7th edn), 46.

[224] *North Sea Continental Shelf* cases above note 112, [74].

> The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances.[225]

The Court in the *North Sea Continental Shelf* cases makes it clear that, in the traditional orthodoxy, state practice is an 'indispensable' requirement. Nevertheless, in practice, the distinction between state practice and *opinio juris* has become blurred, especially when statements (as opposed to actions and omissions) are relied on to constitute state practice. Some commentators maintain a rigid distinction between state practice and *opinio juris* – to them, 'a claim is not an act'.[226] The very concept of 'custom' requires a course of conduct, and statements are not custom unless they produce effects in the physical world, such as a state's recognition of another state, or the giving of a notice or order.[227] This view has much to commend it in that it is logically consistent. The alternative view is less coherent, but it may more accurately reflect the reality of how custom is 'found' by international courts and tribunals. This view is that the state can only act through its organs and, in fact, most of the 'acts' of a state are statements issued to its organs, such that it would be 'artificial to distinguish between what a state does and what it says'.[228]

2.2.2.3 *Opinio juris*: the second element of custom

2.2.2.3.1 General sources of evidence of opinio juris *Opinio juris sive necessitatis* is the second and more complex element of custom. In requiring that states undertake state practice out of a sense of legal obligation, *opinio juris* serves to distinguish practice that is custom and practice that is mere 'comity'. For example, the practice of saluting ships flying a different flag is not customary law, since states do this merely out of courtesy – they do not consider it to be legally obligatory. In the seminal *North Sea Continental Shelf* cases judgment, the ICJ stated:

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[225] Ibid., 176.

[226] Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca; London: Cornell University Press, 1971), cited in Kammerhofer, above note 189, 525.

[227] For other examples of statements with legal effect, see Cassese, above note 7, 184–5.

[228] Michael B. Akehurst, 'Custom as a Source of International Law' (1977) 47 *British Year Book of International Law* 1, cited in Kammerhofer, above note 189, 526.

> 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, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition.[229]

There are certain conceptual difficulties with the notion of *opinio juris*. Customary law is formed only when state practice and *opinio juris* exist in a sufficient number of states. This presupposes a period before the crystallization of the custom when some states possess the requisite *opinio juris* but other states do not. Hence, the seemingly counter-intuitive conclusion follows that custom is formed by states possessing a mistaken belief that the practice is already legally obligatory.[230] This apparent paradox has led Kelsen to suggest: 'They must believe that they apply a norm, but they need not believe that it is a legal norm which they apply. They have to regard their conduct as obligatory or right.'[231] However, this formulation insufficiently distinguishes custom from comity. The view that best reflects international reality is that states initially engage in divergent practice out of a sense of political, social or economic necessity (*opinio necessitatis*),[232] coupled with a feeling that the practice *should* be legally obligatory.[233] It constitutes an invitation to other states to do the same.[234] Only if this does not meet with consistent opposition over time and other states have taken up the invitation does the belief that the practice amounts to law (*opinio juris*) develop. Even then, it is probably more accurate to say that states merely 'claim' that it amounts to law and their subjective belief, being presumably cognizant of the current state of the law, remains that the norm *should* be law.[235] Of course, once the norm crystallizes, its continuing existence is sustained by consistent state practice and *opinio juris*, otherwise a counter-norm might emerge.

It is hardly surprising that one of the more difficult aspects in the ascertainment of *opinio juris* is how exactly to deduce a state's 'opinions'. *Opinio juris* can be derived from the conclusion of treaties, attitudes to the activities of international organizations (such as resolutions of the UN

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229 *North Sea Continental Shelf* cases, above note 112, 44 [77].
230 See, e.g., Thirlway, above note 188, 122.
231 Kelsen, above note 168, 440.
232 Cassese, above note 7, 156–7.
233 Raphael Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13 *Israel Law Review* 86, 97; Hugh Thirlway, *International Customary Law and Codification* (Leiden: A.W. Sijthoff, 1972) 55.
234 Harris, above note 32, 39.
235 Thirlway, above note 233, 55.

General Assembly), legislation, press releases, the jurisprudence of international and national tribunals, diplomatic correspondence, opinions of national legal advisers, government policies, official manuals (for example, relating to conduct of the armed forces), executive practices and comments on drafts written by the ILC.[236]

In practice, these sources are often insufficient to found a robust attribution of *opinio juris*. Thus, *opinio juris* may be inferred from the state practice itself,[237] though this is not always a fruitful exercise. It may be impossible to deduce whether a state is engaging in conduct out of a sense of obligation, or whether it is merely doing so out of expediency or convenience.[238] For example, in the *North Sea Continental Shelf* cases, 'no inference could legitimately be drawn as to the existence of a rule of customary law' from practice consistent with the Geneva Convention on the Continental Shelf by the States Parties to it.[239] Not even the consistent practice of states not party to the Convention indicated *opinio juris*: there was 'not a shred of evidence' that 'they believed themselves to be applying a mandatory rule of customary international law'.[240] However, the ICJ did not appear to reject the possibility that inferences of *opinio juris* might be drawn from state practice, given its conclusion that state practice 'must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[241]

Having set out a relatively rigid regime for the determination of the elements of custom, the ICJ has at times itself – indeed, one might say increasingly – sourced relevant *opinio juris* purely from past judicial decisions of the Court and that of other international tribunals. In the *Gulf of Maine* case,[242] for example, the ICJ was asked to delimit the maritime boundary between Canada and the United States. In drawing the boundary, a Chamber of the Court stated that the ICJ's judgment in the *North*

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[236] International Law Commission, 'Documents of the Second Session including the Report of the Commission to the General Assembly' (1950) *Yearbook of the International Law Commission*, II, 368–72; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn), 6; *Military and Paramilitary Activities in and against Nicaragua*, above note 11, 99–101.

[237] Brownlie, ibid., 8; Thirlway, above note 188, 123.

[238] Kelsen, above note 168, 450.

[239] *North Sea Continental Shelf* cases, above note 112, [76].

[240] Ibid., [76].

[241] Ibid., [77].

[242] *Delimitation of the Maritime Boundary on the Gulf of Maine Area* (*Canada v United States of America*) [1984] ICJ Rep 246. See also discussion below at section 2.2.2.5: Treatment by international courts and tribunals.

Sea Continental Shelf cases is 'the judicial decision that has made the greatest contribution to the formation of customary law in this field' and proceeded to apply its finding that the delimitation must, in the absence of agreement between the parties, be drawn 'according to equitable principles'.[243] To confirm the norm in the *North Sea Continental Shelf* cases, the Court cited another of its own decisions and the decision of an arbitral tribunal.

In the *Arrest Warrant* case,[244] the ICJ stated that it had 'carefully examined state practice', including 'decisions of national higher courts, such as the House of Lords or the French Court of Cassation', to reach the conclusion that there is no exception in customary international law to the rule of immunity from domestic criminal process of incumbent ministers for foreign affairs, even when they are suspected of war crimes or crimes against humanity.[245] No actual state practice or *opinio juris* was cited.

Finally, in the *Israeli Wall* case,[246] the ICJ cited solely from its previous decisions to determine that it had jurisdiction to render an Advisory Opinion on the legal consequences of Israel building a wall in occupied Palestinian territory.[247]

This process of determining the existence of a customary rule by reference to judicial determinations gives rise to serious questions. Such a reliance on previous decisions – whether it is bare or substantial – may amount to a breach of Article 59 of the ICJ's own Statute, which states that previous decisions of the Court are not binding upon it in cases other than that under consideration.[248] In other words, there is no system of binding precedent in international law. The Court may not rely upon its own determinations as to the existence or content of a rule as evidence of the existence of that rule. Rather, it must rely upon material evidence of the existence of *opinio juris*, state practice or indeed both.

As discussed above, omissions can amount to state practice, whether as practice relating to a prohibition, such as genocide or crimes against humanity, or in the form of acquiescence when a right is invoked by

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243 Ibid., [91]–[94].

244 *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) [2002] ICJ Rep 3. For a discussion of the facts of this case, see text accompanying note 316 below.

245 Ibid., [58]. Compare the difference in approach of Judge van Wyngaert in her Dissenting Opinion: ibid., [9]ff.

246 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

247 Ibid., [36]–[45].

248 See section 2.2.4.1 below.

another state, such as that which occurred in *Anglo-Norwegian Fisheries*. Although a state's silence in respect of the former class of omission (performance of an obligation) is not evidence of *opinio juris*, lack of protest at another state's exercise of a claimed right constitutes *opinio juris* so long as the acquiescing state has actual or constructive knowledge of the other state's practice.[249] For example, in *Anglo-Norwegian Fisheries*, the United Kingdom complained that it did not know of the Norwegian practice in relation to maritime delimitation. The ICJ rejected this argument, as the United Kingdom was 'greatly interested' in the fisheries in the area and, as an important maritime power, 'could not have been ignorant' of the Norwegian practice, 'nor, knowing of it, could it have been under any misapprehension as to the significance of its terms'.[250]

2.2.2.3.2 Treaty obligations as evidence of opinio juris A treaty can interact with customary law in three ways. The treaty may (1) codify a pre-existing custom; (2) crystallize an emerging custom; or (3) constitute evidence of *opinio juris* that might contribute to the formation of a customary norm in the future.[251] Importantly, the existence of a treaty as a material source of custom does not 'supervene' the custom itself, even if the terms are identical. Thus, even if a treaty declaratory of customary law is terminated, or otherwise cannot be relied upon, the customary rule is not affected.[252] This situation arose in the *Nicaragua* case. The United States had made a reservation to the Court's jurisdiction in respect of 'multilateral treaties', which included Article 2(4) of the UN Charter relating to the use of force. Therefore, to determine whether the US had impermissibly engaged in the use of force, the ICJ had to revert to the non-use of force as an analogous customary rule of international law.

The third kind of interaction was argued by the Netherlands and Denmark in the *North Sea Continental Shelf* cases. These states claimed that the equidistance method of delimitation[253] contained in Article 6 of

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[249] *Anglo-Norwegian Fisheries* case, above note 198.

[250] Ibid., 138–9.

[251] Codification and progressive development of treaties is discussed above at section 2.2.1.8.1.

[252] *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [177].

[253] Equidistance is explained in Article 6(1) of the Geneva Convention on the Continental Shelf as follows: 'Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every

the Geneva Convention on the Continental Shelf, which entered into force a mere three years before the institution of proceedings,[254]

> is, or must now be regarded as involving, a rule that is part of the *corpus* of general international law; – and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter. . . . As a matter of positive law, it is based on the work done in this field by international legal bodies, on State practice and on the influence attributed to the Geneva Convention itself, – the claim being that these various factors have cumulatively evidenced or been creative of the *opinio juris sive necessitatis*.[255]

For a treaty provision to constitute *opinio juris*, the provision must, 'at least potentially, be of a fundamentally norm-creating character'.[256] This is not a reference to *jus cogens*, but to whether the treaty provision is expressed in such a manner as to be laying down a rule of law. The Court determined that several factors indicated that Article 6 was not 'fundamentally norm-creating'. First, the obligation to use the equidistance method was made contingent on failure of a primary obligation to effect delimitation by agreement. Secondly, there was significant ambiguity about the 'exact meaning and scope' of the qualification of 'special circumstances' relative to the treatment of equidistance. Finally, parties had the ability to make reservations to Article 6.[257] These factors, though not by themselves enough, were cumulatively effective in denying the 'fundamentally norm-creating character' of Article 6. Additionally, the Court found that the practice of parties and non-parties to the Convention in acting consistently with the treaty was not unequivocally indicative of *opinio juris*.[258]

The Court in the *North Sea Continental Shelf* cases stated that the eventual creation of a customary norm as a result of the influence of a treaty provision is 'not lightly to be regarded as having been attained'.[259] However, as mentioned above in the context of state practice,[260] customary law seems to apply differently to proscriptive norms, such as the norm against genocide. Where such a proscriptive norm is concerned, it is less

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point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.'

254 *North Sea Continental Shelf* cases, above note 112, [74].
255 Ibid., [77].
256 Ibid., [72].
257 Ibid., [72].
258 Ibid., [76].
259 Ibid., [71].
260 See discussion above at section 2.2.2.2.

likely that states are taken to be acting merely in the application of a treaty, such as the Genocide Convention.[261] It is more readily to be concluded that states are foregoing the acts proscribed in such treaties because they believe a norm of international law independent of the treaty compels such forbearance. This position appears to be starker where *jus cogens* norms, such as the proscription against genocide, are concerned.

A related point is the significance of dispute resolution and other procedural clauses in a treaty. Such clauses are by definition not of a 'fundamentally norm-creating character' and cannot therefore express customary law.[262] Thus one reason why a state would conclude a treaty on a matter already covered by customary law might be to create procedural mechanisms for the monitoring, enforcement and other resolution of disputes relating to pre-existing customary norms. Looked at in this way, the notion that states conclude a particular treaty precisely because of their belief that there is no pre-existing law on the matter may in any given circumstance be quite wrong.[263]

The influence of treaties on customary law is complex and allows courts, tribunals and states significant leeway in considering whether a customary norm has crystallized as a result of the existence of a relevant treaty regime.

2.2.2.3.3 UN General Assembly resolutions as evidence of opinio juris The ICJ has often used UN General Assembly resolutions as evidence of *opinio juris*. In the *Nicaragua* case, the United States had made a reservation to the jurisdiction of the ICJ in respect of Article 2(4) of the UN Charter, making it necessary to determine whether there was a customary norm against the use of force. The ICJ found that such *opinio juris* existed, but in doing so relied exclusively on a series of General Assembly resolutions. The Court stated:

> The *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions. . . . The effect of consent to the text of such resolutions . . . may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[264]

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[261] Higgins, above note 196, 30–31; Cassese, above note 7, 158.

[262] *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [178].

[263] See further Thirlway, above note 188, 131.

[264] *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [188].

The value of *opinio juris* in General Assembly resolutions should not be overstated. It depends on the degree of consensus achieved by particular resolutions, as well as the number of times the norm has been reaffirmed in subsequent resolutions.[265] Although such resolutions can be a 'very concentrated focal point'[266] for *opinio juris*, there are limits to their effectiveness. In the *Nuclear Weapons* Advisory Opinion, evidence of numerous General Assembly resolutions expressly condemning as illegal the use of nuclear weapons – several by very large majorities – was not effective to constitute *opinio juris* amounting to a prohibition on nuclear weapons. Starting with GA Resolution 1653 (XVI),[267] overwhelming majorities in the General Assembly have passed numerous resolutions – 49 by 1996[268] – asserting that the use of nuclear weapons is unlawful.[269] The Court, however, considered that the consistent reservation of the nuclear weapons states of the right to use nuclear weapons in self-defence, pursuant to a policy of deterrence, prevented the formation of the custom.[270]

Rosalyn Higgins explained the 'obsessive interest' in UN Resolutions as a basis for *opinio juris* as reflecting two things: first, the relative ease with which a court can ascertain what is in the minds of states, as opposed to the complex and sometimes impossible task of searching for evidence of this in more traditional ways; and, secondly, a growing sense that a rigorous search for evidence of states' belief about the existence of a binding rule is less important.[271] Recent seminal ICJ rulings indicate increasing reliance upon UN Resolutions and other more easily ascertainable evidence of state practice and *opinio juris* for the determination of the existence and content of a rule of custom. Examples include the *Nicaragua* case, where such evidence was used to ascertain that common Articles 1 and 3 of the Geneva Conventions of 1949 reflect customary international law and are therefore binding on all states, whether or not they are parties to those treaties, without ever examining evidence of the existence and content of customary rules reflecting the content of these provisions.[272] Another

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265 Higgins, above note 196, 22–8.

266 Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London: Oxford University Press, 1963) 2.

267 Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons, GA Resolution 1653 (XVI), UN GAOR, 16th sess., 1063rd plen. mtg, UN Doc. A/5100 (1961).

268 See *Nuclear Weapons* (Advisory Opinion), above note 210, 532.

269 Ibid., 255.

270 Ibid., 248–53, 255.

271 Higgins, above note 196, 23.

272 *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [220].

example was in the *Israeli Wall* case where it was used to confirm the prohibition on the use of force and the principle of self-determination.[273]

The ICJ has, at least on one occasion, expressed the need for caution in the use of these declaratory resolutions of the UN General Assembly. In the *Nuclear Weapons* case, the ICJ stated that, to ascertain whether a particular UN General Assembly resolution has normative force, 'it is necessary to look at its content and the conditions of its adoption'.[274] As discussed above, while the Court noted that there were numerous General Assembly resolutions condemning the use of nuclear weapons, they did not show a 'gradual evolution' of customary law, as many of the resolutions were adopted with substantial numbers of negative votes and abstentions.[275] Such reticence might also be read in light of the politically delicate question under consideration – a conclusion supported by the ultimate non-finding in the case. Considered overall, the contemporary practice of the Court clearly indicates employment of these resolutions without a genuine attempt to explain whether the resolution is evidence of state practice, *opinio juris* or both.

As with any declaration by a state, it is always necessary to consider what states actually mean when they vote for or against certain resolutions in international fora. States often vote in a particular way not because they believe the issue in question to give rise to a binding rule, or even because they necessarily agree with the content of the resolution. Their vote may well be an expression of nothing more than political compromise designed to achieve a goal partly or entirely distinct from the issue under vote.[276] While it is tempting to simplify the process of identifying the existence of *opinio juris* in relation to a question of custom under consideration, it is important to carefully consider the context and purpose of any expression of a state's belief, particularly before international fora, where questions of politics and diplomacy are accentuated.

Some scholars have gone even further and suggested that General Assembly resolutions can evidence both state practice as well as *opinio juris*, thereby giving rise to a self-contained source of custom.[277] This approach was implicitly rejected in the *Nicaragua* case, where the Court

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[273] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 246, [87]–[88].

[274] *Nuclear Weapons* (Advisory Opinion), above note 210, 254–5.

[275] Ibid., 255.

[276] See G. Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations'(1972 III) *Recueil des cours*, 431; Higgins, above note 196, 26.

[277] Blaine Sloan, *United Nations General Assembly Resolutions in Our Changing*

expressly linked its analysis of General Assembly resolutions only to *opinio juris*.[278]

2.2.2.4 Challenges to the traditional elements of custom

In 1993, Grigory Tunkin suggested that the exponential growth of general multilateral treaties since 1945 has changed the international paradigm to such a degree that treaties should now also be regarded as formal sources of general international law – in other words, some treaties should, like general custom, apply to all states, even those not parties to the treaty.[279] Tunkin's invitation went largely unanswered. Recently, however, Rudy Baker provocatively asserted that the jurisprudence of international criminal courts and tribunals has been elevated to the status of customary law and hence 'the debate over whether consistent state practice and *opinio juris* are the only building blocks of customary international law is over, because clearly, for better or for worse, they no longer are'.[280]

Baker seeks to substantiate this proposition by reference to three case studies. First, he cites the International Criminal Tribunal for the former Yugoslavia (ICTY) judgment of the Appeals Chamber in the *Tadić* case, which applies a variant of the control test set out by the ICJ to determine whether, for the purposes of armed conflict, one state can be said to be acting as an agent of another. [281] The ICTY 'overall control test', which expressly differs from the 'effective control test' formulated by the ICJ, it is argued, may be taken to express new customary international law.[282]

Baker's second example relates to the suggestion by commentators that the law on state immunity is now in flux, given the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) based on their Statutes, which expressly reject the application of the dispositional custom of state immunity in respect of their jurisdictions.[283] The suggestion is that the different treatment of the issue of immunity in the

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World (Ardsley-on-Hudson, NY: Transnational Publishers, 1991) 71–5; Cheng, above note 221.

[278] *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [188].

[279] Grigory Tunkin, 'Is General International Law Customary Law Only?' (1993) 4 *European Journal of International Law* 534.

[280] Roozbeh (Rudy) B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21(1) *European Journal of International Law* 173, 175.

[281] *Prosecutor v Tadić* (Appeals Chamber Judgment) IT-94-1-A (15 July 1999), [40]–[62] (setting out the relevant test).

[282] Baker, above note 280, 187.

[283] Ibid., 189; Statute of the International Criminal Tribunal for the former

context of the ad hoc international criminal tribunals creates, by virtue of these provisions and endorsement by the Courts of their content, a separate customary law rule.

Thirdly, Baker refers to the application of the doctrine of superior responsibility before the modern international criminal courts and tribunals – an ancient doctrine which was given a modern voice in the jurisprudence of the International Military Tribunals at Nuremberg and Tokyo.[284] Baker argues that such a doctrine, which has since become accepted as customary law, could only be sourced in general principles of law,[285] while concluding that the 'had reason to know' element of command responsibility, as articulated by the tribunals,[286] is not reflected in the domestic law of major legal systems.

The argument that the jurisprudence of the international criminal tribunals has created a new form of custom, rendering state practice and *opinio juris* as no longer indispensable to the formation of custom, is quite wrong. First, Baker acknowledges that 'the majority of ICTY and ICTR jurisprudence follows generally accepted international law'.[287] Secondly, the 'overall control' test in *Tadić* was said by that Court to be expressly founded in custom. The manner in which the ICTY and ICTR go about determining the existence of a customary international law rule is the subject of considerable concern and may call into question the reliability of some of its rulings.[288] However, while the tribunals' methods of identifying state practice and *opinio juris* are at times highly questionable, they are very far from repudiating the need to base custom in those elements – indeed, they confirm the need to do so, in principle if not always in practice. Thirdly, the fact that the customary position of state immunity appears to be 'in flux' suggests only that state practice and *opinio juris* may be developing to change the customary law on this point. Indeed, it was not by judicial determination of a couple of international tribunals that the immunity exception was created; rather it was created by the Security

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Yugoslavia ('ICTY Statute'), Art. 7(2); Statute of the International Criminal Tribunal for Rwanda ('ICTR Statute'), Art. 6(2).

284 See ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3).

285 See discussion below at section 2.2.3.

286 See, e.g., *Prosecutor v Delalić et al. (Čelebići)* (Appeals Chamber Judgment) IT-96-21-A (20 February 2001), [226].

287 Baker, above note 280, 184.

288 An example of this unsatisfactory identification of custom can be found in a case before the ICTY concerning privilege attaching to a former ICRC employee: see *Prosecutor v Simić* (Trial Chamber Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness) IT-95-9-PT (27 July 1999), [73]–[74]. This decision is discussed further in section 2.2.2.5 below.

Council under Chapter VII of the UN Charter.[289] Finally, even assuming a dubious birth in general principles for the doctrine of superior responsibility, state practice and *opinio juris* subsequent to (and indeed including) the Nuremberg and Tokyo trials is the professed basis for the current customary norm.

Despite such flirtations with the idea of a modified doctrine concerning the creation of custom, the twin elements of state practice and *opinio juris* are enduring requirements. At the same time, a lack of rigour in their identification by courts or tribunals may call into question how and when a rule has come into existence. It may even threaten the confidence of states and other subjects of the international legal regime in the identification of customary rules by such bodies. This is the subject of the following section.

2.2.2.5 Treatment by international courts and tribunals

As a subsidiary source, decisions of international courts and tribunals do not make international law. Nevertheless, as these fora constitute the enforcement mechanism for international law, it is vital that they apply the correct methodology when pronouncing on customary law. Some recent decisions of international criminal tribunals and the ICJ have suggested a disturbing trend away from a rigorous approach toward the identification of state practice and *opinio juris*.

A stark example of this in the context of international criminal law was the case of *Prosecutor v Simić*[290] tried before the ICTY. This case concerned the trial of three accused for crimes against humanity and violations of the laws and customs of war, for events that occurred during the Bosnian armed conflict. An interlocutory issue that arose in the proceedings concerned whether or not there was a customary norm granting absolute immunity to employees of the International Committee of the Red Cross (ICRC) from testifying about matters they learnt in the course of their employment. In addressing the issue, the Trial Chamber emphasized the importance of the right of non-disclosure to the ICRC's mandate, before stating:

> The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC as described above, leads the Trial

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[289] Itself, the most important multilateral treaty in existence. All the international criminal courts and tribunals containing effectively the same provision are created by or in agreement with the UN, save for the International Criminal Court, which is created by virtue of a multilateral treaty.

[290] *Prosecutor v Simić*, above note 288.

> Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of information.[291]

As Judge Hunt noted in his Separate Opinion, 'it is an enormous step to assume' that states had contemplated an absolute immunity for employees of the ICRC before international courts, especially given the role of these courts in enforcing the Geneva Conventions.[292] Not only do the Conventions themselves not recognize anything like such an immunity of the ICRC, it had not been expressly reflected upon at any of the Red Cross and Red Crescent International Conferences[293] such that states could be said to have expressed views about this specific issue. Also, no real evidence of state practice and *opinio juris* was referred to in support of the Chamber's determination. The decision shows the risks involved in using the decisions of courts on the existence of a customary rule as precedent for the existence of that rule. It is critical to look at what evidence the court specifically identified as establishing a rule. Verification and application of that *evidence*, as opposed to poorly substantiated assertion, may be of some use.

While more understandable – and perhaps less dangerous – in *sui generis* tribunals where there is a variation in the competence and international law experience of judges and where decisions are being rendered on discrete subjects, this attenuated practice has also appeared in judgments of the ICJ. As discussed above, the ICJ has increasingly relied on its own prior judgments as evidence of customary law without independently articulating the basis for the law, despite the injunction in Article 59 of its own Statute that previous decisions have no binding force.[294] A similarly dubious practice has been the mere assertion by the Court in its judgments that it has considered state practice without referring expressly to what this practice is. In the *Arrest Warrant* case,[295] for example, the ICJ did precisely this:

> The Court has carefully examined state practice, including national legislation and those few decisions of national higher courts, such as the House of Lords

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[291] Ibid., [74].

[292] Ibid., (Separate Opinion of Judge Hunt), [23].

[293] The International Conference of the Red Cross and Red Crescent Movement is the gathering of all the states that have signed up to the Geneva Conventions of 1949 (virtually all states), at which core issues and strategic direction for the Movement are discussed.

[294] See discussion of the *Gulf of Maine* case and other cases, above at section 2.2.2.3.1.

[295] *Arrest Warrant of 11 April 2000*, above note 244.

> or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[296]

Voices from the bench of the ICJ itself echo concerns about the manner in which customary international law rules are determined and applied. Judge van Wyngaert in her dissent in the *Arrest Warrant* case described the Court's inverted logic in determining the question of immunity before it: 'In a surprisingly short decision, the Court immediately reaches the conclusion that such a rule exists. A more rigorous approach would have been highly desirable.'[297] Judge Buergenthal has issued a scathing attack on the majority decision of the Court for its determinations in the *Israeli Wall* Advisory Opinion for reaching determinations about Israel's actions without the availability of evidence to enable that conclusion.[298] The relaxed practice of the Court in identifying custom has also been noted by scholars.[299]

2.2.2.6 The persistent objector exception

Once a custom of general international law forms, it is prima facie binding on all states, notwithstanding lack of consent on the part of particular states. Many scholars assert that there is a narrow exception to this rule.[300]

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[296] Ibid., [58]. Cf the meticulous analysis of state practice and *opinio juris* in the *Nicaragua* case, where the Court established the content of the prohibition against the use of force in customary international law: *Military and Paramilitary Activities in and against Nicaragua*, above note 11, [180]–[210].

[297] *Arrest Warrant of 11 April 2000*, above note 244, [11] (Dissenting Opinion of Judge van Wyngaert).

[298] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 246, Declaration of Judge Buergenthal, in which his Excellency criticizes the Court for reaching determinations based upon UN information in the absence of crucial information which Israel refused to provide to the Court. Judge Buergenthal concludes (at [10]) that, as this was an Advisory Opinion and not a contentious case, Israel was not obliged to produce any evidence and its failure to do so could not prejudice its position.

[299] See Mark Weisburd, 'American Judges and International Law' (2003) 36 *Vanderbilt Journal of Transnational Law* 1475, 1505ff; Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413; Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 *American Journal of International Law* 101.

[300] See, e.g., Brownlie, above note 236, 11; Thirlway, above note 188, 127; *Restatement (Third) of the Foreign Relations Law of the United States*, (1987), Vol. 1, [102], comment 26.

When, during the custom's formative period, a state consistently objects to the application of the customary rule to itself, the custom that eventually crystallizes will not bind that state. This is known as the 'persistent objector exception'.

Commonly cited to support this rule are the *obiter dicta* of two ICJ cases. The first of these is the *Asylum* case which, as discussed below, was arguably concerned only with the doctrine of regional custom.[301] A more cogent argument is based on the *Anglo-Norwegian Fisheries* case.[302] One of the United Kingdom's arguments in that case was that a 'ten-mile rule' of delimitation of territorial waters was a rule of customary international law and thus binding on Norway. The ICJ found that, although some states did apply the ten-mile rule, other states did not and thus state practice was insufficiently widespread. It then added: 'In any event, the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.'[303]

Barring these cases, however, there do not appear to be many international judicial pronouncements in support of the persistent objector rule, and state practice on the issue is minimal.[304] Thus, if the persistent objector rule – necessarily a customary norm – exists at all, its scope would be narrow. It would certainly not be applicable to exclude a state from the application of a *jus cogens* norm, as the general disregard of South Africa's opposition to the *jus cogens* norm of apartheid shows.[305]

On a consensualist view, the persistent objector rule is desirable because it prevents international law degenerating into a tyranny of the majority.[306] The sovereign equality of states demands that there be some limits to the ability of the majority to bind the minority, especially since the persistent objector rule only concerns dispositional custom. On a communitarian view, the more integrated, less anarchic nature of modern international society means that in practice states find it more difficult to resist the will of the overwhelming majority.[307] It is a natural consequence of modern

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301 See discussion below at section 2.2.2.9.

302 *Anglo-Norwegian Fisheries* case, above note 198.

303 Ibid., 131.

304 Thirlway, above note 188, 127; Cassese, above note 7, 163.

305 Louis Henkin, *International Law: Politics and Values* (Dordrecht; London: Martinus Nijhoff, 1995) 39; see discussion below at section 2.2.2.7.

306 Thirlway, above note 188, 127; *Restatement (Third) of the Foreign Relations Law of the United States*, above note 300. The Restatement admits such exemption has been rare.

307 Cassese, above note 7, 155, 163.

international society that all states are bound by the same set of rules. Those who hold this opinion stress the flimsiness of the evidence that the consensualists are able to drum up of the existence of the persistent objector rule, pointing out that all customary international law automatically applies to a new state, even though it may not have consented to particular norms, putting the lie to any unified consensualist theory.[308]

Although the issue is far from settled, it appears that opposition by states to an emergent custom will, in virtually all cases, amount to nothing more than evidence that the customary rule may not yet be supported by enough states for it to crystallize. If the persistent objector rule does exist, its narrowness would at very least require strong and consistent opposition, both before and after the crystallization of the norm, for a state to hope to invoke it.

2.2.2.7 *Jus cogens*

The debate over the basis and content of *jus cogens* is one of the most contentious in international legal scholarship.

As treaty law and customary law are usually hierarchically equal, a subsequent treaty rule will ordinarily override, as between the States Parties to the treaty, the operation of any inconsistent customary rule. This is true for *jus dispositivum*, or 'yielding' custom, but not so for *jus cogens* – 'peremptory' norms of international law. Such norms sit at the top of the hierarchy of international law sources and cannot therefore be derogated from by states, either by international agreement or national legislative action.[309] Article 53 of the Vienna Convention on the Law of Treaties provides:

> A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[310]

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[308] Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 *International and Comparative Law Quarterly* 779, 794; Jonathan Charney, 'Universal International Law' (1993) 87 *American Journal of International Law* 529, 541. But see MacGibbon, above note 187, 137.

[309] See Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1974–75) 47 *British Yearbook of International Law* 273; Malcolm N. Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008, 6th edn) 115–19.

[310] Similarly, Article 64 of the Vienna Convention on the Law of Treaties

It is widely recognized that this provision, which deals with the consequences rather than the content of *jus cogens*, has attained the status of custom.[311] This is despite the fact that some delegates at the Vienna Conference only agreed to the adoption of this provision after insisting on the inclusion of Article 66(a), which obliges parties to a dispute under Article 53 to submit the matter to the ICJ. The delegates were concerned that, as the *jus cogens* norms were themselves left undefined – precisely because many of them were highly controversial – the stability of treaties might be impaired.[312] Yet, as a dispute resolution provision, Article 66(a) is not part of custom, unlike its substantive counterpart in Article 53,[313] and given that there are currently only 111 parties to the Vienna Convention, it is conceivable that a non-party could claim that a treaty contravenes *jus cogens* without having to resolve the dispute before the ICJ. In practice, however, legal disputes about *jus cogens* have not arisen. This is largely because, as the ICTY stated in the *Furundžija* case, in convicting a member of the Croatian Defence Council of torture and rape:

> [T]he *jus cogens* nature of the prohibition against torture . . . is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.[314]

Indeed, Antonio Cassese has gone so far as to assert that deterrence is the *primary* purpose of the *jus cogens* concept and that it has achieved its goal, given the diplomatic and psychological motivations that have largely dissuaded states from contravening a rule that the rest of the community considers to be fundamental.[315] There are also suggestions that the ICJ has been reluctant to apply the *jus cogens* concept. In the *Arrest Warrant* case,[316] the ICJ considered whether the incumbent Congolese Foreign

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provides: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

311 Cassese, above note 7, 206.

312 I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, UK: Manchester University Press, 1984, 2nd edn), 66; Egon Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 71 *American Journal of International Law* 946, 972–3.

313 Cassese, above note 7, 205.

314 *Prosecutor v Furundžija* (Trial Chamber Judgment) IT-95-17/1-T (10 December 1998), [154].

315 Cassese, above note 7, 209; Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291, 305.

316 *Arrest Warrant of 11 April*, above note 244.

Minister (Yerodia) was immune from domestic Belgian criminal process, even though he was accused of war crimes and crimes against humanity. In the absence of any link between Belgium and the accused, Belgium argued that it had universal jurisdiction to try him. As the Democratic Republic of the Congo did not ultimately contest this latter claim, the sole question before the ICJ was whether, assuming Belgium otherwise had jurisdiction, the accused was immune by virtue of his position as Foreign Minister during the alleged crimes. In a controversial and highly criticized ruling, the Court held that the dispositional custom of immunity of foreign ministers from the criminal process of other states[317] was unaffected even when the crimes charged contravened *jus cogens* norms.[318]

The other reason for considering Article 53 of the Vienna Convention to be a material source of custom, notwithstanding the non-customary nature of Article 66(a), is that the concept of *jus cogens* pre-dates the Vienna Convention. The most uncontroversial *jus cogens* norm is *pacta sunt servanda* – that promises must be kept. This norm is of truly ancient pedigree, as it is the machinery without which treaty-making would be entirely meaningless.[319] The institution of treaty-making relies on a hierarchically superior norm enabling states to bind themselves in the future in exchange for the same from the other parties to the compact. State practice and *opinio juris* on *pacta sunt servanda* exists 'from time immemorial'.[320] That Article 53 codified an existing norm finds ample support. For example, during the *Krupp* trial in 1948, the United States Military Tribunal sitting in Nuremberg considered whether 12 directors of the Krupp Group of companies were guilty, inter alia, of the war crime of using French prisoners of war in the German armaments industry. In the course of convicting the accused, the Tribunal stated that any treaty between Germany and the Vichy government authorizing Germany to engage French prisoners of war in German armament production would

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317 See Chapter 6 for further discussion of state immunity.

318 *Arrest Warrant of 11 April*, above note 244, [58]. The case has been the subject of much scholarly criticism: Neil Boister, 'The ICJ in the Belgian *Arrest Warrant* Case: Arresting the Development of International Criminal Law' (2002) 7(2) *Journal of Conflict and Security Law* 293; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium* Case' (2002) 13(4) *European Journal of International Law* 877.

319 Wehberg, above note 69, 782–3. The modern formulation is Article 26 of the Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' See discussion above at section 2.2.1.

320 Wehberg, above note 69, 783.

have been void as manifestly *contra bonos mores*[321] – against good morals. This idea underscores the deductive, even natural law, basis of *jus cogens*. Further evidence can be found in the prohibition against genocide. Judge Elihu Lauterpacht has stated that 'genocide has long been regarded as one of the few undoubted examples of *jus cogens*'.[322]

Rather than arising from the consent of states, *jus cogens* appears to spring from the core ethics of international society. It expresses, in the words of the ICTY, an 'absolute value from which nobody must deviate' and runs counter to the old orthodoxy that international rules 'binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[323]

Some commentators have erroneously suggested that the requirement in Article 53 that the norm be 'recognized by the international community of States *as a whole*' means that it should be a norm that *every* state recognizes, such that if there is one deviant, the norm is defeated.[324] This interpretation would make the norm logically inconsistent, as it would merely reflect international reality – something that law is, by definition, designed to regulate. In other words, a state could defeat the norm by refusing to recognize it and engaging in practice incompatible with it. Ambassador Yasseen, the President of the Drafting Committee of the Vienna Convention, stated:

> [I]f one State in isolation refused to accept the peremptory character of the rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.[325]

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[321] Cited in Schwelb, above note 312, 950–1. This was also the view of the International Law Commission in its Commentary on the precursor to Article 53, although governments seemed reluctant to recognize it as such in their comments on the draft: ibid., 970.

[322] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Yugoslavia*) [1993] ICJ Rep 325, Separate Opinion of Judge ad hoc Elihu Lauterpacht, 440. See also *Barcelona Traction, Light and Power Co. Ltd* (*Belgium v Spain*) above note 4, [33]–[34]; William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 445–6.

[323] *SS 'Lotus'* (*France v Turkey*), above note 209,18.

[324] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 324.

[325] UN Conference on the Law of Treaties, 1st session, Vienna, 26 March to 24 May 1968, *Official Records*, Summary Records of the Plenary Meetings and of the

As *jus cogens* can only be modified by a 'subsequent norm of general international law having the same character', contrary dispositional custom and the persistent objector rule are inapplicable. So, too, are reservations to *jus cogens* norms contained in multilateral treaties.[326] Besides limiting the validity of international acts of states, *jus cogens* may also impugn the validity of domestic legislative or executive acts, insofar as they are inconsistent with the *jus cogens* norm.[327] Laws bestowing amnesty on perpetrators of international crimes that have the character of *jus cogens* can thus be declared invalid in an international forum or even in a domestic forum if international law is part of the law of the land.[328] A striking example of such incorporation is the inclusion in 1999 of provisions of the Swiss Constitution giving the Federal Assembly the duty to invalidate an attempt at reform of the Constitution that violates '*les règles imperatives du droit international*'.[329]

The above has briefly sketched the potential operation of *jus cogens*. Of course, the secondary norm codified in Article 53 is itself meaningless without identification of the content of the primary norms the consequences of which it purports to regulate. Hugh Thirlway has argued that the crystallization of a specific *jus cogens* norm would, according to traditional concepts of custom formation, require an attempt by a state to enforce a treaty in breach of customary law, followed by universal condemnation asserting that the custom was non-derogable.[330] However, as mentioned above, disputes over *jus cogens* are rare in practice, given the deterrent effect that attends the widespread belief that a norm is 'fundamental' to international public order. Nevertheless, while such heinous acts as genocide, slavery and torture are universally recognized as *jus cogens*, it appears then that there is an abundance of *opinio juris* but very little state practice. This has implications for the traditional conception of custom as a rigid separation of its two elements, discussed above.[331] Dinah Shelton has even stated:

> Although it may be appropriate today to recognize fundamental norms deriving from an international public order, the extensive assertions of peremptory

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Meetings of the Committee of the Whole, Doc. A/Conf.39/11 (1969), 472, cited in Cassese, above note 7, 201.

326 *North Sea Continental Shelf* cases, above note 112, 97, 182, 248.

327 *Prosecutor v Furundžija*, above note 314, [154]–[157].

328 See Chapter 3.

329 The fundamental rules of international law.

330 Thirlway, above note 233, 138.

331 See discussion above at section 2.2.2.2.