REFLECTIONS ON THE ROLE OF CONSENT

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Introduction

How one approaches the structure of international law depends upon a variety of factors.

In the first place these factors will influence the basic definition one adopts of that structure, ie whether one is content to accept a fairly traditional view of international law as based upon or springing from State practice in the form of treaties and custom, or whether one adopts a more fundamentalist approach which involves a questioning of the existence of an international society within which customary rules can develop and a notion of legal obligation can become accepted.

Secondly, even if one accepts (for the purpose of analysis if nothing more) that a society or community of States exists, there are still fundamental issues to be resolved. Does a rule exist between two States by virtue of *their* acceptance of the rule in question, or because it has been generally accepted by the international community of which the two States form part? This formulation of the matter conceals other issues. Is the question formulated in this way as a matter of pleading, or as a matter of conviction?

Perhaps it should be explained that the expression "as a matter of pleading" is not intended to relate to a procedure adopted for use before the International Court or some other tribunal, but simply the way a dispute is presented at the diplomatic level where legal issues are raised between the States concerned. In that situation, it may be that the choice is made by the claimant State for purely practical reasons between seeking to establish the other party's express or implied consent to the rule contended for, or alleging that the rule has been accepted as a general rule of customary international law by which both the claimant State and the other State were therefore bound.

Where the approach is dictated by ideology this can exist at different levels. To some international theorists, international law is little more than a patchwork of experiences that suggest possible solutions to the current dispute, but only coalesce in the actual solution of that dispute (thus providing a fresh experience for future reference). This equation would be expressed in a different form by a commentator from the CLS school who might point to the absence of any determinative effect in so-called rules of law, the outcome of a particular dispute being both a haphazard concomitance of factors and of limited use in suggesting the result of subsequent disputes.[1]

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As for the role of consent within this framework (or should one say these frameworks), it will be influenced by the issue being addressed. For example, if the question is the relationship between law and the concept or nature of international society, the answer may well be influenced by how that society is perceived (is there in reality "a society", and, if there is, does it exist because of some implied (social) contract to which States have in some way consented?). On the other hand, if the matter under discussion is the perception of international law as essentially dispute related, it is possible that consent might play a more significant role. If law exists only or primarily within its application to a particular case, not only is the application of law subject to the consent of the contesting States, but the selection and shaping of the appropriate rule(s) will also be subject to their approval (in the absence of judicial determination of the dispute).

Whether these suppositions are correct will be the subject matter of this paper, although, at the same time, the attempt will be made to draw in various strands of other papers in this volume. In relation to both aspects, I apologise in advance that the treatment will be cursory. The canvas of the first is too large to be encompassed in a single chapter; as for the latter, this paper will simply provide a number of reference points for further reflection. However, in pursuing this objective, I have attempted to present a different perspective of international law making, suggesting that the process is one of consolidation, in which the formal sources referred to in Article 38.1 of the Statute of the International Court play a part, but are not necessarily determinative. Within this framework, I have presented some of the literature of international law, although neither to international writers in general, nor to the papers in this volume, could I possibly do justice.

International Law and Society

If we wish to employ the thesis that international law exists because of the proposition that wherever there is a society there must be legal rules regulating the activities of its members, at least some attempt should be made to justify the assumption upon which the thesis is based. Is it a fair assessment of the world totality of States that they constitute a society?

International lawyers tend to eschew such esoteric discussions and to accept the appearance of societal conduct. To Mosler, for example, an "international

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1 Or the denial of the existence of any rules in certain areas of international conduct. Hence Kennedy's assertion that (Kennedy D, *International Legal Structures* (1987), p 193):

> "Unlike the international legal process, the regime of substantive public international norms is fragmented and incomplete. Although some areas ... are rather elaborately regulated, others await normative treatment. Despite this patchwork quality, however, substantive international law participates in generating the overall legal regime more complete than its terms – partly through its relationship to the regimes of process and sources and partly through its own imagination."

legal community" exists because of "*a general conviction that all these units* (ie States) *are partners mutually bound by reciprocal, generally applicable, rules granting rights, imposing obligations and distributing competences.*"[2] Moreover, the writer seems to be accepting a close analogy between municipal societies and the international community in a subsequent passage:[3]

> "The constitution of a society, whether it regulates life within a State or the coexistence of a group of States, is the highest law in society. It transforms a society into a community governed by law ... In spite of the lack of a general constitution for the functioning of the international community there are many constitutional elements of varying form and importance."

It is not necessary here to analyse more closely this view of international society except to reflect that the "general conviction" as to the existence of rules between, and structures providing a framework for, individual members is for some purposes a sufficient basis for an examination of international law and for the role of consent to which that "conviction" must be related.

In contrast, writers on international relations would regard this approach as complacent and legal theories based upon it as inadequate. From the perspective of the realist, law can only be a reflection of the imbalances in the relative power of States and their allies, and can therefore play only a restricted role in their relations (perhaps in a period or area of equilibrium in the essentially conflictual nature of international society). For such writers, it is doubtful whether one should refer to an international society at all. Bull, for example, seemed to regard this society as having chameleon characteristics, appearing in guises of varying colours against different backgrounds. In one context the relations of States in their entirety are characterised as constituting the "anarchical society". In this perspective law is both consensual and coercive: bargains are struck on the rules of customary as well as treaty law but there is little to protect the weaker and to prevent the stronger from promoting their interests through the latter means. According to Bull, while the use of force in the extreme, "plays a central role in the maintenance of international order, in the enforcement of international law, the preservation of the balance of power and the effecting of changes which a consensus maintains are just",[4] it might equally be "the instrument of overthrowing rules of international law, of undermining the balance of power and of preventing just changes or of effecting changes that are unjust."[5]

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2 Mosler H, *The International Society as a Legal Community* (1980), p 2.

3 Ibid, pp 15–16.

4 Bull H, *The Anarchical Society* (1977), pp 91–92.

5 Ibid, p 92. Not that Bull's comments are particularly perceptive because he ascribed the acceptance of changes wrought in defiance of principles of justice as a failing of international law. As he went on to say (loc cit):

> "contrary to much superficial thinking on this subject, it is not as if this tendency of international law to accommodate itself to power politics

It is true that international relations' theorists do not employ the concept of anarchy in its normal sense as suggesting a totally unregulated and disordered phenomenon, but rather to contrast the community of States with the hierarchical structures of municipal law. However, the real criticism of Bull's use of the description, "the anarchical society", is the apparent rejection of the concept of a single society of States. According to his own definition, *a* society of States exists "when a group of States, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions."[6] On this basis, there may be an international society comprising all States (ie, to the extent that they share, or conceive of themselves as sharing, common rules and in the working of common institutions). But the sense of sharing would be much the greater amongst, for example, States which are members of a regional grouping. Acceptance of this proposition carries with it the likelihood of a number of overlapping societies. Thus, it would seem that the Council of Europe, NATO or the European Community would all constitute differing societies of various overlapping groups of European States. As for the foundation of the rules of each such society, they would be consensual at least from the point of view of the group's cognition of the norms operating between them.

It is possible that Bull's phenomenonology of society in the international sphere would deny the existence at present of any single all-embracing society of States. After all, the Oakeshott[7] view of a State as an "enterprise", or

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were some unfortunate but remediable defect that is fit to be removed by the good work of some high-minded professor of international law or by some ingenious report of the International Law Commission. There is every reason to think that this feature of international law, which sets it at loggerheads with elementary justice, is vital to its working, and that if international law ceased to have this feature, it would lose contact with international reality as to be unable to play any role at all."

One would have thought that a more obvious reaction to the situation that was troubling Bull's conscience would be to suggest that, in adopting this stance, international law was simply recognising the quasi-legislative competence of States, through recognition, acceptance and acquiescence, to acknowledge the legality of a situation brought about in defiance of the law: see below p 136.

6 Ibid, pp 13–14.

7 Oakeshott M, *On Human Conduct* (1975). To Oakeshott, the character of a modern European State, as described in Chapter 3 of this work, was to be seen partly in its basis as an "association". As he wrote early in that chapter (p 196):

> "when, in the sixteenth century, the word 'state' ... was added to the European vocabulary ... and began, after some hesitations, to be used for an association of human beings, it was not merely a synonym for what had earlier been called a 'realm' .... It stood for a somewhat new kind of human association".

Later (p 263), Oakeshott said that in the "continuous strand of modern European thought a modern European state is understood in terms of that mode of association

"purposive" association, of individuals linked together by common aims and objectives vis-à-vis the outside world can only be translated into the international setting where a group of States unify their activities in order to pursue common ends. It can hardly hold true for the entire international community. For example, there is no external threat to the community as a whole. And, while all States have a fundamental concern for their own security, it is hardly a shared common interest because the threat to that security emanates from other members of the community. Collective security is seldom conducted as a community exercise (as the debility of the Security Council has demonstrated), but has manifested itself in a number of regional organisations dedicated to collective self-defence.

The reason for these trends in the conduct of international relations is the very obvious one that States act out of self-interest (after all that is the inevitable consequence of the enterprise or purposive nature of the State as an association). However, it does not follow that, outside the groups of States which feel a sense of solidarity amongst themselves, there is total disorder. Even amongst those pursuing inconsistent objectives, often in an atmosphere of distrust or hostility, there need to be accommodations, whether of a legal (particularly to allow for co-operation where that is mutually beneficial) or a political (especially to manage the antipathy so that it does not inadvertently get out of control) kind. As Nardin has written:[8]

> "it would be a mistake to regard all international relations as defined and governed by the pursuit of shared purposes. I want to argue that there is another mode of relationship that is more fundamental because it exists among those pursuing divergent as well as shared purposes. Durable relations among adversaries presuppose a framework of common practices and rules capable of providing some unifying bond where shared purposes are lacking. Such practices are embedded in the usages of diplomacy, in customary international law, and in certain moral traditions.

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which I have ... called civil association." As to the purpose behind the association, he had this comment to make (p 289):

> "A state is to be understood as circumstantially distinguished territory whose inhabitants, incorporated in the relentless exploitation of its resources, have a common interest in the continuous success of the enterprise. And the government of a state is the custodian of this common interest and the director and manager of the enterprise."

8 Nardin T, *Law, Morality, and the Relations of States* (1983), p 5. Or, as Abbott has suggested as an advantage of the world view from the perspective of regime theory ("Modern International Relations Theory: A Prospectus for International Lawyers", (1989) 14 Yale JIL 335 at 340):

> "In seeking to explain the underlying bases of conflict and cooperation in international politics, the theory has begun to ask fundamental analytical questions like those noted above, setting out an ambitious research agenda. It brings to bear a powerful analytic approach, viewing international norms as products of sophisticated self-interest, the rational choices of states in a decentralised world."

> These practices are extremely important for international relations of any regular, enduring sort for they not only regulate such relations but define and facilitate them. Specifically, by prescribing restraint, toleration, and mutual accommodation according to authoritative common standards of international conduct, they make it possible for states pursuing different ends to coexist. And they provide procedures on the basis of which particular transactions and purposive cooperation can be arranged."

However, it is not only between competing States that rules are required to limit or regulate their competition. The rules are necessary for all members of the international community, and are employed as much by cooperating groups. To take the following example:[9]

> "States can bind themselves to certain kinds of action – setting up a common market, for example – by making a treaty to that effect; the co-signatories are thereby bound into a purposive association and obliged to behave towards one another in ways specified by the terms of the treaty. Such an arrangement is based on the consent of the parties; however, the making of a treaty involves other considerations that are not so limited. The idea of a treaty refers to a legal standard of conduct. What is to count as a treaty, how states become committed in treaties – the circumstances in which it is permissible to break treaty obligations – these are matters that are logically prior to the content of any particular treaty. The answers to these questions can only be constructed by reference to the 'authoritative practices' of international society embedded in the 'practical association' of states that has created international law. Individual states are free to decide for themselves whether or not to be bound by the obligations of any particular treaty, but they are not free to decide what constitutes a treaty in the first place, nor are they free to decide for themselves the circumstances under which they may legally and properly revoke their consent to a treaty. Such decisions are bound by the authoritative practices of international society."

The question of whether there is such a concept as an international society depends very much, therefore, on how one views the threads that are necessary to bind a given range of independent units together into a community. There are a number of basic rules which most States need to rely upon for most of the time, whether they are substantially in harmony or in opposition to each other. Even amongst those States between whom relations are essentially discordant, power and its exercise or control are not always obsessive preoccupations.[10] But, even if they were, there would still be a need to regulate the use of power to avoid the dangers of all out unpremeditated, modern warfare.

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9 Brown, "Ethics of Coexistence: the International Theory of Terry Nardin", (1988) 14 Rev Int Studies 213 at 215.

10 As Abbott observed note 8 above, at 344–345: "States pursue many goals other than power, and ... relative power does not dominate every interaction."

It may be that this residual universality is not sufficient to establish the existence of a global legal order (though even amongst potential foes there are increasing pressures for cooperation in fields other than the maintenance of a minimum degree of security). Not that the issue is necessarily of crucial relevance. Amongst system theorists, for example, there are apparently divisions as to whether such theories can be applied to the entire field of international relations, or only to the segments where the existence of a regime is discernible.[11] The most that can be said is that all States are likely to be subsumed within a variety of regimes, the range and number depending upon the extent of those States' involvement in the activities of the international community.

The weakness of a regime perception of international law is that it downplays the extent to which the diversity of these societal groupings can result in States being totally "individual" as far as the range of rules by which they are bound are concerned. To take some examples, it would be possible to argue that, in relation to diplomatic asylum, Latin American States comprised a separate regime; or that, prior to the general acceptability of the concept of an exclusive economic zone, a number of those States were subject to a different regime with regard to maritime coastal regulation and control. However, it would also appear to be true that, amongst the States concerned, the rules were far from uniform in relation to either regime. With regard to the former, the *Asylum* case[12] at least showed that, even if there were special rules governing diplomatic asylum in the regime, they were at best fragmented and certainly not uniform amongst all

11 See Stein, "Coordination and Collaboration: Regimes in an Anarchic World", (1982) 36 Int Org 299 at 300 fn 1, suggesting that both Puchala and Hopkins, "International Regimes: Lessons from Inductive Analysis", ibid 245; and Young, "Regime Dynamics: the Rise and Fall of International Regimes", ibid 277, treated such regimes as "coextensive with international politics". There are obvious similarities here with McDougal's "diverse systems of public order", see McDougal and Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", (1959) 53 AJIL 1 at 10:

> "In this perspective it is evident that our world is composed of a series of community contexts beginning with the globe as a whole and diminishing in territorial range and scope. To the extent that it can be demonstrated that the globe as a whole is a public order system, and only to that extent, do we speak of universal international law. To the degree that territories larger than national states comprise a public order system, we refer to regional international law.
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> ...Clearly, systems of public order differ not only in territorial comprehensiveness but also in the completeness of arrangements in terms of the different value processes regulated, and in the internal balance of competence for decision *inclusive* of the entire area in question and that for decision relating *exclusively* to component areas within it. To the extent that there is universal international law some prescriptions are inclusive of the globe; other prescriptions recognize self-direction by smaller units. Regional international law has a corresponding separation between region-wide prescriptions and sub-regional units."

12 ICJ Rep 1950, p 266.

Latin-American States.[13] With respect to coastal regulation, although (a number of) Latin-American States constituted a distinct group, the actual claims they advanced varied in the degree of control which they sought to exercise.

For the purpose of international relations theory, there would have been no purpose in being more specific than the general aim of the regime to promote some such ideas as a patrimonial sea or exclusive economic zone as a balance, in the case of the Pacific States, to their lack of a continental shelf.[14] To an extent, this is sufficient for the international lawyer in tracing the emergence of an exclusive economic zone. However, on occasions it may be necessary to identify the specific rules applicable to a dispute between individual States. The fact that they are both subject to or participants in a regime to which the relevant rules relate may, but does not necessarily, provide the answer.

To establish the answer, the lawyer must decide whether the rule or rules in question is or are opposable by one State to the other. This might be established by showing that the rule or rules is or are common to all participating States, or that it or they have been accepted by the two disputing States. In the *Asylum* case,[15] Colombia failed to show that the principle of unilateral determination of the grant of asylum applied either generally amongst Latin-American States, or specifically vis-à-vis Peru.

In the legal context, regime theory should not be discarded. Admittedly it does not account for (but then it was not designed for this purpose) the situation where a particular rule may apply between two States alone.[16] However it does recognise the fragmentisation of the regulation of international relations which must inevitably affect international law. Not that this is a novel phenomenon.[17] However, it was glossed over in the Western tradition according to which international law was universal and uniform. Only recently has the cultural as well as political diversity of the international community been recognised as leading inevitably to a corresponding diversity in the legal regulation of the relationships between its members.

Not that Western lawyers very readily acknowledge or condone such a development. Indeed the lack of uniformity is today obscured by the frequent invocation of equity as a means of rendering general rules suitable for application to a variety of situations, whether the variety stems from issues of fact or from sectional interests. The rules with the available modification to hand give the

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13 At 276–278.

14 See Kreuger and Nordquist, "The Evolution of the 200 mile Exclusive Economic Zone. State Practice in the Pacific Basin", (1979) 19 Virg JIL 321 at 334 et seq.

15 ICJ Rep 1950, p 266 at 276–278.

16 *Right of Passage* case, ICJ Rep 1960, p 6.

17 See the reference to Ward R, *An Enquiry into the Foundation and History of the Law of Nations in Europe from the time of the Greeks and Romans to the Age of Grotius* (1795), Vol 1, pp xii–xv, at the start of Butler, "Regional and Sectional Diversities in International Law", in Cheng B (ed), *International Law: Teaching and Practice* (1982), p 45.

appearance of generality, and this fiction is preserved by much of the writing on the topic. The Western view of equity is primarily to identify it as a means of providing a tribunal with a (limited) discretion as to how it should apply strict legal rules; where it might sanctify a significant change in legal development, it is regarded as "legislative" in nature and dependent upon the notion of jurisdiction *ex aequo et bono*.[18] In contrast, writers viewing international law from a third world perspective conceive of equity, in appropriate circumstances, as a principle capable of advancing the cause of redistributive justice, particularly in the economic sphere.[19]

Whichever concept of equity is adopted, the fiction is preserved of rules of general application. The reality is however different. The rules become of such indeterminate content that the outcome in a particular case is largely discretionary. In other words, the rule is case specific and has meaning only in the context of those particular facts. Not only is the outcome case specific but it is also forum dependent.[20] Overall, therefore, the diversity of factors influencing what constitutes equity in a particular case renders agreement on the appropriateness of its application difficult to achieve.

The issue of equity and consent will be adverted to later.[21] Returning to the subject of regime theory, there would seem to be little room for doubt that its cooperative perspective is predicated upon a consensual basis. In the words of one proponent:[22]

> "This article constitutes an attempt to improve our understanding of international order, and international cooperation, through an

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18 See further below p 140.

19 See Bedajoui M, *Towards a New International Economic Order* (1979), p 119; Haq, "From Charity to Obligation: A Third World Perspective on Concessional Resource Transfers", (1979) 14 Texas ILJ 389 at 406; both cited by Janis, "The Ambiguity of Equity in International Law", (1983) 8 Brooklyn JIL 7 at 20.

20 It is arguable that the International Court which, in laying down its view of the equitable principles relevant to the German coastline in the *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3, denied that it was in any way "refashioning nature" (at 49), would not have embarked upon the reconstruction necessary to decide the Anglo–French *Continental Shelf* arbitration (1977) 54 ILR 6, in the way adopted by the Court of Arbitration in that case. As by far the vast majority of disputes are settled without judicial assistance, invocation of equitable principles by the parties might well suggest widely divergent outcomes to a particular matter. The solution finally arrived at might be an equitable adjustment of the positions previously held, but it need not be particularly equitable in the light of the circumstances of the case.

21 Below p 140.

22 Keohane, "The Demand for International Regimes", (1982) 36 Int Org 325 at 325–6; Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", ibid 185: "International regimes are defined as principles, norms, rules, and decision–making procedures around which actor expectations converge in a given issue area"; Young, "Regime Dynamics: the Rise and Fall of International Regimes", ibid 277; Stein, "Coordination and Collaboration: Regimes in an Anarchic World", ibid 299 at 324.

> interpretation of international regime-formation that relies heavily on rational-choice analysis in the utilitarian social contract tradition. I explore why self-interested actors in world politics should seek, under certain circumstances, to establish international regimes through mutual agreement; and how we can account for fluctuations over time in the number, extent, and strength of international regimes, on the basis of rational calculation under varying circumstances."

Regime theory may also be viewed, not just as an analytical concept in itself, but as an aspect of a functional approach to international law and relations. In present company it is appropriate to quote Professor Johnston's words:[23]

> "Most will accept that international law has now been assigned corrective and developmental functions: that is, the correction of distributive injustice among nations and peoples through a restructuring of the international legal system designed to bring preferential benefits to the developing and the disadvantaged, and the planning and development of international regimes through the negotiation of interrelated treaty arrangements in response to complex institutional problems."

On the face of it, this would seem to suggest that international law has accepted the cooperative and corrective ethic, and must then persuade (or coerce) States into building structures (regimes) capable of giving effect to this ethic. This framework would undoubtedly reduce the significance of consent. As the same writer went on to suggest:[24]

> "Functionalist logic, favouring specificity over generality, seeks a restructuring of the law of treaties, whereby separate concepts, rules, and procedures would be developed for each functionally distinguishable class

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23 Johnston "Functionalism in the Theory of International Law", (1988) 26 Canadian Yearbook IL 3 at 28.

24 Ibid at 31-32. The writer's stance on custom was less clear as the following passage (at 34-35) does not provide any explanation of the differences between "virtually universal practice accepted as law", "habitual behaviour or usage", or "general state practice":

> "Post-classical theory is reluctant to assign any kind of priority to international custom, unless it is clearly evidenced by virtually universal practice accepted as law. New states have legitimate reasons for questioning the justice of a legal system; which insists that they must accept, without reservation, all existing rules, even those in the classical period. The modern tendency is to shift the concept of custom away from the notion of habitual behaviour or usage (*consuetudo*) to that of general state practice. In functionalist perspective, a classical rule of customary international law may be invoked against a new state in support of co-operative ethic applied to a specific issue context or problem situation. On the other hand, doctrine purporting to base the binding force of custom on implied consent, acquiescence, or estoppel should be weighed against the evidence of highly unreliable processes of communication around the world, and of huge disparities in protest and confrontation practices in diplomacy."

of international agreement. Analogy with contract law in national legal systems should be critically re-examined, especially in the case of multilateral conventions. For certain classes of agreements the traditional requirement for consent through a series of discrete sovereign acts should be re-evaluated. In the case of a law-making convention subject to ratification the pattern of signature may be of more significance than subsequent acts of consent."

While it is fair enough to argue that a traditional, formal or "hard" view[25] of treaty making procedures or requirements is "functionally" inadequate, it does not follow that consent is lacking to the development of law from a treaty text by other means. This is as true of treaties, properly so-called, which are not widely ratified in accordance with their terms, as it is of agreements the treaty status (or binding nature) of which is uncertain. The parties "consent" to making the arrangement in this form despite the uncertainty inherent in its form or content. In this respect, despite Professor Johnston's rejection of the analogy with the municipal laws of contract,[26] there are parallels. The most notable example is in relation to the distinction between arrangements which are formally binding and those which are not. Some States employ memoranda of understanding in order to deprive the arrangement of legal effect.[27] In business circles in some

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25 According to Kennedy, above n 1, p 20 :

> "In sources argument, one characteristically seeks to convince someone that a state which does not currently believe it to be in its interests to follow a given norm should do so anyway. Sources rhetoric provides two rhetorical or persuasive styles which we might call 'hard' and 'soft'. A 'hard' argument will seek to ground compliance in the 'consent' of the state to be bound. A 'soft' argument relies upon some extraconsensual notion of the good or the just. Of course there is no *a priori* reason to divide either the 'sources' of law or persuasive reasons for compliance into these two categories. Indeed, it is difficult to classify the various classic sources as either 'hard' or 'soft', and it seems intuitively obvious that fulfilling promises is an important dimension of justice and *vice versa*. Nevertheless, it turns out that arguments about sources doctrine often rhetorically contrast these two sets of ideas."

26 "Theory, Consent, and the Law of Treaties: A Cross-Disciplinary Perspective", above p 122:

> "If there is to be any scholarly and detailed understanding of how the world community operates, it is important to develop a field of enquiry freed from the artificial, formalistic constraints imposed by the disciplinary analogy between treaty and contract."

27 This is the view of the Australian government according to statements made on a number of occasions by officers of the Australian Department of Foreign Affairs and Trade. See Campbell, "Australian Treaty Practice and Procedure", in Ryan KW(ed), *International Law in Australia*, 2nd ed (1984), p 61:

> "Documents of less than treaty status, on the other hand, with the exception of contracts which would normally be expressed to be subject to the domestic law of a particular country, are regarded by Australia as statements of intention, regardless of whether they are styled memoranda

countries, "understandings" are reached without legal consequences being intended.[28] However, whatever the initial presumption arising from the use of such an expression, ultimately the crucial issue would be to ascertain the parties' intentions, whether under municipal law,[29] or under international law.[30] However, even if the document in question was not intended to be legally enforceable, it was obviously intended to have some consequences, including means of enforcement[31] falling outside the purview of a court system. Such possibilities are not the exclusive domain of international law.[32]

Even if one accepts the Johnston thesis that there is little useful to be gained from a comparison between contract and treaty, it does not dispense entirely with consensual theory. It may be true that, in their day to day activities, States are not aware, or at least do not take cognisance, of the law making consequences of their activities. But when, in the course of the quasi-legislative process of conference diplomacy, they inevitably take such matters into account, it is not reasonable to suppose that they are "consenting" only to a process culminating in ratification of the projected convention. They are accepting of the likelihood that

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of understanding, arrangements, records of discussion or some other variant. They are not intended to create rights and obligations governed by international law and in the case of breach may normally be pursued only as a normal function of diplomatic relations."

28 See *Milner (JH) and Son v Percy Bilton Ltd* [1966] 1 WLR 1582; and, on the deliberate use of the word in conjunction, but contrast, with contract in s 45(2)(a) of the *Trade Practices Act* 1974 (Cth), see *Hughes v Western Australian Cricket Association Inc* (1986) 69 ALR 660 at 683.

29 See *Ampol Ltd v Caltex Oil (Australia) Pty Ltd* (1986) 60 ALJR 225, in which the High Court of Australia held that the arrangement was intended to have contractual effect.

30 This is certainly the view of the United States of America, see the Memorandum of 5 August 1974 written by the Assistant Legal Adviser for Treaty Affairs in the Department of State in *Digest of United States Practice in International Law 1974*, pp 198–199. Curiously, despite the assertions of its officials that memoranda of understanding entered into by Australia do not have legal effect, the Australian government entered into such a memorandum with the Democratic Republic of Vietnam on 14 February 1984 for the exchange of embassy premises in Canberra which had previously belonged to the Saigon regime for the equivalent Australian premises in Saigon. What is particularly interesting is that the memorandum was submitted to the Acting Registrar of Titles for the Australian Capital Territory as the basis of the Commonwealth's newly acquired title to the premises in question and this fact was duly recorded. See (1991) 11 Aust YBIL 482–483.

31 See above, n 27.

32 An example under municipal law would be letters of comfort. In some formulations such instruments would be regarded as having legal effect. In others the wording might be regarded as not constituting any promise on the part of the issuer to maintain a subsidiary company's funds to enable it to pay debts incurred to a lender which had granted the loan on the strength of the letter: see *Kleinwort Benson Ltd v Malaysia Mining Corp Berhard* [1989] 1 WLR 379; *Commonwealth Bank of Australia v TLI Management Pty Ltd* [1990] VR 510.

the treaty text itself will herald in a new period of legal development,[33] and of the need to express their objections if they wish to prevent this process occurring.[34] If they do not make any (or any adequate) protest, they are aware that the normal processes of international law making will take effect. Their silence will represent consent to those processes and to the subsequent build up of practice that will transmute the embryonic treaty rules (ie, those which do not already have the status of rules of customary international law) into customary law.

Where regime theory and the Johnston view of functionalism perhaps diverge is in the scope and degree of cooperation. The latter perceives the cooperative ethic as a world wide phenomenon and deduces from this the development of global solutions to a multiplicity of problems. Regime theory is more cautious. It would not deny that there are examples of cooperative ventures on a global scale, but points to the need to identify the fields of cooperation. Each field might represent a regime and encompass a number of States, but it does not guarantee that those States would be willing to cooperate in another field even with the same States, let alone with a different group of States.

There is another difference. The approach propounded by Professor Johnston bypasses or reduces the significance of consent. Regime theory emphasises the consensual basis of a particular regime, thus diminishing its potential for extension to different fields and for application to other States. In a world of increasing diversity of outlook and interests, the latter may more closely represent the fragmented system of legal rules which is contemporary international law; Professor Johnston may more truly provide the objective for which international law should aim.

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33 As Judge Tanaka pointed out in the *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3 at 176–177:

> "First, the existence of the Geneva Convention itself plays an important role in the process of the formation of a customary international law in respect of the principle of equidistance. The Geneva Convention constitutes the terminal point of the first stage in the development of law concerning the continental shelf. It consolidated and systematised principles and rules on this matter although its validity did not extend beyond the States parties to the Convention. Furthermore, the Convention constitutes the starting point of the second stage in the development of law concerning the continental shelf. It has without doubt provided the necessary support and impetus for the growth of law on this matter."

34 The obvious example is provided by the intention of many of the States participating in UNCLOS III to maintain the integrity of the Law of the Sea Convention 1982. They hoped to forestall any attempt by the United States and some other Western countries to remain aloof from the Convention while claiming to be entitled to the benefit of those parts of the Convention which suited their interests on the ground that those parts represented, or were developing as, rules of customary international law: see Lee, "The Law of the Sea Convention and Third States", (1983) 77 AJIL 541; Caminos and Molitor, "Progressive Development of International Law and the Package Deal", (1988) 79 AJIL 871.

The Nature Of International Law

I. The Scope of Equity

A convenient starting point to an examination of the nature of international law is provided by Dr Lowe's paper on equity, or more particularly by those parts of it in which he comments upon the nature of law.

The substance of his thesis is that in a number of basic ways equity is an aspect of law and its application. This would be true both with regard to equity *infra legem* and equity *praeter legem*. The law is indeterminate because the choice between alternative interpretations of a given rule is not inevitable. The choice has therefore to be made according to equity *infra legem*. The law is indeterminate also (and this is presumably more true of international law than municipal law) because, in choosing between different rules, the gap between them is so large that none of the possible alternatives is obviously applicable: accordingly, the selection of one in preference to another must be on the basis of equity *praeter legem*.

The deconstruction of municipal law by CLS scholars has had the apparent benefit for international law of enhancing its legal nature, or at worst of reducing municipal law to the same level of unpredictability. Indeterminacy strikes at the binding nature of all law and thus has the effect of placing municipal law on a par with international law. Whether indeterminacy is a chalice from which international lawyers can safely drink is a matter which should perhaps be examined further. What is relevant here is the point that the application of law to a given set of facts is not predetermined but depends very much on the perspective of the "law-applicator". It does not necessarily assist in the performance of this task to mask the process by describing it as that of doing equity.

The reason for raising this doubt is the uncertainty which has surrounded the role of "general principles" (of which equity is sometimes said to form part) in the scheme of international law. For example, it could be said that the application of general principles is limited to the circumstances of a particular dispute and that this is the most that Article 38.1 of the Court's Statute signifies. After all, sub-para (a) refers exclusively to conventions recognised by the contesting States, and it is easy enough, under sub-para (c), to countenance the application of a principle like estoppel to a dispute because of the need to ensure good faith between the parties.

Have these general principles wider currency? Dr Lowe rightly points to justice and fairness as valuable aids to legal arguments,[35] but can it be claimed that equity in that sense can be applied in a legal context? The view of Western writers is that such a use of the term equity is misleading, because it is not being

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35 Above p 69.

used to signify legal principles or rules.[36] Indeed Dr Lowe admits as much. He refers to some of the distinctions between "legal reasoning" and "practical reasoning", suggesting that moral arguments are of the nature of the latter rather than the former. "In terms of that distinction", Dr Lowe says, "reasoning based on equity can be regarded as practical reasoning and so distinct from legal reasoning."[37]

The feeling that the term "equity" is too often used in two different (though at times coalescing) senses comes through in the next parts of Dr Lowe's paper. He refers to Alexy's assertion that the "claim of correctness ... in legal discourse ... is not concerned with the absolute rationality of the normative statement in question, but only with showing that it can be rationally justified within the framework of the validly prevailing legal order."[38] As Dr Lowe points out, the International Court's jurisprudence is essentially in line with this description in its application of equitable principles. In the *North Sea Continental Shelf* cases,[39] the Court treated Article 6 of the Convention on the Continental Shelf 1958 as expressing notions of equity in the balance between equidistance and special circumstances. In doing so, however, the Court saw equity as operating within the framework provided by existing legal rules.

There will always be factors of an extra-legal nature that influence the way in which the law is applied in a particular case, and this will be as true of rules based upon equity. Some of these factors may never be articulated in a tribunal's judgment. The consequence of the application of equitable principles by the Court of Arbitration in the Anglo-French *Continental Shelf* case[40] might have

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36 Hence Brownlie's observation in "Legal Status of Natural Resources in International Law (Some Aspects)", (1979-I) 162 HR 253 at 287:

> "As a sort of appendix to the discussion of models for systems of allocation of natural resources, it is necessary to give a short account of the role of equity and of equitable principles in contemporary international law, since at first sight equity provides a major source of principles of distribution. The enquiry is not about equity as a general legislative goal, the broad conception of fairness, which was the subject of the previous chapter. The focus is upon equitable principles, that is to say, principles which, in spite of the designation of equity, have, or are intended to have, the same form and purpose as other principles applicable in a legal context."

37 Page 70 above, quoting the assertion by Kratochwil F, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989), p 207, that "reasoning with legal rules differs essentially for the type of reasoning appropriate for making policy decisions". Amongst that writer's illustrations to which Dr Lowe refers is, in the latter's words, the distinction that "moral arguments utilise mostly principles, whose range of application is unspecified and debatable, whereas legal arguments use specific rules whose ambit is defined."

38 Alexy R, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (1989), p 220, quoted p 70.

39 ICJ Rep 1969, p 3 at 48 et seq.

40 (1977) 54 ILR 4.

appeared somewhat surprising, partly at least because the non-legal factors which contributed to the equity in the particular circumstances were not identified.[41] It is in this light that we must interpret the following passage from the judgment of the International Court in the *Libya/Malta* case:[42]

> "although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of the continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature."

The use of equity as a synonym for justice and fairness may be creative of confusion. Justice can be employed as a justification for a rewriting of the relevant law in a totally different form, aspects of the New International Economic Order providing a range of examples.[43] It may be a moot point, of course, whether the rewriting has this qualitative nature, or whether the reshaping is less significant and could be classified as no more than an example of the application of equity to redefine the rules in question. In either situation the appeal to equity is a plea for recourse to a just solution in favour of the pleader. Equity is thus linked to a concept of justice. It is then to an extent at least a matter of personal preference for the arbiter or critic whether the justice of the solution is perceived as lying within, or extraneous to (and perhaps even in conflict with), the law.[44]

The interposition of equity into the equation between facts and decision might seem to deprive the rules of international law of their consensual quality. The reason for this is that consent operates at two levels. If the parties to a dispute retain control over its settlement through negotiation, they can also control the extent to which equity figures in the outcome of the process. If the matter is referred to a judicial tribunal, the use of equity and its scope as a

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41 Hence the following comment (Lauterpacht E, *Aspects of the Administration of International Justice* (1991), p 130): "In short, the Tribunal, in exercising its equitable discretion, has not shared with anyone else the precise considerations that led to its specific conclusions."

42 ICJ Rep 1985, p 13 at 40.

43 See Brownlie, note 36 above, at 266: "The Charter [of Economic Rights and Duties of States G A Res 3281 (XXIV) of 12 December 1974] itself has a lengthy 'preamble' stating the broad aims of the instrument and stressing the need to establish a just and equitable economic order."

44 See the comments of Fitzmaurice in a letter to the author of the book in question that the Court of Arbitration in the Anglo-French *Continental Shelf* case, "while purporting to apply equity *intra* or *secundum legem*, was really ... acting *ex aequo et bono*, or on the extreme outer edge of *praeter legem*" (Lauterpacht, note 41 above, p 129 n 38).

determining factor pass out of the control of the parties. It is not even dependent upon the arguments presented on their behalf, but upon the tribunal's discretion.

It might thus appear that the application of equity is far removed from the consensual basis of international law indicated by Article 38.1 of the Statute of the International Court. However, because "general principles of law" may be employed in a specific case should not release the Court from the need to relate a particular principle to the existing customary (or conventional) law. Once such a principle has been introduced as a norm, or part of a norm, of relevant conduct, it becomes subject to the interpretation placed upon it by the conduct of States. Moreover, it is possible to regard the recourse to adjudication in an area of the law where equity has a role to play as amounting to the parties' consent to the continuation of that role.[45]

II. *Human Rights, General Principles and the Appropriateness of Customary Law*

General principles of law are also of major significance to the theme of international human rights. The question asked by Professors Simma and Alston in their paper is how it might be possible to justify human rights law on a non-conventional basis. Their answer is given in two parts: to reject customary international law and to opt instead for general principles of law.

The reasons for the first part of this response are not difficult to understand. Their decision reveals a genuine distrust of new theories of custom based upon assertion rather than application in practice: theories which emphasise what States say rather than what they do; which pay attention to *opinio juris* as if there can be acceptance of a fictional pattern of behaviour as law where no such pattern exists because many States act in a manner that is inconsistent with such a pattern. They illustrate this point:[46]

> "The elevation of the Universal Declaration of [Human Rights] 1948 and of the documents that have built upon its foundations to the status of customary law, in a world where it is still customary for a depressingly large number of States to trample upon the human rights of their nationals, is a good example of such an approach."

How does one resolve this difficulty? In order to preserve the integrity of the traditional picture of customary international law, they advocate the adoption of a theoretical foundation for human rights norms in general principles of law. In their opinion "the concept of a 'recognised' general principle seems to conform

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45 It would be difficult to imagine that the parties to the Anglo-French Arbitration Agreement of 10 July 1975 for the submission of the dispute over the delimitation of their continental shelf boundary to arbitration (for text see the *Continental Shelf* arbitration (1977) 54 ILR 6 at 13) thought that, by requesting the tribunal to decide the issues "in accordance with the rules of international law" (Article 2), they were excluding the application of principles of equity.

46 Above p 90.

more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated."[47] Recognition in word would in some way be more important than recognition in deed because of the inherent authority of the norm in question.

With respect, the statement begs the question. As with customary law,[48] the acts of acceptance can hardly pre-date cognisance of the norm in question. The only alternative explanation is that the inherent authority of the *putative* norm stems from its moral persuasiveness to which the subsequent acceptance gives legal significance. Viewed in this way, however, one is faced with the same danger as that expressed by Professors Simma and Alston in the form of "sub-conscious chauvinism".[49] How is one to be sure that the inherent authority is independent of national - or indeed ideological - bias? Nor should total impartiality and objectivity be regarded as an obtainable objective, because law is seldom, if ever (according to CLS scholars and others), ideologically neutral.[50] Human rights norms cannot claim to be an exception. They are as much a product of the political process as norms in other areas of international law.

It is pertinent to consider two additional issues, the first relating to the reasons for the breakdown in the traditional explanations of customary law identification; and the second dealing with the matter of where this line of development is leading.

With regard to the first issue, much of the responsibility must lie with the International Court itself which has often been prepared to sanction major innovations in the law with scant regard for the traditional requirements of law

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47 Above p 102.

48 For the suggestion that both the wording of Article 38.1(b) of its Statute and the case law of the International Court have suggested "the impossible by posing as conditions for the creation of a rule of customary international law that it be applied and that its existence be recognised", see Van Hoof GJH, *Rethinking the Sources of International Law* (1983), p 87, citing inter alios Meijers, "How is International Law Made? The Stages of Growth of International Law and the Use of its Customary Rules" (1978) 9 Neth Yearbook IL 3 at 12; Thirlway H, *International Customary Law and Codification* (1972), p 47: "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 ... that it necessarily implies a vicious circle in the logical analysis of the creation." On the other hand, it is Koskenniemi's view (Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (1989), p 1) that lawyers are deluding themselves by seeking to maintain that: "International law is kept distinct from descriptions of international political order by assuming that it tells people what to do and does not just describe what they have been doing"!

49 Above p 94.

50 See for example Koskenniemi, note 48 above, Chapter 1, entitled "Objectivity in International Law: Conventional Dilemmas".

creation.[51] Ironically, it has also been prepared to reject a claimed rule of customary law by imposing the most stringent requirements for the emergence of new norms.[52]

There are difficulties in explaining this apparent conflict, whatever approach one adopts. Nevertheless it is at least plausible that, if a substantial quantity of practice can lead to an inference of the quality present in *opinio juris*, the latter quality can replace to a large extent the requirement of practice.[53] After all, the emphasis in Article 38 of the Court's Statute is the recognition or acceptance by States of the phenomenon in question (treaty, practice or principle) as constituting an international legal obligation. To this extent, at any rate, the Court's judgment in the *Nicaragua* case can be supported.[54]

Where the trouble lies, as our speakers point out, is in the existence of discordant practice to the rule contended for. The Court's comment on this factor had a hollow ring to it:[55]

> "It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. 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. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie imcompatible with a recognised rule, 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."

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51 This has been a feature of the Court's approach throughout its life, from the *Corfu Channel* case, ICJ Rep 1949, p 4, to the *Nicaragua* case, ICJ Rep 1986, p 3.

52 *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3. Comparing the *Fisheries Jurisdiction* cases, ICJ Rep 1974, p 3, with the above decision, Cheng commented that it "leads to the suspicion that if the court prefers a given solution, then the test is going to be lenient, whereas if the court dislikes a solution, it is going to be severe" ("Custom: The Future of General State Practice in a Divided World", in Macdonald RStJ and Johnston DM (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983), p 513 at 543).

53 Though whether it is the most helpful or logical approach may be doubted, see below.

54 Though Cheng was prepared to go so far as to assert that the "whole problem of customary international law revolves around the notion of *opinio juris*, which is in fact the essence of general (alias customary) international law" (ibid at 548).

55 *Nicaragua* case, ICJ Rep 1986, p 3 at 98.

It is undoubtedly true that practice diverging from an established rule will have no initial impact upon the rule, but the same can hardly be said of an emerging rule to which the divergence would usually be regarded as fatal.

But this latter proposition is very much an over-simplification, although based upon the Court's out and out rejection of a particular rule relating to diplomatic asylum.[56] The Court's words are almost too well known to need repetition, but let us recall them:[57]

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

What the Court did not say was that, because of the political considerations involved, there was no such institution as diplomatic asylum.[58] The coalescence

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56 *Asylum* case, ICJ Rep 1950, p 266.

57 At 277.

58 Admittedly the grant of asylum in this case was justifiable by reference to the Havana Convention on Asylum of 1928 to which both Colombia and Peru were parties. However, some of the Court's statements were confirmatory of the existence of a background of customary rules. Thus, the Court said (at 279):

> "There exists undoubtedly a practice whereby the diplomatic representative who grants asylum immediately requests a safe-conduct without awaiting a request from the territorial State for the departure of the refugee. This procedure meets certain requirements: the diplomatic agent is naturally desirous that the presence of the refugee on his premises should not be prolonged; and the government of the country, for its part, desires in a great number of cases that its political opponent who has obtained asylum should depart. This concordance of views suffices to explain the practice which has been noted in this connexion, but this practice does not and cannot mean that the State, to whom such a request for a safe-conduct has been addressed, is legally bound to accede to it."

Later it went on to refer to a situation in which most western States are prepared to provide at least temporary refuge in their diplomatic premises (at 282–283):

of the principle of the inviolability of diplomatic premises and the concept of humanitarian intervention into domestic sovereignty provide the basis for the granting of protection. The concept has emerged (and not solely amongst Latin-American States) despite the absence of totally uniform practice. Indeed, unless it is possible to regard all new international law as operating in virgin areas of inter-State relations,[59] rules of international law must be capable of developing in the face of discordant practice adhering to a previous rule or principle.

In such a situation the theoretical answer to the question of which rule is to be applied is easy enough (though in practice the resolution of a dispute might be more difficult to accomplish): between adherents to the old rule that rule will still prevail; between supporters of the new rule, that rule will be effective; and between an adherent to the former and a supporter of the latter rule, the way in which the matter is resolved may well depend upon the forum or process to which that task is entrusted. It might be surmised that a selection of one rule in preference to the other is more likely to occur when the decision is made by a judicial tribunal. In other words, the decision would be made by reference to the answer to the question of whether or not the new rule had supplanted the old as representing "general" international law.[60] Such a conclusion may not fit comfortably with the position of the consistent objector, though the ambit of that

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> "It has not been disputed by the Parties that asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population",

though today the practice seems to have extended to cases of political persecution by the Government of the territorial State.

59 See for a discussion of this point, van Hoof, above note 48 above, pp 98 et seq.

60 Some writers accept the inevitability of conduct directed towards a replacement rule as constituting a breach of the pre-existing rule. According to one writer (D'Amato A, *The Concept of Custom in International Law* (1971), p 98):

> "any theory must incorporate the possibility of change into its concept of custom. In particular, an 'illegal' act by a state constitutes the seeds of a new legality. When a state violates an existing rule of customary international law, it is undoubtedly 'guilty' of an illegal act, but the illegal act itself becomes a disconfirmatory instance of the underlying rule. The next state will find it somewhat easier to disobey the rule, until eventually a new line of conduct will replace the original rule by a new rule."

This is very much an over-simplification for several reasons: (1) as the text suggests, the change may occur in stages (two rules can co-exist for different States) and the intermediate stage could last indefinitely; (2) a breach of the law can take place without any intention on the part of the law-breaker to create an alternative rule (see the passage from the Court's judgment in the *Nicaragua* case, ICJ Rep 1986, p 3 at 98, quoted above p 143; (3) the groundwork for a change can be prepared through articulation – ie assertions of a new *opinio juris* – of a new rule, without breach of the (pre-) existing rule, so that the subsequent conduct is regarded, at least by some, as complying with that new rule (see van Hoof, note 48 above, pp 100 et seq, for an explanation of the importance of *opinio juris* in changing customary international law).

principle is far from clear.[61] In contrast, when the matter is resolved through diplomatic channels, the outcome would probably represent some form of accommodation between the two rules, rather than a disposition by reference to one of them alone.

If the International Court has, in more recent times, loosened the requirements for law-making, the second issue raised above[62] of where this development is leading needs to be addressed. This is linked to the alternative theory for which Professors Simma and Alston have stated a preference, that greater reliance should be placed upon general principles in accordance with Article 38.1(c) of the Statute of the Court. Whereas, in their view, discordant practice may be regarded as destructive of a new rule of customary law, it is not so harmful in the context of rules founded upon general principles.

Leaving aside the question of where the principle originates in order to attain the status of having inherent authority, to which reference has already been made,[63] there are still questions to be raised as to the justification for this view of the norms in question. In this regard, Professors Simma and Alston appear to be on firmer ground, being able to refer to a number of pronouncements by the International Court which seem more in harmony with sub-para (c) than (b) of Article 38.1. In fact, they are prepared to go further and to treat rules created in this way as part of the *jus cogens*. In their view, "if another case involving human rights issues, perhaps even more centrally, was brought before the Hague Court tomorrow, the Court would adhere to the tendency described by acknowledging fundamental human rights prescriptions as binding and part of peremptory international law without going into details about their formal source, but rather stressing their inherent authority and universal recognition."[64]

The cases referred to by Professors Simma and Alston give plausible support to their thesis, though perhaps some caution should be expressed. In the *Corfu Channel* case,[65] the reference to "elementary considerations of humanity, even more exacting in peace than in war" was hardly evidence of a direct invocation of general principles of law. It was simply that States had in 1907 attempted to place some limits upon the mine laying activities of belligerents.[66] Accordingly,

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61 See below p 173.

62 Page 142.

63 Page 142.

64 Above p 106.

65 ICJ Rep 1949, p 4 at 22.

66 Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. It is true that the Court stated that the obligations were based, "not on the Hague Convention of 1907, No VIII, which is applicable in time of war, but on certain general and well-recognised principles" etc. The approach in the text is consonant with the explanation given in the *Nicaragua* case, ICJ Rep 1986, p 3 at 112, that "if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits

it was hardly to be supposed that a State could, in peace time, with impunity lay mines, or fail to warn of the existence of a mine field of which it should have been aware, in its territorial waters.

At least the Court was, in the *Corfu Channel* case, dealing with the substance of the dispute. The same could not be said of the *Reservations* case[67] in which the Court was in no sense invoking a rule of law proscribing genocide to apply between the parties. It was explaining the nature of the obligations underlying the Genocide Convention in so far as they helped identify the object and purpose of the Convention as a means of ascertaining the parties' intentions with regard to the making and scope of reservations. As to genocide itself, it may have been a special case for international legislative action, but the principles upon which it was based had been recognised and applied amongst the crimes against humanity within the jurisdiction of the International Military Tribunal.[68] It may be that the illegality of these activities stemmed from general principles rather than international custom, but this assessment had not been made by the International Court.

Perhaps this is being rather pedantic. The laws of war, or international humanitarian law as they are now more usually called, were based upon a combination of customary rules and general principles, as the famous Martens clause clearly indicated.[69] As to the question of which general principles were applicable as law (there must be many activities of war which are decidedly unprincipled without being categorised as unlawful), the answer would probably have been those which State practice had recognised as having legal content. To a large extent, the Nuremberg Tribunal avoided the issue, though this was because crimes against humanity under Article 6(c) of its Charter were limited to matters otherwise "within the jurisdiction of the Tribunal",[70] more especially the

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a breach of the principles of humanitarian *law* underlying the specific provisions of Convention No VIII of 1907" (emphasis supplied).

67 ICJ Rep 1951, p 15.

68 While the Tribunal had decided that its jurisdiction was limited to crimes committed in the course of the Second World War, the existence of genocide as a crime under international law was affirmed by the UN General Assembly in Resolution 96(I) of 1946.

69 The revised version of 1907 in the preamble to Convention (IV) Respecting the Laws and Customs of War on Land read:

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

70 The text of this part of Article 6 was as follows:

> "(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political,

war crimes described in Article 6(b).[71] As the Tribunal expressed the position:[72]

> "To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity."

With regard to the basis upon which war crimes (and therefore crimes against humanity) entered into the international legal order, the explanation is well known:[73]

> "The rules of land warfare expressed in the [1907 Hague] Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter."

The progress from the ambivalence as to the status of crimes against humanity under the Charter of the Tribunal, through the General Assembly affirmation of its principles in 1946, to the Genocide Convention of 1951, is one of gradual recognition and acceptance. Such obligations *erga omnes* do derive

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racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

71 The text reads:

> "(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity".

72 *Trial of the Major War Criminals before the International Military Tribunal*, Vol 1 (1947), pp 254–5.

73 Ibid, pp 253–4.

ultimately "from the principles and rules concerning the basic rights of the human person",[74] but this assertion does not help identify the process whereby the obligatory element came about. It is not easy to see why it was necessary for the Court, in the later *Tehran Hostages* case,[75] to cite, in support of its proposition about the wrongfulness of depriving human beings of their freedom and subjecting them to physical constraint in conditions of hardship, the fact that such treatment was "manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." The principle itself was well enough established in international jurisprudence, so that the references to the two instruments in question could only have been made for emphasis.

III. Authoritative Interpretation

One can readily accept the basis of the Simma–Alston thesis that there is a "need for additional sources of international human rights law":[76] treaties alone are too few in number and limited in scope, or have received insufficient ratifications, to provide adequate protection. The speakers have identified a number of possible routes to achieving the objective of extending the sources of obligations for States in the field of human rights. The overall answer to the need must however be found in those means that coincide most closely with the attitude and practices of States.

From this point of view, the authoritative interpretation of the Charter has its attractions – and its drawbacks. As to the former, there is the obvious point that it provides a ready explanation of the influence of assertions made by the General Assembly and other United Nations organs on rules of law said to be based upon the Charter.[77] In particular, it avoids any difficulties arising out of the very obvious fact that those organs, and principally the Assembly, have no legislative power. It also diverts attention from the criticism voiced by D'Amato that what States say cannot be classified as State practice as part of the process of customary law making,[78] and that the concerted assertions of a large number of States can be considered no differently.

With regard to the drawbacks of the approach, there is the inevitable problem of distinguishing between a simple matter of interpreting the treaty (in this case the Charter), and extending its operation in relation to matters which are not

74 *Barcelona Traction* case, ICJ Rep 1970, p 3 at 32, quoted above p 106.

75 *Tehran Hostages* case, ICJ Rep 1980, p 3 at 42, above p 106.

76 Above p 107

77 There was a division of opinion in the early years of the United Nations as to whether the human rights provisions of the Charter created any obligations for member States, or at least whether, because of Article 2.7, they could be enforced: see Lauterpacht H, *International Law and Human Rights* (1950), pp 166 et seq; and above p 145 n 60. Today the crucial questions concern the identification of the scope of the obligations and the power of the General Assembly to carry out this task.

78 Note 58, p 144.

obviously encompassed by its provisions.[79] The human rights provisions fall into this category because, for the most part, they are general in nature, being designed for future practice to work out the details. The counter to this objection provided by the example of the outlawing of apartheid is not totally convincing. In the *Namibia* case,[80] the Court regarded the proscribing of such conduct as stemming, at least in part, from the international status of the territory, rather than the universality of the particular rule. In any case, the condemnation of the racial policies of the South African government was not limited to declaratory pronouncements by the General Assembly; many States had voiced their objections in other fora and by other means.

In the context of the debate over the interpretative authority of the General Assembly in relation to the Charter, reference is sometimes made to the Vienna Convention on the Law of Treaties and the role of subsequent practice. Although such practice can be treated as a "supplementary means of interpretation" within Article 32 of the Convention,[81] the primary emphasis upon practice is in Article 31.3(b), whereby there shall be taken into account, together with the context, for the purpose of the interpretation of a treaty,

> "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

It is not altogether clear whether the effect of the practice is to interpret or to amend or modify the treaty. The above provision refers only to interpretation. Amendment or modification is covered by Articles 39 to 41 of the Convention, which seem to be too specific to allow for tacit agreement arising from practice. Yet practice seems to have been recognised as capable of modifying both multilateral[82] and bilateral treaties. [83]

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79 As Schachter has observed ("The Nature and Process of Legal Development in International Society" in Macdonald and Johnston, note 52 above, p 745 at 789):

> "The premise is that the resolution does not purport to impose new obligations; the formal source of authority is the Charter itself. But as we know the line between interpretation and new law is often blurred. Whenever a general rule is construed to apply to a new set of facts, an element of novelty is introduced; in effect, new content is added to the existing rule. This is even clearer when an authoritative body redefines and makes more precise an existing rule or principle."

80 ICJ Rep 1971, p 16 at 31–32.

81 Given the amount of attention paid to the subsequent conduct of the parties in international jurisprudence as illustrating their understanding of the meaning to be attributed to their treaty arrangements, it is surprising that Article 32 refers specifically only to "preparatory work ... and the circumstances of its conclusion" as supplementary means for confirming or determining the meaning of a treaty: see Sinclair I, *The Vienna Convention on the Law of Treaties*, 2nd ed (1984), p 138.

82 *Namibia* case, ICJ Rep 1971 p 16 at 22, below p 151. It is of course open to debate as to whether the practice of the Security Council with regard to abstentions constituted an interpretation or a modification of Article 27.3 of the United Nations Charter: see Greig, "The Interpretation of Treaties and Article IV.2 of the Nuclear Non–Proliferation Treaty", (1978) 6 Aust YBIL 77 at 98.

With regard to a treaty which also comprises the constitution of an international organisation, there is a secondary issue of deciding whether the practice in question is that of the organisation (which can therefore affect its "internal" rules or constitute the views of the organisation as to the obligations owed by States to the organisation itself), or that of the individual members (contributing towards a change or development in the external rules of customary international law of which the provisions of the treaty form part). The tendency has been to regard the two types of situations as equally covered by the concept of authoritative interpretation. It is at least arguable that they should be kept distinct, and indeed there is some authority in support of this hypothesis.

The effect of the practice of States within the organisation is well illustrated by the example of Article 27.3 of the United Nations Charter. In the *Namibia* case,[84] the International Court was careful to relate the practice of members to the practice of the United Nations as an organisation:[85]

> "the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions... This procedure followed by the Security Council ... has been generally accepted by Members of the United Nations and evidences a general practice of that Organisation."

Where the treaty arrangement (or the nature of the arrangement in the case of certain parts of the United Nations Charter) creates rights and obligations between the United Nations and some or all of its member States, the resolutions of a majority of members within an organ of the institution are authoritative only to the extent that they represent the views of the United Nations as a party to the treaty, or a determination to exercise the rights of the United Nations under or arising out of the treaty in question. In the *Namibia* case, the assertion by the General Assembly that South Africa's Mandate over South West Africa had come to an end was not binding upon South Africa in any legislative sense. It was effective as the exercise of a right of termination by the United Nations as one party to the Mandate agreement for material breach of the Mandate by South Africa as the other party.[86]

In both situations, although the reason why each State voted in the way it did was individual choice, the overall effect was representational. In both cases, the practice could be classified as representing the will of the organisation (though

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83 *Temple* case, ICJ Rep 1962, p 6 at 33; *Air Transport Services Agreement* arbitration, (1963) 38 ILR 182 at 249.

84 ICJ Rep 1971, p 16.

85 At 22.

86 At 37, relying upon Article 60 of the Vienna Convention on Treaties 1969 as expressing a rule of customary international law.

the consequences of this differed between the two situations). When it comes to the assertion of views as to the implications for the content of rules of general international law of provisions contained in the Charter, it is difficult to treat resolutions of the General Assembly as containing the representational view of the organisation, or, if they did, how they could impose a duty to respect such an interpretation upon other, non-consenting, States. This is not to deny the influence of the expressions of opinion on the law by a large number of States, whether or not it relates to the interpretation to be placed on Charter provisions. It is simply to suggest that, in the absence of any persuasive linking factors to suggest that a majority of States is representing the organisation, they cannot be regarded as empowered to give an authoritative interpretation of the Charter having in effect legislative consequences.

It is for this reason that doubts must exist as to the use of such an analysis to provide a means of identifying rules of the *jus cogens*. In the opinion of Professors Simma and Alston:[87]

> "Such norms do not (and simply cannot) result from a gradual accretion of State practice mutually accepted as law. Rather, what we witness here is the express articulation of principles in the first instance, *ab initio* or progressively being 'accepted and recognized' as binding and peremptory by the 'international community of States as a whole'. This process does not – or not yet – lead to the emergence of customary law but to the formation of 'general principles of law recognised by civilised nations' in the sense of Article 38 of the ... Statute [of the International Court of Justice]."

With regard to their particular concern, Professors Simma and Alston go on to suggest that this "line of argument provides a more plausible explanation of how substantive human rights obligations may be established in general international law, than offered by a strained, or even denatured, 'new' theory of custom."[88] It may explain, but does it justify?

Under Article 38.1 of the Court's Statute, various rules or bases of rules have to be "recognised" or "accepted". In the case of international conventions, it is the rules established by those instruments which have to be "expressly recognised" by the parties before the Court. With regard to general principles of law, these must be "recognised by civilised nations". There can be no question of these principles being expressly recognised because, as the provision was originally conceived, the recognition was solely for the purpose of their internal application as part of municipal law. Moreover, despite the direction to the Court to apply them, there was presumably an intermediate stage (other than one of ascertaining what might qualify as such principles) of converting them into appropriate rules of international law capable of resolving the issues in dispute. Indeed, such a stage would still appear to be necessary in so far as it may be

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87 Above p 104.

88 Ibid.

argued that the conduct of States has at least accepted certain general principles as part of international law.

As far as customary rules are concerned, the criterion is different: there must be "acceptance" of the practice in question as law. As to what constitutes a rule of the *jus cogens* which, by definition,[89] is of a higher order than other rules of international law, Article 53 of the Vienna Convention on the Law of Treaties 1969 describes such a rule as "a peremptory norm of international law" which is "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted".

A number of obvious issues arise from this definition which need not be discussed further in the present context. For example, were the words "accepted" and "recognised" employed out of pure rhetoric, or were they used for a purpose, and, if so, do they have any connection with the similar terminology in Article 38.1 of the Court's Statute? In so far as there is a reference to the need for the community as a whole to signify its acceptance and recognition of a particular norm, how are those steps to be taken? The implication in the line adopted by Professors Simma and Alston is that the General Assembly has a quasi-legislative role in the process. Does this arise from the wording of Article 53 of the Vienna Convention, or from some other source?

The very uncertainty of the existence or content of the alleged rules of the *jus cogens* is enough to underline the fact that no ready legislative path is available for their determination. There is a need for them to be recognised or articulated and then to be accepted. In this process, the General Assembly has an obvious role to play as a forum for expressions of opinion. As the views of States, within that and other fora, coalesce there is no persuasive reason for denying the statements the status of State practice. This would be true for the creation of rules of international law in general, whether or not they are peremptory.

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89 Although the definition, part of which is set out in the following text, from Article 53 of the Vienna Convention on the Law of Treaties 1969 opens with the words "For the purposes of the present Convention", the definition is usually quoted for purposes of general discussion without adverse comment. It should be pointed out, however, that the reason why it is so difficult for States to agree upon what rules do constitute part of the *jus cogens* is that the principal candidates for that status do not apply automatically if they are infringed. As the ensuing text suggests, not every use of force (even if not excused by a plea of self-defence) is treated by the international community as constituting a breach of the *jus cogens*; nor is every failure to allow a people to exercise a right of self-determination. The international community of States does not wish to deprive itself of the power of judgment over particular cases, whether of a use of force or a denial of a right of self-determination. Accordingly, Article 53 may set out the position correctly as far as treaties are concerned, but it is misleading to treat the same principle to be of general application. Norms of the *jus cogens* are not peremptory *per se* in the sense that they are subject to no derogation (the latter being a statement of political naivety). They have that quality if the conduct in question is so classified by the international community in a particular case.

Some idea of the uncertainties involved can be seen in the context of two legal principles in respect of which the *jus cogens* has been invoked: one is the proscription on the use of force, and the other is the right of self-determination. If both represent peremptory norms, then any infraction of either would constitute a breach of rules at the heart of the legal order "from which no derogation is permitted". It would seem to follow from the nature of the rules themselves that States cannot recognise or accept a situation in breach of them.

Such a view seems to disregard the nature of the international system which involves a number of inbuilt processes for the application of legal rules (of whatever quality). In the first place, there is the preliminary judgment as to whether the situation falls within the norm in question. As far as the use of force is concerned, the issue of whether the conduct constitutes a breach of the prohibition in Article 2.4 or is encompassed by the exculpatory provisions of Article 51 of the United Nations Charter may come before the Court, but is more likely to be presented to the Security Council (at least initially). The Charter, in Article 39, gives the latter body the authority to determine "the existence of any threat to the peace, breach of the peace, or act of aggression". In fact, it could be argued from the use of the words, the Security Council "shall determine", that it is under a duty to do so. The failure of the Council and its members to comply with this obligation has emasculated the processes of the Council to act under Chapter VII of the Charter because political judgments have outweighed the determination of facts which this reading of Article 39 would have required.

To a large extent, the practice of the Council and its members has been to recognise the inevitability (in the absence of a total or at least large scale commitment of the major and other powers to promoting the principle contained in Article 2.4 of the Charter) that the decision to employ force is a purely political judgment and that the primary reactions to such a step are equally subject to political influences. It is difficult to perceive of a rule as amounting to *jus cogens* when its very application is dependent upon a political rather than a legal judgment. Nevertheless, it is at least arguable that such is the case. If a breach of the *jus cogens* arising out of Article 2.4 is to have any meaning or significance, it must be necessary to apply it to the invasion of Kuwait by Iraq, even if, because of the political judgment of the Security Council, the invasion of Iran by Iraq could not be so characterised.

It is also maintainable that a similar situation prevails with regard to self-determination. The power to decide whether a situation falls within the appropriate principle is not expressly bestowed under the Charter. The judgment of the international community is therefore a more generalised process, and is, for that reason, no less a matter of political judgment in which legal factors might play a secondary or uninfluential role. If the outcome with regard to East Timor is different from the result in relation to Western Sahara, the reason will be the political factors operating within the legal rules themselves.

If political factors were not allowed to work within the legal framework as part of the process of judgment, one would be faced with an absurdity which

supporters of the *jus cogens* have not been prepared to acknowledge. If a use of force and the denial of self-determination are matters of automatic illegality, it would seem to follow that any failure to act upon that basis would itself involve an illegality, a detraction from the *jus cogens*.

An exponent of an essentially legalistic view of self-determination is Crawford.[90] Not only is the right of self-determination founded in the *jus cogens*, but the right of self-determination is entirely a matter of factual application. However, to justify the elision of political elements from the process, he found it necessary to explain in factual terms situations where no choice as to their future was allowed to the inhabitants of certain territories. The path he chose was to argue for the reintegration of territories with larger units of which they once formed part, but only where they could be classified as "colonial enclaves". This theory he explained as follows:[91]

> "if there exists a further exception to the fundamental principle of self-determination, in the shape of 'colonial enclaves', international practice supports its application only in the most limited circumstances: that is, to minute territories which approximate, in the geographical sense, to 'enclaves' of the claimant State, which are ethnically and economically parasitic upon or derivative of that State, and which cannot be said in any legitimate sense to constitute separate territorial units. Such a category would include Gibraltar, the French and Portuguese settlements in India, and apparently, Ifni. It would not include island territories – which are by definition not enclaves: the General Assembly has given only lukewarm support to Argentina's claim to the Falkland Islands. Equally, it would not include larger, relatively more viable territories such as the Western Sahara or Portuguese Timor. To such territories, as the International Court affirmed, the principle of self-determination applies as of right."

The passage is unacceptable for a number of reasons. In the first place, there was nothing in the *Western Sahara* advisory opinion,[92] upon which he relied, to suggest that the reintegration principle[93] applied only to "enclaves". It is true that Ifni was an enclave, whereas Western Sahara could not be so classified. But that is not remotely the reason why the Court dismissed the contentions of Morocco and Mauritania. Secondly, if, as the Court seemed to be saying, the true test is the quasi-sovereignty of a predecessor entity, that test is applicable to territories other than enclaves. It may be unlikely that territories of a sufficiently large size would be deprived of a right of self-determination on this basis, but

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90 Crawford J, *The Creation of States in International Law* (1979).

91 Ibid, p 384: taken from Sureda, R *The Evolution of the Right to Self-Determination* (1973),pp 174-7.

92 ICJ Rep 1975, p 12.

93 According to paragraph 6 of the GA Res 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples: "Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations".

that consideration would not exclude islands from the operation of the reintegration principle. Indeed, it is crucial to the Argentine claim to the Falkland (Malvinas) Islands, a claim that has virtually unanimous support in South America.

Not only is Crawford's comment on this latter issue no longer correct in the light of the General Assembly's insistence that the United Kingdom negotiate the issue of the future of the Islands, notwithstanding the almost total commitment of the inhabitants to the maintenance of the British connection, but it was an inaccurate assessment of the situation as it existed in the 1970s when Crawford was writing.[94] Moreover, the point hardly needs making that East Timor is not an island, but only part of one. While it is not for that reason an enclave, it certainly has an obvious geographical link to territory that is Indonesian, which makes nonsense of what Crawford was saying. As Schwed went on to observe of the Falkland (Malvinas) Islands situation, to which the reintegration principle seemed to be regarded as a relevant factor by the General Assembly, notwithstanding the fact that they are nearly 400 kilometres from the mainland of Argentina:[95]

> "It should be clear from the resolution of the General Assembly on Gibraltar, Ifni and the Falklands, as well as the *Western Sahara* opinions of the International Court of Justice, that both bodies consistently view paragraph 6 of resolution 1514 as establishing such territorial limitations to the right of self-determination. The General Assembly's interpretation of the right to self-determination is especially important because that organ, through its resolutions, incorporated the right into international law. Therefore, in certain limited situations, the people of non-self-governing territories will not be able to determine their future status. Their right to vote can be precluded by competing territorial claims."

The reasons why these various territories were or may in the future be granted, or denied, a right of self-determination has less to do with their factual characteristics[96] and more to do with the political reactions to the particular

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94 See Schwed, "Territorial Claims as a Limitation to the Right of Self-determination in the Context of the Falkland Islands Dispute, (1983) 6 Fordham ILJ 443 at 466, who, having referred to GA Res 3160 (XXVIII) of 1973 which, in his view, emphasised that "the historical-territorial claims to the Islands ... must be resolved before the rights of the Falklanders can be addressed", went on to say that recognition "of the Argentine position becomes more explicit with every resolution", pointing to the fact that Resolution 31/49 of 1976 "for the first time implies support for Argentina's historical claims"; and also Greig, "Sovereignty and the Falkland Islands Crisis", (1983) 8 Aust YBIL 20 at 56 et seq dealing with the historical setting for the application of such a principle.

95 6 Fordham ILJ at 467.

96 It is not proposed here to become involved in Crawford's "parasitology" (see above p 155) in relation to these various territories, but it does seem strange that he should suggest that Goa was in some way less "economically" viable than East Timor. At the time of the seizure of the territories in question, the populations were about the

situation of member States of the United Nations. The reason why, on the basis of the *Western Sahara* case, East Timor did not, initially, fall within the reintegration principle, was not that it failed to qualify as an enclave, whatever that might be, but that, in the early resolutions of the Security Council and General Assembly in 1975–1976, it was determined by the United Nations to be a territory the people of which were entitled to exercise the right of self-determination. However, the principle of reintegration does not, by virtue of that fact, become a totally spent force. It could still retain its political significance. For example, even if India's seizure of Goa had been condemned by the United Nations in 1961, and a right of self-determination had been endorsed, the principle could still have been relied upon by India and its supporters. Acquiescence in such a claim could have created title to the territories before Portugal's recognition of India's sovereignty in 1974. Even if a right of self-determination is recognised, the existence of geographical and other factors supporting (re-)integration might well influence the process of self-determination, and even lead to a denial of that right.

Taken to its logical conclusion, the automatic operation of a "right" of self-determination would have some surprising consequences. Even in the absence of a decisive vote by one of the political organs of the United Nations in favour of the existence of such a right in a particular case, dealings in derogation from the right of self-determination would be regarded as illegal. This would presumably mean that it would be wrongful for a State, by its vote in the General Assembly, to support a claim made in denial of that right. This amounts to a *reductio ad absurdum*. States are entitled to exercise their judgment on the application of the right in a particular case. They are not precluded from doing so by the factual parameters of previous situations, nor do those parameters determine the outcome on a subsequent occasion.

Consolidation of Rules of International Law

If one does not recognise the exercise of political judgment, not only in the making of rules, but also in their scope and application, one is forced back to an essentially static (and formalistic) concept of international law. It will be recalled[97] that Bull expressed the view that, "when the law is violated, and a new situation is brought about by the triumph not necessarily of justice but of force, international law accepts this new situation as legitimate, and concurs in the means whereby it has been brought about." There is the obvious point that it is society itself, rather than the law, which sanctions the changes thus effected. In addition, Bull's preoccupation was with the use of power in international

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same size and, although East Timor was considerably larger (by a factor of more than four), it was grossly underdeveloped by comparison with Goa.

97 See generally Bull H, *The Anarchical Society: A Study of Order in World Politics* (1977).

relations, so that he seemed to find it necessary to adopt an excessively legalistic view of international law, its development and its ability to change.[98]

To an extent, it is we as international lawyers who are to blame. The very use of the word custom as a vehicle of change suggests that the change will scarcely be rapid. Perhaps the time has come to recognise how inappropriate is this concept.[99]

I would like to draw a parallel between the traditional modes of acquisition of territory and the traditional modes of developing international law. The former have seldom been referred to specifically in international awards or judgments.

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98 It may be that Bull's reason for adopting this misconception of international law was to promote his *realpolitik* view of the world. Contrast the approach of Fain H, *Normative Politics and the Community of Nations* (1987). A flavour can be obtained from the following extract (p 12):

> "The moral issues connected with the existence of war will continue to preempt philosophical thinking about international politics as long as philosophers accept the proposition that 'force remains the essence of the international milieu' .... Reject the proposition that force is of the essence, however, and it becomes possible to depict the relationship between citizen and foreigner as lying essentially upon the same normative political continuum as the relationship between citizen and citizen."

Referring to the contention by Wight that the good life of political theory was achievable only within a nation State (in Wight's view, international theory "is the theory of survival": "Why Is There No International Theory?" in Butterfield H and Wight M (eds), *Diplomatic Investigations* (1966), p 33), Fain went on to say (op cit, p 15):

> "In the ensuing pages I develop an alternative political model to the state – I call it 'the egalitarian political community' – which is neither an anarchy nor a state. I shall suggest reasons that the nations of the world ought to be deemed members of an egalitarian political community. I contend that the world political community, though it does not have a central government, is not an anarchy because as members of an egalitarian world political community, nations possess equal political powers of various kinds over one another. It is the existence of these political powers, I shall show, that make it conceptually possible for nations to enter into *binding* treaties with one another. To achieve 'the good life', both the idea of legality and the idea of welfare – the common good – must be given proper weighting."

99 It is certainly difficult to conceive of custom as being "instant" as suggested by Cheng, "United Nations Resolutions on Outer Space : 'Instant' International Customary Law?", (1965) 5 Ind JIL 23. In order to explain this possibility, Cheng suggested that (at 36):

> "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*".

In van Hoof's view (note 48 above, p 86), "customary law and instantaneousness were irreconcilable concepts." Hence, it is "too slow to provide the quick regulation required in the new areas which international law now has to cover" (p 115).

Courts or tribunals have been concerned with the cumulative effects of the claimants' conduct, a process of consolidation, which passes through various stages from, possibly, discovery, through inchoate title to full sovereignty. Today, as far as the sources of law are concerned (and in this I would agree with what I regard as the thrust of what Professors Simma and Alston are saying), it is more important that a sufficient quantity of evidence exists, signifying general acceptance of or consent to the rule in question, whether it comprises practice in a traditional sense, or contributes towards the *opinio juris*, and whether it can be justified by reference to specific sub-paragraphs of Article 38.1 of the Statute of the International Court. In other words, the creation of rules of law may equally occur through a process of consolidation.

The concept of (historical) consolidation of the title has a number of adherents. According to De Visscher, it takes the following form :[100]

> "Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or nonexistence of a consolidation by historic titles."

However, he saw it simply as an alternative to the more traditional modes of acquiring territory.[101] More satisfactory is the version which sees consolidation as replacing these modes and providing an all embracing formula. As Schwarzenberger explained the concept:[102]

> "The analysis of the problem in historical perspective puts the emphasis on historical consolidation of title as a process. Moreover, it underlines the two typical characteristics of titles to territory. It brings out their initial relativity and the growing multiplicity of their constituent elements in their movement towards absolute operation.

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100 *Theory and Reality in Public International Law* (Eng Trans 1968), p 209.

101 As he went on to say (ibid) :

> "In this respect such consolidation differs from acquisitive prescription properly so called, as also in the fact that it can apply to territories that could not be proved to have belonged formerly to another State. It differs from occupation in that it can be admitted in relation to certain parts of the sea as well as on land. Finally, it is distinguished from international recognition – and this is the point of most practical importance – by the fact that it can be held to be accomplished not only by acquiescence properly so called, acquiescence in which the time factor can have no part, but more easily by a sufficiently prolonged absence of opposition either, in the case of land, on the part of States interested in disputing possession or, in maritime waters, on the part of the generality of States."

102 *International Law*, Vol 1, 3rd ed (1957), p 292.

> Such a historical analysis also explains the unsatisfactory character of any attempt to put the operative rules into the strait-jacket of private law analogies."

Although the emphasis in both descriptions is upon the length of the process, the conolidation of control can take place, and therefore title can be acquired, over a relatively brief period. This at least seems to be the lesson of both the *Clipperton Island* arbitration[103] and the *Eastern Greenland* case.[104]

With the historical paradigm removed as an essential factor from consolidation of title, the similarity to the creation of customary law in its broadest sense is revealed. This analogy is also to be seen in the *Anglo-Norwegian Fisheries* case.[105] At one level the decision of the International Court was about historic titles to territory :[106]

> "Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.
>
> The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it....
>
> The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked

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103 (1931) 26 AJIL 390. Although the tribunal spoke in terms of *territorium nullius* and occupation, its words are readily transposable into a more general means of territorial acquisition, especially where it said (at 394) :

> "Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed."

104 (1933) PCIJ Ser A/B, No 53. As the Permanent Court said (at 45, emphasis supplied):

> "The date at which such Danish sovereignty must have existed in order to render the Norwegian occupation invalid is the date at which the occupation took place, viz, July 19th 1931....
>
> It must be borne in mind, however, that as the critical date is July 10th, 1931, it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title *in the period immediately preceding the occupation.*"

105 ICJ Rep 1951, p 116.

106 At 138.

the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view."

On the other hand, in other parts of the judgment where the emphasis shifted away from "historic title",[107] the decision appears to support the emergence of new customary rules, either bilaterally or even universally:[108]

"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.

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast ; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law."

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107 Even without such a shift, O'Connell DP, *International Law*, 2nd ed (1970), Vol 1, p 18, employed part of the above passage in the context of the following statement :

"Very often the existence or otherwise of a disputed customary rule is dependent more upon general acquiescence in the acts of one or a few States than upon an aggregation of positive and effective acts by a large number of States. The party asserting the existence of the rule will argue from the absence of protest in order to secure the necessary generality for the positive practice. Absence of protest is, however, of relative value. States may not protest for a variety of reasons unconnected with the law. They may not know of the practice or they may be indifferent to it for reasons of geographical or economic irrelevance. Abstention from counter-action, then, is only of significance in establishing acquiescence to the extent to which vital interests are affected."

The Norwegian Counter-Memorial had argued that the British view of international law as having established a traditional system of a base line following the sinuosities of the coast plus safety valves including historic waters (see the British Reply, *Pleadings*, p 585) was not adequate to protect Norway's legitimate interests. In a later passage, the British Reply seemed to open up the possibility of the Norwegian regime being in accordance with a newly emerging principle of customary international law when it said (at 642) :

"If a State is to be the arbiter of the legitimacy of its own maritime claims, there is indeed no legal role for the passage of time to play at all in this sphere. What can it matter whether a claim is new or old if there is no *external* test by which it has to be judged? It is, therefore, somewhat strange that both States and jurists should devote so much attention to the theory of historic waters *as a legal ground of title*. If, however, the extent of a State's maritime territory is regarded as a matter international concern and dependent on recognition either in general rules or by particular consent by reason of the rights of each State in the high seas, then the passage of time has a perfectly intelligible role to play in the legitimation of claims and the attention given by States and writers to the subject requires no explanation."

108 ICJ Rep 1951 at 139.

Here, the consolidation was of a method of employing straight base lines for the delimitation of national and territorial waters. The Court's words did not signify that the waters within the base lines belonged to Norway on historical grounds (though this may also have been so), but that the method was in accordance with international law on a customary basis.

Despite a degree of uncertainty as to its role in the *Fisheries* case, the notion of consolidation was accepted as a legitimate description of the process where customary international law evolved in the *North Sea Continental Shelf* cases.[109] Although the means whereby a nascent rule of customary law was converted into an actual rule by the adoption of a multilateral convention dealing with the subject was referred to as one of crystallisation, it is obvious from a reading of the Court's judgment that this term was used as a synonym for, or perhaps one aspect of, consolidation. As the Court summarised the views of Denmark and the Netherlands:[110]

> "Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet 'the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference'; and this emerging customary law became 'crystallised in the adoption of the Continental Shelf Convention by the Conference'."

Although rejecting the application of this principle to Article 6 of the Convention, the Court readily acknowledged its application to Articles 1 to 3, "these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallising, received or at least emergent rules of customary international law".[111]

To the dissenting minority of the Court, the process of consolidating Article 6 as part of customary international law had been completed, either by virtue of the conventional text, or in the adoption of delimitation agreements based upon that provision. In the words of Vice-President Koretsky:[112]

> "As a result of the inclusion in the work of the United Nations of the task of determining the principles and rules of international law relating to the continental shelf, the general principles of the law of the continental shelf had already taken shape before the Conference, though not in a finally 'polished' form, on the basis of governmental acts, agreements and scientific works. The Geneva Conference of 1958, in the Convention on the Continental Shelf which was adopted, gave definite formulation to the

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109 ICJ Rep 1969, p 3.

110 At 38. See also the summation of the Applicants' position quoted by Judge Khan at 55.

111 At 39.

112 At 157–158.

> principles and rules relating thereto. These were consolidated in subsequent practice in a growing number of governmental acts, international declarations and agreements (as mentioned in the written and oral proceedings), which in most cases referred to the Convention or, when they did not do so, made use of its wording. All this has led to the development, in great measure organised and not spontaneous, of the general principles of international law relating to the continental shelf, in not only their generality but also their concreteness."

Similar expressions can be found in the opinions of other dissenters. For example, Judge Tanaka began his examination of "the speedy formation of customary international law on the subject-matter of the continental shelf, including the principle of equidistance"[113] from the following position:[114]

> "First, the existence of the Geneva Convention itself plays an important role in the process of the formation of a customary international law in respect of the principle of equidistance. The Geneva Convention constitutes the terminal point of the first stage in the development of law concerning the continental shelf. It consolidated and systematised principles and rules on this matter although its validity did not extend beyond the States parties to the Convention. Furthermore, the Convention constitutes the starting point of the second stage in the development of law concerning the continental shelf. It has without doubt provided the necessary support and impetus for the growth of law on this matter."

However, it is clear that, for Judge Tanaka, the consolidating process was on-going as far as the formation of custom was concerned:[115]

> "In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinise formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realised by the customary law in question."

As to the question of terminology in the *North Sea* cases, it would seem that consolidation could be used as a synonym for crystallisation. It would be preferable, however, to employ the latter expression in relation to a situation where a text does define an emerging rule for general application. The text in question does not have to be in the form of a ratified treaty; crystallisation could

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113 At 176.

114 At 176–177.

115 At 178.

just as well occur through the drawing up of a such an instrument[116] or even by means, in appropriate circumstances, of a resolution of the General Assembly. However, whereas crystallisation would in such circumstances "consolidate" a rule of customary international law, consolidation is a term of much wider ambit, extending to situations in which the conventional text is not the culminating step in the emergence, but only a stage in the process, or, of course, to a sequence of stages in which no treaties played any part in the evolutionary process.

But enough of its practical advantages: how does the notion of consolidation relate to sources theory? It is difficult to take seriously those who claim, expressly or even by implication, that Article 38.1 of the Statute of the International Court lays down for all time and for all purposes the sources of rules of international law. Even more remarkable is the ingenuity which seeks to protect this magical formula by requiring that any infidelity to it be justified by preference to the sources themselves. In the words of Virally:[117]

> "If Article 38 be simply declaratory, it clearly cannot inhibit the emergence of new sources of law, brought into being by the development of the international community and its progressive organization. Where, however, new methods of law-making come into use, they are the result of the application of legal rules created by operation of sources already recognized: of treaties, that is to say, and possibly derivatively, of custom. Thus, every imaginable new source is indirectly envisaged in the list in Article 38 and is simply the product of the law emanating from the sources which are mentioned in that list."

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116 The role ascribed to unratified treaties in the observation of Judge Lachs in the *North Sea* cases at 225:

> "It is generally recognised that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, *a fortiori*, capable of producing this effect, a phenomenon not unknown in international relations",

would be equally applicable to other contexts. However, as far as unratified treaties are concerned, the Court on a number of occasions made use of the Vienna Convention on the Law of Treaties 1969, before it came into force, on the basis that it could "in many respects be considered as a codification of existing customary law on the subject" (*Namibia* case, ICJ Rep 1971, p 16 at 47), although avoiding the issue of whether the specific provision being relied upon was, at the time of the Convention, already a rule of customary international law (see also *Jurisdiction of the ICAO Council* case, ICJ Rep 1972, p 46 at 67; *Fisheries Jurisdiction* case, ICJ Rep 1973, p 3 at 14, 18). It would seem plausible to suggest that, whatever precise state of development the actual rule had reached at the time of the Convention, under the influence of the conventional provision, the process of consolidation had been completed by the time of the proceedings.

117 "The Sources of International Law", in Sorensen M (ed), *Manual of Public International Law* (1968), p 116 at 122; also Thirlway, n 48, p 42; cp van Hoof, n 48 p 197, referring to this approach as the "genealogical link" theory.

Admittedly, the attempt has been made by the International Court to preserve this fiction,[118] though the result has hardly been convincing.[119]

In contrast, a number of writers contend that the sources of international law, those manifestations of State practice which are creative of law and legal obligation, constitute a necessarily open ended category. This can be demonstrated by reference to a number of features of the international legal system. At a theoretical level, it can be argued that a product of the formal sources of law (a treaty provision, in this case Article 38.1) cannot logically prescribe what those sources are. In the words of one jurist:[120]

> "the doctrine of the sources can never in principle rest on precepts contained in one among the legal sources the existence of which the doctrine itself was meant to prove. The basis of the doctrine of legal sources is in all cases actual practice and that alone. The attempt to set up authoritative precepts for the sources of law must be regarded as later doctrinal reflections of the facts, which often are incomplete or misleading in face of reality."

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118 As in the employment of General Assembly resolutions. In the *Namibia* case, the Court had this to say (ICJ Rep 1971, p 3 at 21):

> "Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-govenment' (Art 73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'. Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage, This is but a manifestation of the general development which has led to the birth of so many new States."

There is no doubt that both Article 73 of the Charter and the 1960 Declaration were regarded as law making in effect. It was only in the following paragraph of its judgment (ibid) that the Court said of Article 22 of the Covenant of the League of Nations that "its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law."

119 In the *Nicaragua* case, ICJ Rep 1986, p 3 at 97–110, the attempt to ascribe various resolutions to State practice or to *opinio juris* was confusing and irrational: see Charlesworth, "Customary International Law and the Nicaragua Case", (1991) 11 Aust YBIL 1 at 18–26 ; and below p 169.

120 Ross A, *A Textbook of International Law* (1947), p 83.

In more practical terms, as Article 38.1(d) of the Court's Statute implies in suggesting that "judicial decisions and the teachings of the most highly qualified publicists" are "subsidiary means for the determination of rules of law", the primary means must lie with the conduct of States. They, rather than judges or jurists, determine the rules of international law. It would follow from this that they also have control over the means whereby they determine what is law or gives rise to legal obligation. Although the International Court, understandably enough, may feel inhibited by Article 38, there is no reason why anyone else should be.[121]

Consolidation is in no sense antithetical to sources theory. It simply recognises that the various features of international legal life listed in Article 38 can operate cumulatively as part of a process. Sometimes it will be possible to apply a convention or custom (or even a general principle of law) directly to a dispute. At other times it will be necessary to deduce a relevant rule from a combination of such factors. In this context, a resolution of the UN General Assembly may figure alongside some conventional text and might be more important than it.

Consolidation also has the advantage that it does not require the prior classification of the material upon which it is based into the categories set out in Article 38.1 of the Statute of the International Court. I too would like to express my agreement with Professor Pellet in quoting the following passage from Schreuer:[122]

> "A closer look at the realities of international decision-making shows that an attempt to divide the law into neatly separate rules which can be allocated to official types of sources is not satisfactory. Very often it is impossible to base a decision, or even a general prescription, on any one type of source. The process of communication leading to legal expectations and to a conduct corresponding to them, can take place in a variety of forms which are interrelated and often not clearly distinguishable. Even a relatively clear-cut prescription like a treaty provision is in constant interaction with other types of international law, from its drafting up to its application, and can lead a decision-maker through the whole maze of sources of international law, including the resolutions of international institutions.
>
> Each of several relevant elements for a particular decision may not, on its own, be authoritative enough to qualify as a binding rule or to present a sufficient basis for the decision. Their combined effect, however, can be conclusive ...

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121 Unless perhaps involved in a dispute before the International Court, though there is no reason why that body should feel bound to apply *only* the sources referred to in Article 38.

122 "Recommmendations and the Traditional Sources of International Law", (1977) 20 German Yearbook IL 103 at 112–113; above p 48.

> Rather than searching for abstract rules classified by types of sources, it seems more appropriate to examine the entire body of legally significant authority for a particular decision."

In particular, consolidation has the capacity of encapsulating the means whereby legal change occurs within the international community, whether the recognition and acceptance relate to territorial status or the emergence of a rule of law. It could be argued in opposition to such an idea that the adoption of consolidation as the vehicle of change would be to deconstruct the concept of sources which provide long established criteria for identifying the rules of international law. The response must surely be that the process of change fits uneasily into the traditional scheme of Article 38.1.

In the context of change, there might appear to be one substantial difference between the acquisition of title and the creation of a rule of international law. Once title is established, it is absolute, whereas the same is not true of a rule of law. However, appearances are deceptive. In most circumstances, it is true, there is no dispute about the entitlement of a State to the corpus of its territory. Even so, the nature of that sovereignty has been eroded by rules of international law regulating the conduct of States with regard to matters formerly within their domestic jurisdiction. Moreover, even in relation to title to territory, changes can occur, or at least the normal processes might be disrupted, by an untoward event, such as the seizure of Goa by India, or East Timor by Indonesia, or the results of the 1967 War in the Middle East. Finally, even where title is not disputed under the law accepted in one era, it may be undermined by new developments in international law, as occurred with the emergence of self-determination as a norm of State conduct.

It may be that these examples, and especially the limitations being placed on sovereignty, do not provide any exact parallel to the processes of international law making, the rules of which will almost certainly be subject to subsequent, if not continuous, modification. This characteristic stems from the nature of international society, described by Professor Schachter as a "plural world with its perpetual change and multiple influences on law".[123] It is a world in which law can be regarded, as McDougall has characteristically remarked, "not as mere rules but as a whole *process* of authoritative decision in the world arena, a process in which authority and control are appropriately conjoined and which includes, along with an inherited body of flexible prescriptions explicitly related to community policies, both a structure of established decision-makers and a whole arsenal of methods and techniques by which policy is projected and implemented."[124] Accordingly, law is not "a closed system of legal categories that jelled once and for all in some bygone era, but a dynamic, continually

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123 Note 74 above, at 749

124 McDougall MS et al, *Studies in World Public Order* (1960), p 170.

operating process of rejection or refinement of old rules; and the confirmation of new ones in supplement or replacement of the old."[125]

The process of development, the refining and redefinition, of rules of international law is not reflected in the source list provided by Article 38.1 of the Statute of the International Court. Consolidation at least recognises that at the critical date it is necessary for the parties to identify the relevant rule(s) of international law by reference to all available evidence and appropriate prediction. It does not deny that the final outcome of the dispute or case might involve an adjustment of the rule(s) to accommodate the interests of the parties as perceived by themselves or a court or arbitrator. In other words, the point still holds good that, at the relevant time, any rule of international law has to be demonstrated by reference to the process which brought it into existence (ie consolidation).

Consolidation has a role, not only in removing or lessening the need to categorise the basis for the existence of a particular rule (eg treaty or custom), but also in reducing the significance of the apparently formal requirements attached to each source. In this respect, it is in keeping with a phenomenon that has become a noticeable feature of international life. As one commentator has observed: [126]

> "There is fairly general agreement in doctrine that the recent history of international law has been witnessing a decline of form. Under the impact of the changes in international relations, notably their increased frequency and intensity, the significance of formalities and solemnities which used

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125 McWhinney E, *The World Court and the Contemporary International Law-Making Process* (1979), p 1. This view of international law undoubtedly has the effect of "deformalising" its sources. As the same writer went on to say (pp 2–3):

> "Classical International Law was, perhaps, excessively preoccupied with the quest for an ultimate, approved source for each legal rule....Every claimed legal rule, therefore, to deserve the name of law must fit into at least one of the predetermined *a priori* categories of...sources. If not, it was not a valid legal rule.
>
> The argument is, of course, a circular one; if the claimed proposition fits into one of the recognised sources, it must be a legal rule; and if it is a legal rule it must fit into one of the pre-ordained sources.
>
> By contrast, the Legal Realist approach to the definition of law and to the establishing of whether or not a claimed proposition deserves the accolade of legal rule is to put emphasis on the facts rather than on the *a priori* legal categories. If all the interested parties accept a claimed rule as being law, it must be so without need for too much speculation as to whether or not the claimed rule fits into the pre-ordained categories; or, for that matter, without any occasion for anguished concern if it should turn out that the claimed rule does not."

126 Van Hoof, note 48 above, p 200, citing Lachs, "Some Reflections on Substance and Form in International Law", in Friedmann W, Henkin L and Lissitzyn O (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C Jessup* (1972), p 99 at 101–102.

to play an important part in traditional international law, is considered to be diminishing."

Consolidation would certainly be of value in defusing the increasingly arcane debate about what might be regarded as practice, as opposed to *opinio juris*, within Article 38.1(b) of the Statute of the Court.

The confusion as to the distinction between practice and *opinio juris* is to be seen in the Court's treatment of Articles 2.4 and 51 of the UN Charter and of a number of General Assembly resolutions in the *Nicaragua* case.[127] Take the following passage from the Court's judgment: [128]

"The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law [and]... that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the ... Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *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, and particularly resolution 2625 (XXV) entitled "Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law.... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter."

It would seem plausible that the "necessary" practice to constitute, along with the *opinio juris*, the customary rules, can be identified by examining what the *opinio* is attached to. However, the apparent outcome of such an analysis is not illuminating. The relevant *opinio juris* is stated to be the attitude of the parties and other States towards "certain General Assembly resolutions", and particularly the Declaration on Friendly Relations. The actual manifestations of

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127 ICJ Rep 1986, p 3.

128 At 99-100.

that attitude are not specified although they are referred to as "an acceptance of the validity" of the relevant rules. The first references to *opinio juris* were linked to the Charter provisions, which presumably represented the relevant practice that the Court had in mind. However, the Court also stated that "the effect of consent to the text of the resolutions... may be understood as an acceptance of the validity of the rule or set of rules declared by resolution". This would seem to suggest that the text of the resolution itself in some way constituted State practice, even in relation to the *opinio juris* represented by the positive reaction of the States supporting the resolution.

With regard to the rules relating to self-defence, the Court was even less specific, defining it as part of customary international law, partly because of the reference in Article 51 to self-defence as an "inherent" right, [129] and partly because of the "general agreement" of States in the context of what constitutes an armed attack.[130] Similarly, in relation to the proscription upon intervention, the Court was more concerned with its apparent acceptance in the fact that expressions "of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find."[131] Admittedly the Court then went on to say that the "existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice."[132] However, this assertion must be regarded with some scepticism because there have been many examples of contrary conduct, that is of forcible intervention by one State in the territory of another. The Court felt it necessary to deal with this potentially embarrassing factor in a passage[133] that has already been quoted.[134] The Court pointed out that it was not to be expected that "in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs." It went on to say that it did "not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigourous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."

The Court's approach seems to be rather cavalier when tested against the traditional requirements for the creation of customary international law. What States say is given precedence over what they do and *opinio juris* assumes a larger role than State practice. Moreover, in this context, it is difficult to see how

129 At 102-103.

130 At 103-104.

131 At 106.

132 Ibid.

133 At 98.

134 Above p 143.

the adoption of a resolution by the General Assembly can constitute both these elements of customary law making. The text can hardly be more significant than the support given to it ; the latter can scarcely constitute, in all but the most unusual circumstances,[135] the *opinio juris* to the practice of States represented in the former.

It is not necessary to try to fit these various prescriptions within the formalism of Article 38.1(b) and to rationalise the dearth of conspicuous State practice by suggesting that a wealth of *opinio juris* can be a compensating factor. The alternative test of whether a particular norm has been consolidated can take account of a multiplicity of factors. In particular, resolutions of the General Assembly can be counted on their merit, and not be dependent upon whether they can be categorised as practice or *opinio juris* (or even both). Indeed, in so far as they appear to lay down legal norms, it is hardly surprising that they can be so influential. They would not be ignored by a team of lawyers in a department of foreign affairs of a Western country called upon to advise their government on the relevant law. In the case of a developing country without adequate legal resources to research the finer details, the attractions of a text, which harmonises with its political view and aims, and can thus be advanced as representing existing law, are self-evident. Of course, it does not follow that the resolution in question does represent international law, although it may do so for some States in their mutual relations. However, consolidation is capable of recognising this fact and dealing with it.

At this point, it is worth drawing another instructive analogy with the acquisition of title. In some cases, tribunals have been prepared to allocate territory on the basis of insignificant State activity by the contesting parties.[136] This possibility was inevitable given that title is a relative concept.[137] As long as there was no evidence of competing claims by third parties, sovereignty would be awarded by a court or arbitrator, in the interests of the stability of the international order, to the party demonstrating the better of two often quite insignificant claims.[138] Similarly, the concept of inchoate title was necessary

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135 Presumably a (virtually) unanimous resolution adopted with law making intent expressed (again with near unanimity at the time of adoption) could qualify as representing international law, though there is no reason to categorise the outcome as "customary".

136 *Eastern Greenland* case (1933) PCIJ Ser A/B, No 53, p 46:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries."

137 *Island of Palmas* arbitration, (1928) 2 UNRIAA 829 at 840: "Manifestations of territorial sovereignty assume... different forms, according to conditions of time and place."

138 *Island of Palmas* arbitration (above); *Eastern Greenland* case (above); *Clipperton Island* arbitration, (1931) 26 AJIL 390; and note 128 below.

not only because of the slowness with which some titles might be perfected (eg over a large territory), but also to reduce the number of competing claims as part of the ordering of international relations.

If consolidation is acknowledged as an appropriate approach to the formation of rules of international law, there is available an obvious means of acknowledging the existence of "inchoate" rules. Some may be inchoate because they are in the process of emerging as law, or have been accepted as law amongst a group of States but not by others. There are examples of "soft law", including standards that have been set which at the time had less than legally binding status. Some of these even have control mechanisms which render them as enforceable as any "legal" rules.[139] There are various reasons, therefore, why a rule might be inchoate, though it may be important to analyse the stage in the process of consolidation it has reached. It is quite possible for the rules in the various categories to move into the realm of legal enforceability. Certainly "inchoate" has advantages over "soft" as an epithet, not least because it avoids the pejorative connotations sometimes attached to the latter which are not helpful to legal analysis.

As to the role of consent in the process of consolidation, there are undoubtedly differences of emphasis between the creation of title and the development of rules of law. Acquiescence and recognition, or even a disavowal of wishing to compete, are important elements in the former, both by third parties[140] and between the actual claimants.[141] In relation to the emergence of new rules of international law acquiescence and recognition have obvious parts to play. The "general toleration" referred to by the International Court in the *Anglo-Norwegian Fisheries* case[142] is an example of acquiescence and also of

139 See above pp 136–137.

140 See for example the attitude of a number of States to Denmark's designs to extend its control over the whole of Greenland in the *Eastern Greenland* case, (1933) PCIJ Ser A/B, No 53. The United States reaction was that it "will not object to the Danish Government extending their political and economic interests to the whole of Greenland" (a declaraction contained in the Treaty of Antilles 1916 between the two countries, quoted Ser A/B, No 53, at 56). The Permanent Court summarised the French note as being "to the effect that it would make no objection to the Danish Government extending its sovereignty to all Greenland, as contemplated by the American declaration" (at 58). The Italian government, it was stated by the Court, would "have no difficulty in recognising Danish sovereignty over Greenland" (ibid). The Japanese response was similar to the American (at 59), while the British Government, after some preliminary correspondence, "gave the desired recognition to Danish sovereignty and only asked that, in view of the proximity of Greenland to Canada, the British Government should be consulted if the Danish Government ever contemplated the alientation of the territory" (ibid).

In the *Clipperton Island* arbitration, (1931) 26 AJIL 390, the Award referred (at 392) to the facts that the United States had declared that it "did not intend to claim any right of sovereignity over Clipperton", and that the report "that England has designs upon the island" was "afterwards acknowledged to be inaccurate".

141 *Temple* case, ICJ Rep 1962, p 6.

142 ICJ Rep 1951, p 116 at 138, above p 161.

tacit consent. The extent of that toleration undoubtedly hastened the reception of the use of straight base lines as part of international law. In the *Nicaragua* case,[143] there were numerous references to the Parties or States having "expressed recognition"[144] of, or agreed or consented to, treaty provisions or General Assembly resolutions as representing (customary) international law.[145]

However important acts of consent in its various forms might be, in many situations, the reactions of a significant number of States will be neutral in the sense that they will be evidence neither of approval nor of disapproval. Consensualists would treat such circumstances as constituting the acquiescence or tacit consent of the States concerned to the legal development in question.[146] According to this view, provided there is sufficient practice (and, from this or otherwise, evidence of *opinio juris*), the rule will be binding upon non-participants, unless they have objected in such a manner as to bar any implication of acquiescence.

Although this is not the place to canvass the issues of whether the consistent objector principle constitutes part of contemporary international law,[147] its existence does seem plausible at least to this extent. If, as seems to be generally accepted, a new or different rule can become established amongst a regional or other grouping of States in derogation from the general rule, then there would seem to be no reason in theory why the same should not be true in reverse. It is perfectly possible for a group of States to adhere to a former rule in the face of evidence of State conduct moving towards acceptence of a new rule. Indeed, the new rule may well become established amongst the States adhering to it. Admittedly this creates difficulties in determining the rule to be applied in relations between States promoting different rules to a particular situation. However, this is not an uncommon problem.[148] Criticisms of the persistent objector theory ultimately come down to the practical difficulty of a small group of states (a *fortiori* in the case of a single State) remaining aloof from the new development and managing to apply the rule, discarded by most States, in their dealings with those States outside their own privileged circle.[149]

This dilemma for the dissenter(s) exists in relation to both disputed title and conflicts over the development of rules of international law. The process of consolidation would leave behind the objector if its cause failed to obtain support

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143 ICJ Rep 1986, p 3.

144 At 98.

145 At 100 ("consent"; "acceptance"); at 102 ("recognition"); at 103 ("agree"; "general agreement"); at 107 (acceptence"; "accepting").

146 This seems strange when advanced by those amongst them who argue strenously against the cognition of General Assembly resolutions, which States have supported by their votes, as having law-making effects.

147 Above p 146.

148 Above p 145.

149 See Charney, "The Persistent Objector Rule and the Development of Customary International Law", (1985) 56 BYIL 1 at 11 et seq.

from other States sufficient at least to preserve its own position.[150] Similarly, in practical terms, the overwhelming support of the international community for a new rule must have a legislative effect even vis-a-vis a State which seeks to retain the benefits of a former rule in its dealings with others.[151]

Conclusions

International law has many facets. This is essential if it is to fulfil the multiplicity of functions required of it.

In some areas of inter-State activity it has to be specific, to provide precise standards or rules that have to be employed to achieve a desired objective. Normally these can only be established by the actual agreement and consent of the States concerned.

At another level, international law has to provide rules of conduct which help preserve a modicum of order within the world community of States. The rules in this regard are much less specific and can often be attributed to the consent of States only in an indirect way. For example, it would be impossible for a rule to emerge to which States in general were opposed, though it might be difficult to identify just how individual States had ascribed to the rule in question.

International law also exists on different planes: within the context of the normal interplay of diplomatic relations and in the very specialised world of international adjudication. It is only within the confines of the latter that the law is ever consolidated for a fleeting moment into a statement of its rules and their application to the facts of the case. In the former milieu, the law remains part of an ongoing process of invocation and possible influence and operation, though not one that is necessarily determinative. Indeed, for the most part in such circumstances it may be difficult to identify exactly what role the law did play, yet these incidents constitute part of the process whereby the relations of States are regulated.

International law can be perceived as existing in a twilight zone between the "is" and the "ought", between law strictly so called and equity, between the positivist and the naturalist orders. To the CLS writer, it is impossible to understand one concept without recourse to its opposite, or to find rules which appear to belong in one camp (eg firmly based upon State practice) which are for that reason immune to modification by elements from the opposite camp (eg by Utopian notions of justice and equity).

There is nothing remarkable in the latter observation. Even within the adjudicative process, one side may well rely upon equity to ameliorate what it

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150 An example is provided by Argentina's claims to the Falkland Islands (Malvinas). Protest alone may not have been sufficient to maintain its rights in the face of a period of more than a century and a half of British occupation. What has proved to be instrumental in preserving the Argentine position has been the increasing support it has received from other States, particularly in the General Assembly.

151 The obvious example being South Africa in relation to *apartheid*.

regards as an unsatisfactary rule drawn solely from a treaty or State practice. Admittedly, the scope for the admission of equity into the equation between the facts and the conclusion will be circumscribed by the line drawn by the tribunal between equity within the law and equity as an extra-legal factor. However, in the regular processes of diplomacy dealing with a dispute, law may not play a significant role so that the range of "equitable" factors brought into an equation is likely to be greater. It does not follow, of course, that the outcome (whether settlement or continuing disagreement) is devoid of precedential value for the future because it will still be evidence of the attitude of the States in question, and part therefore of any process of consolidation, whether globally or within any regime to which they are contributors.

With regard to regime theory, its relevance must surely be to reconcile international lawyers to the inevitable fragmentisation of their discipline. The increase in the number of law-making treaties to which reservations are allowed leads to a variety of relationships in which different States are governed by different rules even amongst contracting parties. The same processes are also at work in relation to rules of customary international law, versions of which might well become established only amongst groups of like-minded States. This phenomenon is the consequence of the varying fields and degrees of co-operation amongst States in the achievement of objectives which are not universally held. It is upon these differing patterns of collaboration that regime theory is based.

A number of debates over doctrine display an air of unreality. One example is that concerning the legal consequences of resolutions of the UN General Assembly. There seems little point in trying to classify them as practice or *opinio juris* for the purpose of customary law since States support them in order to promote their normative potential (to which *opinio juris* is thus a relevant factor) and that indeed may be their effect for like-minded States. For others such resolutions are an element in the process of consolidation. But to deny them a legislative role in all circumstances is tantamount to denying that role to the international community as a whole. To refer once more to the analogy with consolidation of title, self-determination is not, whatever some writers would have us believe in the interests of legal purity, a legal principle of automatic application in determining what *in fact* are States for the purpose of international law, or conversely what territories may legitimately be absorbed by their neighbours. The reactions of the international community, more often today expressed through the General Assembly (or through the Security Council), constitute the means for law making in general and for its application to particular cases. Nevertheless, whether Goa became part of India, the allocation of East Timor to Indonesia, and the future status of Tibet, are all matters for determination by that community. To deal with such situations, the process of consolidation, whether of title or of rules of law, must include, if not be settled by, resolutions of those UN bodies.

A degree of unreality also pervades concerns about the scope of equity and the role of general principles of law. The selection of argument depends, as has

already been mentioned, upon context. In a legal forum, attention is directed to equity as a component of international law and away from its role in promoting more general ideas of justice and resource redistribution. On the other hand, in a political setting, the emphasis is likely to swing in the opposite direction. In the former situation, the advocate will attempt to demonstrate how the general principle of law relied upon has been given, by precedent or *opinio juris*, a dimension within the law. In the latter, a particular principle might be pointed to as a means of giving effect to the demands of justice presented by the party in question. The fact that arguments about equity or general principles are presented, in a dispute or controversy, to an antagonist or to an adjudicator, makes the content of those arguments receptive to the process of consolidation. For this reason also, sources theory seems far removed from the general practice of international law. Material is judged by its relevance to the consolidation of a particular rule, not by whether it can be fitted into the formal structure of Article 38.1 or can be justified as a "source" by reference to that provision.

Ultimately, the content of international law and the identification of its rules are matters of judgment as to the outcome of the process of consolidation. The lesson preached by the CLS movement is that the judgment in question can never be objective, whether the judgmental role rests with an adjudicator or individual commentator, or even with a State as participator or bystander. Each will have its own perspective, as indeed will the international community in so far as it makes any assessment of a particular situation or rule. It is also important to realise that consent is never far from the surface of the law-making process, even if it is for the most part indirect. Finally, it should be understood that the process referred to here as consolidation is on going. Most rules of international law are subject to continuing change in the sense that the purpose of consolidation is as much predictive as it is adjudicative. The question of where the law is going (self-determination and the rights of peoples being a good example) is often more important than where it is at this moment towards the end of the twentieth century.